Play It Again, Counsel: The Admission of Videotaped Interviews in Prosecutions for Criminal Sexual Assault of a Child

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Notes

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I. INTRODUCTION

On August 6, 1998, in People v. Bowen, the Illinois Supreme Court held that a videotaped interview with a child victim of aggravated criminal sexual assault can be admitted into evidence under section 115-10 of the Illinois Criminal Code of Procedure of 1963. The Bowen court also determined that the inclusion of such evidence is not a violation of a defendant's confrontation right under the Confrontation Clause of the Sixth Amendment (the "Confrontation Clause").

By enacting section 115-10, the Illinois legislature intended to create an exception to the hearsay rule that would admit corroborative testimony of child sexual abuse into evidence. When such evidence is in the form of a videotaped interview, however, questions arise regarding its impact on the defendant's constitutional right to confront the witness.

This Note first summarizes the history of the Confrontation Clause, including its interaction with legislatively-created exceptions to the evidentiary rule against hearsay evidence, and its treatment in both

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3. See Bowen, 699 N.E.2d at 580.
4. See id.
5. See infra Part II.B. (discussing hearsay evidence and the interaction of statutory hearsay exceptions with the Confrontation Clause).
8. See infra Part II.A.
9. See infra Part II.B.
Illinois courts\textsuperscript{10} and the United States Supreme Court.\textsuperscript{11} More specifically, this Note discusses the Illinois Supreme Court's interpretation of section 115-10 and the Confrontation Clause's effect on the admission of videotaped evidence under other Illinois statutes.\textsuperscript{12} Next, this Note discusses the differences between the majority\textsuperscript{13} and the dissenting opinions\textsuperscript{14} in \textit{People v. Bowen}, with respect to both the statutory interpretation of section 115-10 and its constitutionality.\textsuperscript{15} This Note further analyzes the Illinois Supreme Court's failure to adhere to both the rules of statutory interpretation and United States Supreme Court precedent.\textsuperscript{16} Finally, this Note discusses the future impact of the \textit{Bowen} case on the lower courts\textsuperscript{17} and analyze questions the court failed to address.\textsuperscript{18}

II. BACKGROUND

A. The Confrontation Clause

A historical study of the Confrontation Clause reveals that the premise of the Clause developed as a reaction to common courtroom procedure in England during the sixteenth century.\textsuperscript{19} At that time, British magistrates customarily obtained most of the evidence \textit{ex parte} from the defendant, accomplices, and other witnesses.\textsuperscript{20} They presented such evidence at trial by reading aloud the depositions, interrogatories, and letters.\textsuperscript{21} Thus, the British courts disregarded the importance of deriving evidence from live testimony; instead, they relied upon the presentation of evidence through documents detailing

\textsuperscript{10} See infra Part II.C.
\textsuperscript{11} See infra Part II.B.
\textsuperscript{12} See infra Part II.C.
\textsuperscript{13} See infra Part III.B.
\textsuperscript{14} See infra Part III.C.
\textsuperscript{15} See infra Part III.B-C.
\textsuperscript{16} See infra Part IV.
\textsuperscript{17} See infra Part V.
\textsuperscript{18} See infra Part V.
\textsuperscript{21} See White, 502 U.S. at 361 (Thomas, J., concurring).
information obtained from persons outside of the courtroom. This procedure was exemplified when Sir Walter Raleigh was tried for treason based on the forced "confession" of an alleged co-conspirator and Raleigh's request to have his accuser brought before him in court was denied. By the late sixteenth century, a common law right to confrontation developed in reaction to such trial procedure, and it was this right that became the basis for the Sixth Amendment Confrontation Clause in the United States Constitution. Essentially, the Confrontation Clause provides the defendant the right to confront the witnesses who testify against him.

Because the founders never clearly indicated the purpose of the Confrontation Clause, the Clause has been the subject of extensive interpretation by the United States Supreme Court. The Supreme

22. See id. (Thomas, J., concurring). According to some accounts, "there was . . . no appreciation at all of the necessity of calling a person to the stand as a witness[']; rather, it was common practice to obtain "information by consulting persons not called into court." Id. (Thomas, J., concurring) (quoting 5 J. WIGMORE, EVIDENCE § 1364, at 13 (J. Chadbourne rev. 1974).

23. Sir Walter Raleigh was accused of treason against King James. See MUELLER & KIRKPATRICK, supra note 19, § 8.74, at 1449. The charge specifically alleged that Raleigh was raising money to help put Arabella Stuart on the English throne. See id. The prosecution's strongest evidence against Raleigh was a statement made by Lord Cobham, an alleged co-conspirator, who named Raleigh as the instigator of raising money for the insurrection. See id. The magistrate obtained the statement during an intense interrogation of Lord Cobham, that probably included torture. See id. Raleigh proclaimed his innocence, offered alternative explanations to the court, and showed that Lord Cobham had since recanted his story, but it was to no avail. See id. He then argued that because the treason statute required the prosecution to have evidence from two witnesses, the court should call the witnesses so that he could stand face-to-face with them. See id. The judges, however, refused to bring in the witnesses, even though Lord Cobham was "alive, and in the house." Id. (quoting 2 HOWELL'S STATE CASES § 15-20 (1803)).

24. See id.

25. See White, 502 U.S. at 361 (Thomas, J., concurring).

26. See id. (Thomas, J., concurring).

27. See U.S. CONST, amend. VI. The Sixth Amendment right to confrontation is as follows: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Id.

28. See White, 502 U.S. at 359 (Thomas, J., concurring).

Court has stated that the central function of the Clause is to serve as a truth seeking device, ensuring the reliability of evidence used in a criminal proceeding by subjecting such evidence to the rigors of the adversarial process. Accordingly, the Supreme Court has identified four elements of the Clause which, when combined, help ensure that the prosecution will not use unreliable evidence in its case against the defendant: (1) the witness must make his personal presence known in court; (2) the witness must give his statements under oath; (3) the witness must be cross-examined; and (4) the jury must be permitted to examine the witness in order to observe his demeanor and assess his credibility during his testimony.

1. The Defendant’s Right to Face-to-Face Confrontation

The Confrontation Clause can be analyzed with respect to its various aspects, particularly, the defendant’s rights to face-to-face confrontation and cross-examination. The Supreme Court has held that the defendant’s right to confront his accusers face-to-face is inherent in the text of the Sixth Amendment and that this right should not be displaced by trial procedures created by state legislatures. The Court has stated

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237 (1895).

30. See Craig, 497 U.S. at 845.

31. See id. at 845-46. In this Note, these four elements are also referred to as the defendant’s rights under the Confrontation Clause.

32. This element is also referred to as the defendant’s right to face-to-face confrontation. See Mueller & Kirkpatrick, supra note 19, § 8.74, at 1449.

33. The Supreme Court referred to cross-examination as “the ‘greatest legal engine ever created for the discovery of truth.’” Green, 399 U.S. at 158 (quoting 5 J. Wigmore, Evidence § 1367 (J. Chadbourn rev. 1974)).

34. See Craig, 497 U.S. at 845-46 (citing Green, 399 U.S. 149 at 158).

35. See U.S. Const. amend. VI. Additionally, the Confrontation Clause may be analyzed with regard to which witnesses should be considered “witnesses against [the defendant].” Id. Notwithstanding the importance of this aspect of the Confrontation Clause, a detailed discussion of the “witnesses against” the defendant is beyond the scope of this Note. For a more extensive discussion, see White v. Illinois, 502 U.S. 346, 358-66 (1992) (Thomas, J., concurring in part); Mueller & Kirkpatrick, supra note 19, § 8.74, at 1454-56; Kenneth W. Graham, Jr., The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 Crim. L. Bull. 99, 125-34 (1972).

36. See Coy v. Iowa, 487 U.S. 1012, 1016, 1020 (1988). In Coy, the prosecution accused the defendant of sexually assaulting two thirteen-year-old girls while they were camping in the backyard of his next door neighbor’s house. See id. at 1014. At the beginning of the trial, the State requested that the child victims be allowed to testify either from behind a screen at trial or via closed-circuit television pursuant to a recently passed Iowa statute. See id. The trial court approved of the placement of a large screen between the defendant and the witness stand. See id. With certain lighting adjustments, the screen blocked the witnesses’ view of the defendant, although it allowed the
that such a face-to-face confrontation is an essential element of fairness in a trial because a witness may not feel as comfortable distorting or mistaking facts when testifying before the defendant. While such face-to-face confrontation may upset a child victim of sexual assault, that risk is outweighed by the potential benefit of identifying a child who has been coached to lie. Thus, the risk of upsetting the child victim is necessary to preserve the protections guaranteed to the defendant under the Constitution. Accordingly, the Court has stated that the placement of a screen between the testifying child and the defendant, to prevent the witness from viewing the defendant, violates the defendant’s right to face-to-face confrontation under the Confrontation Clause.

The State suggests that the confrontation interest at stake here was outweighed by the necessity of protecting victims of sexual abuse. It is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests. The rights referred to in those cases, however, were not the rights narrowly and explicitly set forth in the Clause. To hold that our determination of what implications are reasonable must take into account other important interests is not the same as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the Clause: ‘a right to meet face to face [sic] all those who appear and give evidence at trial.’ We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they will surely be allowed only when necessary to further an important public policy.

In the dissent, Justice Blackmun argued that the prosecution did not violate the defendant’s confrontation rights because the statutory procedure “did not interfere with what this Court previously has recognized as the ‘purposes of confrontation.’” Specifically, the dissent noted that the testimony of the witnesses was under oath, subject to cross-examination by the defendant, and presented in front of the jury to help it assess the credibility of the witnesses. Moreover, the defendant’s view of the witnesses was not completely blocked, so he could both see and hear the testimony of the victims as it was presented. While agreeing that the Confrontation Clause prefers face-to-face testimony, the dissent noted that preserving such a preference should not be the Court’s priority given that the confrontation right does not exist simply “for the idle purpose of gazing upon the witness, or of being gazed upon by him,’ but rather to
The Supreme Court has also acknowledged, however, that the state's interest in protecting child victims from the trauma of seeing the defendant in court might outweigh the defendant's right to face-to-face confrontation in certain situations. In *Maryland v. Craig*, the Court considered whether allowing a sexually-assaulted-child victim to testify via one-way, closed-circuit television violated the defendant's rights. The Court held that if, on a case-by-case basis, the state makes an adequate showing that the proposed procedure is necessary to lessen the trauma experienced by a particular child witness, the state's interest in protecting child victims in sexual abuse cases could supersede the defendant's right to face-to-face confrontation. Because the closed-circuit television procedure preserves the reliability of the testimony by allowing the defense to still cross-examine the witness at trial, the Court concluded that the procedure would preserve the essence of the Confrontation Clause. By making this decision, the Supreme Court made a policy judgment that the protection of the child and the possibility of receiving more effective and reliable testimony may outweigh the defendant's right to face-to-face confrontation in some cases.

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42. See id. In *Craig*, the Supreme Court answered the question left open in *Coy*: whether the defendant's right to face-to-face confrontation was an absolute right or if it could be outweighed by a child specific state interest. See id. at 849-50.
43. See id. at 855. The Court delineated situations in which the defendant's right to face-to-face confrontation could be displaced:

[W]e hold that, if the State makes an adequate showing of necessity, [which must be done on a case-by-case basis] the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

Id.
44. See id. at 857.
45. See Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 782. But see Craig, 497 U.S. at 860-70 (Scalia, J., dissenting) (stating that the Constitution should not give way to policy interests and that the majority incorrectly recharacterized the Confrontation Clause as guaranteeing the reliability of the offered evidence instead of certain trial procedures, like face-to-face confrontation). "The purpose of enshrining this [face-to-face confrontation] protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court." Id. at 861 (Scalia, J., dissenting).
2. The Defendant's Right to Cross-Examination

In addition to guaranteeing the defendant the right to face-to-face confrontation of a witness, the Confrontation Clause bestows upon the defendant a right to cross-examine the witness before the jury. The Supreme Court has continued to stress the importance of this right, generally holding that no confrontation problem exists when the witness is at least subject to cross-examination. For example, in *California v. Green*, the Supreme Court held that the admission of a witness's prior inconsistent testimony does not violate the defendant's confrontation rights if the witness is subject to subsequent cross-examination at trial. Specifically, the prosecution may read portions of a witness's testimony from the preliminary hearing where the witness identified the defendant as the felon if the witness gives inconsistent testimony regarding this matter at trial. Since the primary purpose of the Confrontation Clause is to prevent the prosecution from using only depositions and ex parte affidavits against the defendant, the Court held that the admission of out-of-court statements by a declarant who testifies in court and is subject to cross-examination does not violate the Confrontation Clause.

"[T]he Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was 'face-to-face' confrontation." *Id.* at 862 (Scalia, J., dissenting).


49. *See id.* at 151-53. Originally, the police arrested the prosecution witness, Melvin Porter, for selling marijuana to an undercover police officer. *See id.* at 151. Porter told the police that the defendant had called him earlier in the month and asked him if he wanted to sell some "grass." *See id.* At a preliminary hearing a week later, Porter again named the defendant as his supplier. *See id.* During the trial two months later, however, Porter claimed that he did not know how he obtained the marijuana because he was on acid when the defendant called him. *See id.* at 152. Porter further testified that he could not remember what happened after the defendant called him on the day in question because the drugs he ingested interfered with his ability to distinguish fact from fantasy. *See id.*

50. *See id.* at 158.

51. *See id.* In *Green*, the Court supported its conclusion by reiterating that the Confrontation Clause requires that the witness be present, under oath, subject to cross-examination, and observed by the jury. *See id.* While recognizing that not all out-of-court statements are subject to those protections, the Court stated that when the declarant testifies at trial, those statements regain the protections for all practical purposes because the defendant is under oath, subject to cross-examination, and
Furthermore, the Supreme Court explained that the prior inconsistent statements could be admitted into evidence even if they had not been subject to cross-examination at the preliminary hearing. The Court pointed out that the main danger in allowing subsequent cross-examination to replace in court cross-examination is that during the interim between direct and subsequent cross-examination, false testimony may solidify in the witness’s mind, given that the witness has time to reconsider the evidence while exposed to the possible negative influence of other people. Because the prior testimony was inconsistent with the in-court testimony, however, the Court found that not only was the danger of the testimony hardening against the truth avoided, but the prior testimony actually “softened to the point where he now repudiates it.”

The Supreme Court has further clarified the scope of the right to cross-examination by stating that the defendant’s right to confrontation is not violated when courts admit into evidence the prior testimony of a witness who is unavailable at trial as long as the defense had the opportunity to cross-examine the witness during the preliminary hearing. This is true even if the cross-examination that takes place at observed by the jury while he either “disavows or qualifies his earlier statement.” Id. at 158, 160. The dissenting opinion asserted that the prior testimony from the preliminary hearing should not have been admitted because it was unreliable. See id. at 201-03 (Brennan, J., dissenting). Moreover, the cross-examination that takes place during a preliminary hearing is fundamentally different than that which takes place at trial, and the former should not replace the latter. See id. at 195-97 (Brennan, J., dissenting).

52. See id. at 159.
53. In this Note, contemporaneous cross-examination refers to an examination which takes place as the witness is making a statement, and subsequent cross-examination refers to cross-examination that occurs at a date later than that on which the witness’s statement was originally obtained. See Mueller & Kirkpatrick, supra note 19, § 8.74, at 1457.
54. See Green, 399 U.S. at 159; see also Mosteller, supra note 45, at 724-36 (discussing the differences between contemporaneous and subsequent cross-examination).
55. Green, 399 U.S. at 159. “The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant.” Id.
56. See id. at 159-60; see also infra Part II.B.1 (discussing the definition of “constitutionally unavailable” and the Supreme Court’s subsequent expansion of this definition to include witnesses who are alive, but unable to be present at trial; and/or witnesses who are physically present at trial, but have a lapse of memory or plea for Fifth Amendment protection). The Court held that the witness was unavailable to testify because she moved out of state, could not be contacted, and failed to respond to five state subpoenas. See Ohio v. Roberts, 448 U.S. 56, 59-60 & n.2 (1980).
a preliminary hearing differs in substance than that which occurs at trial. Even in situations where defense counsel does not formally cross-examine the witness, if the questioning complies with the general truth-seeking purpose of the Confrontation Clause, courts should properly admit the evidence.

B. The Evidence Rule of Hearsay and its Relationship to the Confrontation Clause

Hearsay statements are any out-of-court statements offered for the truth of the matter asserted, and the hearsay rule bars the admission of such statements into evidence. Because a witness’s testimony may contain potentially inaccurate and untrustworthy information, the hearsay rule requires courts to exclude such evidence unless it is tested by adversarial cross-examination aimed at exposing any inaccuracies. Accordingly, the hearsay rules generally require that any statements presented against the defendant must be made in court with the declarant available for cross-examination. Given that the hearsay rules and the Confrontation Clause both emphasize the importance of reliable evidence and cross-examination, they appear to be very similar.

There are, however, some subtle differences between the hearsay rules and the Confrontation Clause, and it would be incorrect to suggest that the Confrontation Clause merely codifies the rules of hearsay. The Supreme Court has stated that the Confrontation Clause does not necessarily bar the admission of hearsay evidence against a defendant, even though such admission may seem to violate the rule against hearsay. Conversely, the Supreme Court has also

57. See Roberts, 448 U.S. at 70.
58. See id. The defendant argued that his questions occurred during direct examination, not cross, because the Court never declared the witness a hostile witness. See id. at 71.
59. See id. at 71.
60. See id. at 70.
61. See Fed. R. Evid. 801; see also Mueller & Kirkpatrick, supra note 19, § 8.74, at 1045.
64. See Mueller & Kirkpatrick, supra note 19, § 8.74, at 1052-53.
66. See id.
67. See id. at 156; see also White v. Illinois, 502 U.S. 346, 353-57 (1992) (establishing that the admission of out-of-court statements under certain established exceptions to the hearsay rule does not violate the Confrontation Clause); United States
found in more than one situation that evidence admitted under a valid hearsay exception violated the defendant’s confrontation rights. Accordingly, when state legislatures enact statutes providing for exceptions to the hearsay rule, such exceptions are closely scrutinized under the Confrontation Clause.

The Supreme Court has considered many cases about the constitutionality of hearsay exception statutes. When states create new exceptions to the hearsay rule, the Court questions whether the defendant’s confrontation rights will be violated by the admission of such evidence. In Ohio v. Roberts, the Supreme Court held that the Clause operates in two ways to limit the scope of admissible hearsay, thereby establishing “the Roberts two-prong approach.” The Clause establishes a “rule of necessity,” which requires the prosecution to either produce the witness at trial or demonstrate that the witness is unavailable to testify at trial prior to offering his out-of-court statements into evidence. The second prong of the approach applies only when the prosecution proves that the witness is unavailable and requires that the hearsay evidence bear an “indicia of reliability.”

v. Inadi, 475 U.S. 387, 394-96 (1986) (holding that the admission of co-conspirator statements does not violate the Confrontation Clause).

68. See Green, 399 U.S. at 155-56; see also Coy v. Iowa, 487 U.S. 1012, 1015-21 (1988) (concluding that the admission of testimony given by a witness from behind a screen pursuant to a state statutory hearsay exception violated the defendant’s confrontation rights); Barber v. Page, 390 U.S. 719, 722-25 (1968) (finding that the accused was deprived of his right to confront the witnesses against him when the transcript of a witness’s statements from a preliminary hearing was read at trial because the witness was in prison and unable to testify); Pointer v. Texas, 380 U.S. 400, 403-08 (1965) (holding that the admission into evidence of a witness’s transcript denied the defendant his confrontation rights).

69. See Green, 399 U.S. at 156. “[T]he modification of a State’s hearsay rules to create new exceptions for the admission of evidence against a defendant, [sic] will often raise questions of compatibility with the defendant’s constitutional right to confrontation.”

70. See generally White, 502 U.S. at 346; Idaho v. Wright, 497 U.S. 805, 817-18 (1990); Inadi, 475 U.S. at 387; Green, 399 U.S. at 149.

71. See Green, 399 U.S. at 156.

72. Ohio v. Roberts, 448 U.S. 56 (1980); see supra notes 56-60 and accompanying text (discussing the facts of the Roberts case). In Roberts, an Ohio statute allowed the admission of preliminary testimony of a witness who could not be produced at trial. See Roberts, 448 U.S. at 59 & n.2.

73. See Roberts, 448 U.S. at 65.

74. See id. In this Note, the “rule of necessity” and the “unavailability rule” are used interchangeably to refer to the same concept.

75. See id.

76. See id. at 65-66.
1. The Unavailability Rule

The unavailability rule requires that the prosecution either show that the witness is unavailable or produce the witness at trial prior to introducing hearsay statements. The definition of an unavailable witness is essential to the determination of when hearsay statements are admissible because only the statements of unavailable witnesses can be admitted. Historically, the Court did not consider a witness to be constitutionally unavailable unless the witness was deceased. The Court has since expanded its definition of an unavailable witness to include those who are currently living but unable to be present at trial, if the prosecution made a good faith effort to secure their presence.

Moreover, the Court has recognized that a witness is unavailable if the State cannot secure the witness’s live testimony because of either the witness’s lapse of memory or the Fifth Amendment plea of protection. Consequently, the courts may admit evidence out-of-court statements of a witness who claims memory confusion at trial. Recently, the Court expanded the definition of the unavailable witness to include child witnesses who would suffer trauma from having to testify or when the child is found to be incompetent.

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77. See White v. Illinois, 502 U.S. 346, 354 n.6 (1992); see also Mueller & Kirkpatrick, supra note 19, § 8.74 at 1462-1467 (discussing the rationale behind the unavailability rule). The unavailability rule encourages prosecutors to call live witnesses to the stand instead of introducing the witness’s out-of-court statement at trial. See id. at 1462-63.

78. See Mueller & Kirkpatrick, supra note 19, § 8.74 at 1462-63. “Where the constitutional requirement applies, the prosecutor must make a good-faith effort to produce the speaker rather than offer his out-of-court statement, and this effort is not bounded by the geographical reach of the subpoena power.” Id. at 1463.

79. See Mosteller, supra note 45, at 723; see also California v. Green, 399 U.S. 149, 165 (1970) (citing Mattox v. United States, 156 U.S. 237 (1895), where the Court admitted testimony from a prior trial of a witness who died before the second trial).

80. See Roberts, 448 U.S. at 74.

81. See Green, 399 U.S. at 167-68 & n.17. But see Mueller & Kirkpatrick, supra note 19, § 8.74 at 1465 (discussing that a witness who claims protection against self-incrimination is arguably available because the government could access the testimony by granting the witness immunity).

82. See Green, 399 U.S. at 167-68; see also supra note 49 and accompanying text (discussing the facts of Green).

[A]s a constitutional matter, it is untenable to construe the Confrontation Clause to permit the use of prior testimony to prove the State’s case where the declarant never appears, but to bar that testimony where the declarant is present at the trial, exposed to the defendant and the trier of fact, and subject to cross-examination.

Green, 399 U.S. at 166-67.

83. See Mosteller, supra note 45, at 692-93; see also Mueller & Kirkpatrick, supra
because the child cannot communicate with the jury. Because the Court has redefined unavailability so that some witnesses who are physically available to testify can be found unavailable, the hearsay statements of those witnesses may be admitted into evidence.

The Supreme Court originally articulated the unavailability rule as the first prong in the Roberts two-prong approach for determining when statements admitted under a hearsay exception meet the requirements of the Confrontation Clause. Subsequently, however, the Court narrowly interpreted the unavailability rule's general applicability to situations where the hearsay evidence in question is not prior testimony. Requiring the prosecution to demonstrate witness unavailability when offering into evidence the prior testimony of the witness is reasonable because prior testimony is frequently only a weaker version of the evidence and is intended to replace live testimony when it cannot be secured. The Court, however, has

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85. See Mosteller, supra note 45, at 723-24.
86. See supra notes 72-76 and accompanying text (discussing the two-prong approach the Court established in Roberts); see also supra notes 56-60 and accompanying text (discussing the facts of the Roberts case).
87. See United States v. Inadi, 475 U.S. 387, 394 (1986). In Inadi, the prosecution produced tapes of conversations between the defendant and four other co-conspirators under the Federal Rule of Evidence 801(d)(2)(E)--the co-conspirator hearsay exception. See id. at 390; see also FED. R. EVID. 801(d)(2)(E). The relevant portion of the rule is as follows: "(d) Statements which are not hearsay. A statement is not hearsay if . . . (2) Admission by party-opponent. The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Id.

The Court emphasized that the hearsay evidence at issue in Roberts was prior testimony and that "Roberts simply reaffirmed a long-standing rule . . . that applies unavailability analysis to prior testimony. Roberts cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without showing that the declarant is unavailable." Inadi, 475 U.S. at 394 (italics added). The Court held that the prosecution did not violate the defendant's right to confrontation where the prosecution sought admission of tapes of conversations between the defendant and four other co-conspirators into evidence under Federal Rule of Evidence 801(d)(2)(E), despite witness unavailability. See id. at 399-400.

88. See Inadi, 475 U.S. at 394. The Supreme Court distinguished Inadi from Roberts because the Roberts Court's analysis of the Confrontation Clause was only concerned with the issues that develop when the prosecution offers hearsay evidence from a prior judicial proceeding at trial. See id. at 392-94. The Court noted that such an analysis does not apply to the admission of co-conspirator evidence. See id. at 395. In Inadi, the Court held that prior testimony statements differ from the statements of a co-conspirator.
determined that applying the unavailability rule to all out-of-court statements would frustrate the truth seeking purpose of the Confrontation Clause and place an undue burden on the prosecution in certain situations.\(^8\)

For example, the Court has held that witness unavailability is not a prerequisite to the admission of hearsay evidence under the co-conspirator statement,\(^9\) spontaneous declaration,\(^9\) and medical

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8. See Inadi, 475 U.S. at 396-400.
9. See id. at 399-400. "[W]e continue to affirm the validity of the use of co-conspirator statements, and we decline to require a showing of the declarant's unavailability as a prerequisite to their admission." Id. at 400. The dissenting opinion, however, asserts that the Roberts Court "consciously sought to lay down an analytical framework applicable to all out-of-court declarations introduced by the prosecution for the truth they contain." Id. at 402-03 (Marshall, J., dissenting). The dissent noted that the rule of unavailability encourages the live testimony of witnesses in court because "confrontation and cross-examination of the declarant in open court are the most trusted guarantors of the reliability that is the primary concern of the Confrontation Clause." Id. at 403 (Marshall, J., dissenting). Moreover, the dissent noted that the co-conspirator exception originated in substantive law, as opposed to being created, because of a belief that such statements are especially reliable as were the other types of hearsay exceptions. See id. at 405 (Marshall, J., dissenting). Accordingly, the dissent accused the majority's decision of sacrificing the Confrontation Clause's guarantee of reliable evidence for prosecutorial efficiency. See id. at 401 (Marshall, J., dissenting).

91. See White v. Illinois, 502 U.S. 346, 348-49 (1992). "The spontaneous declaration exception applies to '[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.'" Id. at 350 n.1 (quoting People v. White, 555 N.E.2d 1241, 1246 (Ill. App. Ct. 4th Dist. 1990)); see also FED. R. EVID. 803(2).

92. See White, 502 U.S. at 348-49. The White court cited the relevant Illinois statute as follows:

In a prosecution for violation of Section 12-13, 12-14, 12-15 or 12-16 of the 'Criminal Code of 1961', [sic] statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.

\(^\text{Id. at 351 n.2 (quoting ILL. REV. STAT., ch. 38 para. 115-13 (1989)); see also FED. R.}\)
examination hear say exceptions. The Supreme Court refused to apply the unavailability requirement of the Roberts two-prong approach expansively in these situations because these hearsay statements included a contextual atmosphere that could not be replicated by in-court testimony. Thus, the Court reasoned that the out-of-court statements in these situations were not a weaker version of the live testimony, as was the prior testimony in Roberts. Moreover, because such evidence is highly probative, the Court determined that barring it because it violates the Confrontation Clause would subvert the Clause's truth-seeking purpose. As the imposition of the unavailability rule would also unduly burden the prosecution, the Court has held that the unavailability rule is not a prerequisite to the admission of hearsay evidence under the co-

EVID. 803(4).

93. See White, 502 U.S. at 357.
94. See supra notes 72-76 and accompanying text (discussing the Roberts two-prong approach).
95. See White, 502 U.S. at 353-57 (discussing the similarities between evidence admitted under the co-conspirator exception and evidence admitted under the spontaneous declaration and medical examination exceptions and determining that the unavailability rule should not apply in those situations). The Court noted that:

A statement that has been offered in a moment of excitement—without the opportunity to reflect on the consequences of one's exclamation—may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom. Similarly, a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony.

Id. at 356.
96. See id.
97. See id. at 356-57. "To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the 'integrity of the factfinding process.'" Id. (citations omitted).
98. See id. at 357 ("A generally applicable unavailability rule would have few practical benefits while imposing pointless litigation costs . . . .").
conspirator statement, spontaneous declaration, and medical examination hearsay exceptions.

In sum, the Supreme Court has determined that unavailability is a prerequisite for the admission of prior witnesses testimonial hearsay evidence, but that it is not a prerequisite for statements admitted under the firmly-rooted hearsay exceptions of co-conspirator statements, spontaneous declarations, and medical examinations. Although the Court has not yet considered whether unavailability is a prerequisite to the admission of hearsay evidence under exceptions which are not firmly rooted, such as those applicable in child sexual abuse situations, some observers suggest that the requirement is likely to apply. When the Court waives the unavailability requirement, it appears that hearsay evidence can be admitted based solely on a showing of its reliability. The dismissal of the unavailability requirement is especially important given that the Court considers statements admitted under firmly-rooted hearsay exceptions to be inherently reliable.

100. See White, 502 U.S. at 349. Although the White Court did not say that all firmly-rooted hearsay exceptions escape the unavailability requirement, the logic behind the decision is that the second prong of the test, the reliability requirement, can eclipse the unavailability rule. See Mueller & Kirkpatrick, supra note 19, § 8.74, at 1466. This is especially important because the Court has held that firmly-rooted hearsay exceptions are inherently reliable. See id.; see also infra note 109 and accompanying text (discussing the determination of the reliability of hearsay evidence).
101. See supra notes 56-60 and accompanying text (discussing Ohio v. Roberts).
102. See supra notes 87-88 and accompanying text (discussing United States v. Inadi).
103. See supra notes 91-93 and accompanying text (discussing White v. Illinois).
104. In Idaho v. Wright, the prosecution charged the defendant with lewd conduct with a minor. 497 U.S. 805, 808 (1990). At trial, the prosecution admitted the child victim's hearsay statements under a catch-all hearsay exception statute. See id. at 811-12. Although the Court acknowledged the unavailability prong of the Roberts two-prong test, it noted that "this case does not raise the question whether, before a child's out-of-court statements are admitted, the Confrontation Clause requires the prosecution to show that a child witness is unavailable at trial," because "we assume ... the younger daughter was an unavailable witness within the meaning of the Confrontation Clause." Id. at 815-16.
105. See Mueller & Kirkpatrick, supra note 19, § 8.74, at 1466.
106. See id. "Still the logic of White is that the reliability requirement, which is itself satisfied when 'firmly rooted' exceptions apply, can essentially eclipse the unavailability requirement." Id.; see also supra note 72-76 and accompanying text (discussing the Roberts two-prong approach). When the Court waives the first prong, only the second prong's requirement of reliability potentially bars the admission of hearsay evidence. See Mueller & Kirkpatrick, supra notes 19, § 8.74, at 1466.
2. Reliability of the Offered Evidence

The second prong of the Roberts approach is that hearsay statements violate the defendant's confrontation rights unless the statements bear an "indicia of reliability."\(^{108}\) Because cross-examination assures the reliability of in-court testimony, the court will admit out-of-court hearsay statements into evidence only when the prosecution can subject them to in-court cross-examination or show that the statements are so inherently reliable that testing them by cross-examination would do little to increase their reliability.\(^ {109}\) The Supreme Court stated that reliability can be inferred in situations "where the evidence falls within a firmly-rooted hearsay exception"\(^ {110}\) or in cases where the statements are shown to have "particularized guarantees of trustworthiness."\(^ {111}\)

Out of deference to legislative and judicial experience in assessing the

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108. See id. The phrase "indicia of reliability" has two different meanings. See Mueller & Kirkpatrick, supra note 19, § 8.74, at 1467. "In Roberts . . . [where] the statements amounted to testimony given in proceedings where the speaker was cross-examined; reliability means that prior questioning provides adequate basis to evaluate what was said." Id. The Roberts Court stated:

In sum, we perceive no reason to resolve the reliability issue differently here than the Court did in Green. "Since there was an adequate opportunity to cross-examine [the witness], and counsel . . . availed himself of that opportunity, the transcript . . . bore sufficient 'indicia of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.'" Roberts, 448 U.S. at 73 (quoting Mancusi v. Stubbs, 408 U.S. 204, 216 (1972)). "Indicia of reliability," however, "also refers to factors that justify a conclusion that a statement is trustworthy for . . . intrinsic or circumstantial reasons having nothing to do with questioning or testing the speaker." Mueller & Kirkpatrick, supra note 19, § 8.74, at 1467. An example of statements belonging to this category are those that arise in situations which define a firmly-rooted hearsay exception. See id. at 1468. In these situations, cross-examination will do little to increase the reliability already offered by the context. See id. at 1467.

109. See Mueller & Kirkpatrick, supra note 19, § 8.74, at 1467; see also White v. Illinois, 502 U.S. 346, 357 (1992) ("A statement that qualifies for admission under a 'firmly rooted' hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability.").

110. Roberts, 448 U.S. at 66. The Supreme Court has determined that the former testimony exception, the co-conspirator exception, and the exceptions for excited utterances, statements for medical purposes, business records, dying declarations, and public records are all "firmly rooted" hearsay exceptions. See Mueller & Kirkpatrick, supra note 19, § 8.74, at 1471. Other exceptions such as individual admissions, adoptive admissions, and statements by agents on matters relating to their duties are likely to survive constitutional scrutiny. See id. The exceptions created under Federal Rule of Evidence 801(d)(1), which are applicable to prior statements made by witnesses who testify at trial, are similarly likely to satisfy the confrontation requirements because the cross-examination at trial may be enough to ensure the reliability of the offered evidence. See id. at 1471-72.

111. Roberts, 448 U.S. at 66.
trustworthiness of out-of-court statements made in certain contexts, the Court determined that out-of-court statements admitted under firmly-rooted hearsay exceptions are inherently reliable. In those contexts, the Court considers the statements to be so reliable that adversarial testing, such as cross-examination, is not necessary to guarantee its reliability.

On the other hand, a hearsay statement that does not fall under a firmly-rooted hearsay exception is presumed to be unreliable and its admission is contingent upon the court finding that the statement has "particularized guarantees of trustworthiness." The Supreme Court instructed that such guarantees can be found when an examination of the "totality of the circumstances" in which the witness made the statement reveals that the declarant is worthy of belief. Thus, the reasoning behind finding which out-of-court statements are trustworthy is similar to the reasoning which led to the creation of firmly-rooted hearsay exceptions—that the witness made such statements under circumstances in which the "possibility of fabrication, coaching, or confabulation" is greatly lessened.

Some factors used to evaluate the reliability of the evidence are "circumstantial indicators of knowledge and memory, spontaneity, consistent repetition, against-interest elements, and indications that the speaker lacked motive to falsify." When the statements at issue are those admitted under hearsay exceptions specific to child abuse cases, additional factors to be considered are the age-appropriateness of the language and indicators that the child has precocious knowledge.

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113. See White, 502 U.S. at 357. "[A] statement that qualifies for admission under a 'firmly rooted' hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability." Id.
114. Wright, 497 U.S. at 817.
115. Id. at 820.
116. See id.
117. Id. "In other words, if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial." Id.
118. MUELLER & KIRKPATRICK, supra note 19, § 8.74 at 1469.
119. See id. In Idaho v. Wright, the Supreme Court cited a number of factors to aid in the decision-making process including the child's spontaneous and consistent repetition of the statement, the child's mental state, the child's use of terminology which would not be expected in another child of the same age, and the child's lack of motive to fabricate. See Wright, 497 U.S. at 821-22. The Supreme Court, however, rejected the requirement that out-of-court statements by a child witness be recorded, stating that while such procedural safeguards enhance the reliability of out-of-court statements, "we decline to read into the Confrontation Clause a preconceived and
Given that the reliability of the statements must be inherent to the context in which the statements are made, other corroborative evidence showing that the abuse occurred is irrelevant to the trustworthiness of the victim's statement.\textsuperscript{120}

\textbf{C. Childlaw, Hearsay Exceptions, and the Confrontation Clause in Illinois}

Cases in which the prosecution accuses a defendant of sexually abusing a child result in special problems being brought into the courtroom\textsuperscript{121} because the child is usually the only witness to the abuse,\textsuperscript{122} corroborative physical evidence is generally scarce,\textsuperscript{123} and the child is often hesitant or incapable of testifying against the defendant.\textsuperscript{124} Such issues arise because of the very nature of the crime.\textsuperscript{125} In most circumstances, the abuser is someone with whom the child and the family have placed their trust.\textsuperscript{126} Also, the defendant often threatens the child with dire consequences if the child tells anyone their “little secret.”\textsuperscript{127} Finally, children lack the emotional maturity of adults\textsuperscript{128} and are still developing cognitive and language skills,\textsuperscript{129} so they may find it difficult to adequately communicate the details of the crime.\textsuperscript{130}

\begin{flushright}
\textsuperscript{artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant.} \textsuperscript{Id. at 818-19.}
\end{flushright}

\textsuperscript{120} See \textit{Mueller and Kirkpatrick}, supra note 19, § 8.74, at 1469. In \textit{Idaho v. Wright}, the Supreme Court stated:

\begin{quote}
The . . . factors on which the trial court relied . . . such as the presence of physical evidence of abuse, the opportunity of [defendant] to commit the offense, and the older daughter’s corroborating identification, relate instead to whether other evidence existed to corroborate the truth of the statement. These factors . . . are irrelevant to a showing of the ‘particularized guarantees of trustworthiness’ necessary for admission of hearsay statements under the Confrontation Clause.
\end{quote}

\textsuperscript{497 U.S. at 826.}

\textsuperscript{121} See generally Sheryl K. Essenburg, \textit{Accommodating Child Victims in the Criminal Courtroom}, 78 ILL. B.J. 248 (1990) (discussing how courts can accommodate the needs of child witnesses).

\textsuperscript{122} See Serketich, supra note 7, at 222-23.

\textsuperscript{123} See id. at 223.

\textsuperscript{124} See id.

\textsuperscript{125} See id.

\textsuperscript{126} See id. at 221.

\textsuperscript{127} See id.

\textsuperscript{128} See Essenbgur, supra note 121, at 248.

\textsuperscript{129} See id.

\textsuperscript{130} See People v. Holloway, 682 N.E.2d 59, 63 (Ill. 1997).
To assist in the prosecution of crimes in which children are the main witnesses, many states have created new hearsay exceptions that admit into evidence the out-of-court statements of the child. The admission of a child's hearsay statements in prosecutions of sexual abuse crimes is important to such cases for three reasons. First, such statements are usually the most compelling evidence that the crime occurred given that most children first disclose sexual abuse to their parents, teachers, friends, or doctors out-of-court. Second, such hearsay evidence may be the only evidence of abuse because corroborative physical evidence is often scarce. Finally, since many children are too traumatized to take the stand or are ineffective witnesses once they do, hearsay statements may be the only means by which the child can actually communicate the circumstances of abuse to the court. Accordingly, such hearsay exceptions can play an important role in the successful prosecution of defendants charged with crimes against children.

In 1982, the Illinois legislature responded to the unique needs of child witnesses in the context of civil suits in juvenile court, but it was much slower in dealing with such issues in a criminal court.

131. See Mosteller, supra note 45, at 692-95 (discussing child shield statutes, hearsay exceptions which allow the admission of ex-parte videotaped testimony in lieu of the child's direct examination at trial, and new trial procedures which allow the child to testify through videotape or live closed-circuit television); see also MUELLER & KIRKPATRICK, supra note 19, § 8.74, at 1476-78 (briefly discussing the Supreme Court's general treatment of these new exceptions and procedures).
133. See id.
134. See id.
135. See id. at 184-85.
136. See id. at 184.
137. See Essenburg, supra note 121, at 248. Amendments to the Juvenile Court Act created special evidentiary and procedural rules for children, which gave the prosecutor more flexibility in proving cases that otherwise might have been dismissed due to the impossibility of the child testifying in court. See id. For example, the new statute provided that a child witness in an abuse or neglect proceeding received a "rebuttable presumption" of competency. See id. Moreover, the juvenile court was granted authority to allow the child to testify in the judge's chambers instead of in open court. See id. As only the court, the court reporter, and attorneys for both sides were permitted to be in chambers during the child's testimony, the child avoided having to testify in front of the person accused of the abuse. See id. The statute also admitted into evidence "previous statements made by the minor relating to any allegations of abuse or neglect." Id. These changes were not subject to inquiry under the Confrontation Clause because juvenile court operates as a civil instead of criminal court. See id. at 249.
context. It was not until 1988 that the Illinois legislature promulgated section 106A-2, which first provided for the use of videotaped testimony of a child victim in criminal court. Similarly, in 1988, the Illinois legislature passed section 115-10 of the Illinois Code of Criminal Procedure to provide for certain hearsay exceptions.

138. See id. at 249.
139. On June 19, 1989, the Illinois Supreme Court held unconstitutional former section 106A-2. See id.; see also People v. Bastien, 541 N.E.2d 670 (Ill. 1989) (holding that section 106A-2 was unconstitutional); infra Part II.C.2.a. (discussing the manner in which the Illinois Supreme Court found section 106A-2 unconstitutional). The statute provided:

(a) Upon motion of the State at any time before the trial . . . , the court may order that a child's oral statement or testimony be recorded . . . in the presence of the court, the attorneys for the defendant and . . . prosecution, . . . the operator of the recording equipment, necessary security personnel, and any person who, in the court's discretion would contribute to the welfare and well-being of the child. The defendant shall be permitted to be present at the making of the recording. Only the attorney for the prosecution or the court may question the child. The court shall rule on evidentiary objections of the attorney for the defendant.

(b) The recording, or portions of the recording, may be admissible into evidence upon motion of either the State or the defendant provided the prosecution complied with seven statutory requirements mandated by section 106A-2.


140. See Essenburg, supra note 121, at 249 & n.7.
141. See 725 ILL. COMP. STAT. 5/115-10 (West 1996) (amended twice in 1998). The relevant portion of section 115-10 of the Code of Criminal Procedure provides:

§ 115-10 Certain hearsay exceptions.

(a) In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13, . . . , the following evidence shall be admitted as an exception to the hearsay rule: . . .

(2) testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim.

(b) Such testimony shall only be admitted if:

(1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(2) The child . . . either:

(A) testifies at the proceeding; or

(B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

Id.
in prosecutions of specific child sexual abuse crimes.¹⁴²

1. Section 115-10

a. The Legislative Purpose Behind Section 115-10

The Illinois legislature originally passed section 115-10 to address the inherent difficulties present during the prosecution of defendants accused of sexually assaulting a child.¹⁴³ Difficulties often arise because children lack the cognitive skills to adequately communicate the details of the crime, and their inability to testify effectively creates problems of proof because the child is usually the only witness to the assault.¹⁴⁴ Accordingly, the legislature wanted to create a hearsay exception under which the court could admit into evidence corroborative testimony¹⁴⁵ that the child complained to somebody else

¹⁴² See Essenburg, supra note 121, at 249. In 1984, the legislature enacted section 115-10.1, which governs the admissibility of prior inconsistent statements in trial proceedings, but is not specifically limited to certain cases involving children or specified crimes. See 725 ILL. COMP. STAT. 5/115-10.1. The part of the statute that is relevant to the defendant's argument in People v. Bowen provides:

In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

(a) the statement is inconsistent with his testimony at the hearing or trial, and
(b) the witness is subject to cross-examination concerning the statement, and
(c) the statement--

(1) was made under oath at a trial, hearing, or other proceeding, or
(2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness, or
(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at trial, hearing, or other proceeding, or
(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

¹⁴³ See People v. Holloway, 682 N.E.2d 59, 63 (Ill. 1997).

¹⁴⁴ See Serketich, supra note 7, at 222-23; see also Holloway, 682 N.E.2d at 63.

¹⁴⁵ See Holloway, 682 N.E.2d at 63. The Illinois Supreme Court suggested that the type of corroborative evidence that the legislature envisioned as being admitted under this hearsay exception was testimony by a third party asserting that the child complained about the abuse to them. See id. The Holloway court stated:

It appears that the legislature . . . was concerned with the ability of the victim to understand and articulate what happened during the incident at trial. Evidence of an outcry statement made to another . . . would corroborate the
about the abuse, thereby strengthening the evidence that the abuse occurred.\textsuperscript{146} Given that the legislature wanted to ensure the reliability of such evidence, section 115-10 also includes a precautionary provision which provides for a hearing to determine the reliability of the hearsay statement before it is admitted into evidence.\textsuperscript{147} In subsequent years, the legislature has acted to further expand the scope of this statute.\textsuperscript{148}

b. Illinois Supreme Court Interpretations of Section 115-10

In most of the cases in which evidence admitted under section 115-10 has been at issue, the Illinois Supreme Court’s inquiry has focused on the admitted evidence’s reliability.\textsuperscript{149} The proponent of the hearsay evidence has the burden of proving that the “time, content and circumstances” of the out-of-court statements provide “sufficient safeguards of reliability.”\textsuperscript{150} For example, the Illinois Supreme Court has held that where the child victim waited four weeks to tell her mother and therapist that the sexual abuse occurred, the mother’s and

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\textsuperscript{146} See id. “During discussion of the bill, Representative Jaffe asserted that the bill ‘deals with corroboration that a child has been sexually molested and testimony that . . . [the child] complained of such an incident.’” Id. (quoting 82d Ill. Gen. Assem., House Proceedings, March 25, 1982 (statements of Representative Jaffe)).

\textsuperscript{147} See 725 ILL. COMP. STAT. 5/115-10(c) (West 1996).

\textsuperscript{148} See Holloway, 682 N.E.2d at 63. In 1993 and 1994, the legislature amended section 115-10 to increase the list of crimes to which this hearsay exception applies and to expand the coverage of the statute to include mentally retarded victims of assault. See id. On July 30, 1998, the legislature further amended section 115-10 so that statements “obtained as a result of interviews conducted pursuant to a protocol adopted by a Child Advocacy Advisory Board . . . ,” or statements obtained from interviews in which the “interviewer or witness to the interview was or is an employee, agent, or investigator of a State’s Attorney’s office” could not be excluded from admission under this section. Pub. Act 90-656, § 5, 1998 Ill. Legis. Serv. 2523 (West) amending 725 ILL. COMP. STAT. 5/115-10 (West 1996). Finally, in an amendment which the legislature approved August 14, 1998 and which became effective on January 1, 1999, the legislature provided that the out-of-court statements of the child victim, if “made before the victim attained 13 years of age or within 3 months after the offense, whichever occurs later,” can be admitted under section 115-10 regardless of the age of the victim at the time of trial. Pub. Act 90-786, § 10, 1998 Ill. Legis. Serv. 3320 (West) amending 725 ILL. COMP. STAT. 5/115-10 (West 1996).

\textsuperscript{149} See infra notes 151-61 and accompanying text (discussing situations in which the Illinois Supreme Court has addressed the reliability of evidence admitted under section 115-10).

\textsuperscript{150} People v. Zwart, 600 N.E.2d 1169, 1172 (Ill. 1992); see also 725 ILL. COMP. STAT. 5/115-10(b)(1) (1996).
therapist’s hearsay testimony about the child’s out-of-court statements could not be admitted into evidence.\textsuperscript{151} The Illinois Supreme Court determined that the statements should not have been admitted because the timing and circumstances in which the child made the statements did not provide “sufficient safeguards of their reliability.”\textsuperscript{152} While recognizing that a delay in the child’s reporting of the crime is not unusual because the child victims are often reluctant to discuss the abuse,\textsuperscript{153} the Illinois Supreme Court determined that the child’s delay in reporting the abuse in this case was questionable because the victim spoke to three other adults prior to making the allegations which identified the defendant as the perpetrator.\textsuperscript{154} Thus, the court’s concern was not only that there was no record of the discussions that occurred with these three adults, but also that the child’s age made her particularly susceptible to outside adult influence.\textsuperscript{155}

\textsuperscript{151} See Zwart, 600 N.E.2d at 1172-73. Pursuant to section 115-10, the trial court held a hearing before admitting the hearsay evidence to determine whether the statements were reliable enough to warrant their admission. See id. at 1170.

\textsuperscript{152} Id. at 1172. The court, however, did conclude that the content of the child’s statements were reliable. See id. “For example, the statements reflect a knowledge of sexual activity which is unexpected and unusual for a three-year-old child. In addition, the victim’s statements to her mother and [therapist] were consistent with each other and were made spontaneously, rather than in response to leading questions.” Id.

\textsuperscript{153} See id. “Section 115-10 also specifies that the timing of the victim’s statements must adequately safeguard the reliability of the statements.” Id. (alteration in original).

\textsuperscript{154} See id. at 1173. The court stated:

[T]he timing of the victim’s statements, standing alone, does not make the statements unreliable. The victim’s delay and initial denial become significant, however, when considered in light of the questionable circumstances surrounding her statements. We are particularly troubled by the fact that the victim made her statements only after substantial adult intervention. As noted above, the victim was interviewed by at least three persons before she even admitted that she was abused or implicated the defendant. Viewed together, the time and circumstances of the victim’s statements do not ‘provide sufficient safeguards of reliability’ as required by section 115-10.

\textsuperscript{155} See id. at 1172; see also supra notes 118-20 and accompanying text (discussing the factors which the United States Supreme Court suggests should be evaluated when determining the reliability of the child’s statements). In his dissent to Zwart, Justice Heiple wrote that “[t]he majority misconstrue[d] the plain language of section 115-10. The statute simply requires the trial court to examine the totality of the circumstances surrounding a victim’s statements to determine if they are reliable.” Id. at 1176 (Heiple, J., dissenting). The statute does not mandate that the State affirmatively present the details of any conversations the victim may have had with adults. See id. (Heiple, J., dissenting). Justice Heiple argued the circumstances surrounding the child’s statement could be found reliable if it was spontaneous and not a response to leading questions.
The Illinois Supreme Court further addressed the reliability of hearsay testimony offered under section 115-10 where a trial court allowed the witness to describe undocumented or unrecorded out-of-court interviews held with the child victim. The Illinois Supreme Court found that because the trial court properly conducted a hearing that determined the time, content, and circumstances of the out-of-court statements provided sufficient safeguards of reliability, the trial court met the requirements of section 115-10. Thus, the Illinois Supreme Court held that section 115-10 can allow for the admission of out-of-court interviews that are not videotaped, recorded, or otherwise documented. Subsequently, the Illinois Supreme Court articulated some factors to determine the reliability of hearsay evidence offered under Section 115-10. These factors include the child’s mental state, the child’s consistent repetition of the experience, the child’s lack of motive to fabricate the story, and the child’s use of terminology.

See id. at 1175 (Heiple, J., dissenting); see also supra note 154 (discussing the majority’s assertion that the content of the statements were reliable). Justice Freeman wrote a separate dissent in which he noted that the three people who interviewed the child before she made her statements, a police officer, a DCFS worker, and a hospital counselor, were required by law to investigate reports of child abuse. See Zwart, 600 N.E.2d at 1176 (Freeman, J., dissenting). He was troubled by the majority’s distrust of the professional workers, noting that the majority failed to point to any evidence which showed that the three professionals used suggestive interviewing techniques. See id. at 1176-77 (Freeman, J., dissenting).

156. See People v. Wittenmyer, 601 N.E.2d 735, 738-40 (Ill. 1992). In Wittenmyer, after the prosecution admitted into evidence hearsay testimony disclosing information gained during undocumented or unrecorded interviews, the judge found the defendant guilty of aggravated criminal sexual abuse and of aggravated sexual assault. See id. at 740. On appeal, the defendant objected to both the fact that the prosecution did not record or videotape the interviews and the fact that his representative was not present during the interviews with the child. See id.

157. See id. at 741.

158. See id.

159. See id. “Defendant’s assertions that procedural safeguards, such as recording or videotaping, should have been used and that a representative of the defendant should have been present for the interviews are meritless . . . . [D]efendant has not cited any authority to support his assertions, and in fact, the Supreme Court has rejected the adoption of such procedural safeguards.” Id.

160. See People v. West, 632 N.E.2d 1004, 1009 (Ill. 1994). In West, the trial court admitted into evidence the out-of-court statements that the child made to a police officer on the day of the alleged abuse. See id. On review, the Illinois Supreme Court addressed the question of whether the trial court had to specifically state its reasons for finding the hearsay statements were reliable. See id. at 1008-09. After answering the question in the negative, the court discussed some factors from which reliability can be inferred. See id.; see also infra note 161 and accompanying text (providing the factors that the court discussed).
expected of a child similar in age.\textsuperscript{161}

2. Videotaped Child Interviews in Illinois

a. Videotaped Testimony Under Former Section 106A-2

Former section 106A-2 of the Illinois Criminal Code of Procedure of 1963 allowed for the videotaping of a child victim’s out-of-court testimony.\textsuperscript{162} However, the Illinois Supreme Court held this statute unconstitutional in \textit{People v. Bastien},\textsuperscript{163} because it infringed on the defendant’s confrontation rights.\textsuperscript{164} Former section 106A-2 can be summarized into four parts: (1) upon the State’s motion, the court can order that the child victim’s “statement or testimony” be videotaped prior to trial; (2) the defendant, the court, and attorneys for both sides must be present during the videotaping; (3) only the prosecutor and the court may question the child with non-leading questions, but the defendant may object to such questions; and (4) the videotape may be admitted at trial only if the witness is available to testify at trial, and the defendant is afforded the opportunity to cross-examine the child.\textsuperscript{165}

Prior to considering the potential impact former section 106A-2 might have on the defendant’s confrontation rights, the \textit{Bastien} court acknowledged that videotaped statements offered under former section 106A-2 were hearsay and should be analyzed accordingly.\textsuperscript{166} Furthermore, the \textit{Bastien} court acknowledged that because the defendant had not been given the right to cross-examine the witness during the videotaping of the statement,\textsuperscript{167} the key issue for the court

\begin{footnotes}
\item[161] See West, 632 N.E.2d at 1009.
\item[162] See supra note 139 (providing the relevant text of former section 106A-2).
\item[163] People v. Bastien, 541 N.E.2d 670 (Ill. 1989).
\item[164] See id. at 677. The \textit{Bastien} court noted:
Among the written reasons given by the [trial] court for denying the [prosecution’s] motion [to videotape the testimony of the child victim under section 106A-2] are the following. The defendant’s inability, under the statute, to cross-examine the witness contemporaneously with the witness’ direct testimony denies defendant his right to confront his accuser. The opportunity to cross-examine the witness at trial, which may take place months after the videotaping, is not an adequate safeguard of the right to confrontation. The State may be able to introduce its evidence twice, first by showing the videotape, and again when the child is called to testify. Finally, the statute does not specify upon what basis the State’s motion to utilize the statute may be granted.
Id. at 671.
\item[165] See id. at 672.
\item[166] See id. at 674.
\item[167] See id. The Illinois Supreme Court noted that although many state courts have
was whether the Confrontation Clause guarantees the defendant a right to contemporaneously cross-examine witnesses during the making of any statement offered into evidence. Accordingly, the Bastien court analyzed the United States Supreme Court's reasoning in California v. Green, where the Court stated that the admission of prior inconsistent testimony would not violate the defendant's rights, even if it had not been subject to contemporaneous cross-examination. The Bastien court, however, distinguished Green on the ground that the evidence at issue was prior inconsistent testimony, the nature of which was very important to the Supreme Court in reaching its decision. The court reasoned that the procedure authorized by former section 106A-2 created the risk that the child's testimony would solidify in an untruthful manner between the original videotaping and the subsequent cross-examination because the child might have contact with interested parties during the interim who might inadvertently or purposefully influence the child. Accordingly, the Bastien court stated that the danger averted by the admission of prior inconsistent testimony in Green was embodied by section 106A-2, which was designed to elicit testimony consistent with that which would be offered at trial.

Furthermore, the court stated that contemporaneous cross-examination is essential during the videotaping of testimony admitted at trial, because the effectiveness of cross-examinations depends on the

upheld the constitutionality of their respective child shield statutes, the statutes in question interfered only with the defendant's right to face-to-face confrontation. See id. Because the court determined that section 106A-2 interfered instead with the defendant's right to cross-examination, it distinguished such situations from those cases involving issues of a defendant's right to face to face confrontation. See id.

168. See id.
169. See id. at 675.
170. See id.; see also supra notes 53-54 and accompanying text (discussing the danger the Green court identified when subsequent cross-examination is substituted for contemporaneous cross-examination).
171. See Bastien, 541 N.E.2d at 676.
172. See id. In Green, the danger of the testimony solidifying in the witness's mind after he first gave his statement and before the defendant's subsequent cross-examination was avoided because the witness changed his story in the interim. See supra note 54 and accompanying text. Clearly, the witness's testimony had not solidified since the witness's first rendition because the witness changed his story. See supra note 54 and accompanying text. Former section 106A-2, however, created a procedure by which the child presented a statement prior to trial that could be used in lieu of her live direct testimony. See supra note 139 (providing the text of former section 106A-2). In this situation, the videotaped testimony would presumably be consistent with the testimony the child presents at trial during cross-examination, creating a situation in which the child's testimony could harden during the interim period before the defense cross-examines the child. See supra note 139 (providing the text of former section 106A-2).
ability of opposing counsel to expose inconsistencies in the testimony at the moment they arise.173 Finally, the court excluded the videotaped testimony because it was a weaker version of the live testimony of the child, who would be available at trial.174

b. Videotaped Interviews Admitted Under Section 115-10

While the Illinois Supreme Court has held that admitting videotaped testimony under section 106A-2 is unconstitutional,175 it had never formally addressed the validity of admitting such testimony into evidence under section 115-10 before Bowen.176 In a poignant dissent, however, Justice McMorrow did suggest that defendant’s counsel was ineffective, in part, because he failed to object to the introduction and admission under section 115-10 of a witness’s videotaped out-of-court interviews with a child victim.177 Justice McMorrow objected to the admission of this evidence for three reasons: (1) section 115-10 does not permit the admission of videotaped interviews with child victims by law enforcement or child advocacy departments;178 (2) the child was not under oath, the interviewer asked leading questions, and the testimony was not subject

173. See Bastien, 541 N.E.2d at 676.

174. See id. “Under the terms of [section 106A-2], the child witness must be available to testify and submit to cross-examination at trial; thus ‘there is little justification for relying on the weaker version’ -- the videotaped statement.” Id. (alteration in original); see also supra notes 88-89 and accompanying text (discussing the Supreme Court’s exclusion of testimony that constitutes weaker evidence).

175. See supra notes 163-74 and accompanying text (discussing Bastien and the court’s rationale for holding section 106A-2 unconstitutional).

176. See People v. Kerwin, 639 N.E.2d 539, 546-47 (Ill. 1994) (McMorrow, J., dissenting) (discussing the implications of admitting videotaped testimony into evidence under section 115-10); see also supra notes 143-61 and accompanying text (discussing section 115-10). The majority decision merely remarked on its confusion with the defense counsel’s decision not to redact portions of the videotaped testimony. See Kerwin, 639 N.E.2d at 543 (“The strategy behind defense counsel’s decision . . . escapes the members of this court.”).

177. See Kerwin, 639 N.E.2d at 546 (McMorrow, J., dissenting). “Without objection from defense counsel, the State presented in court two lengthy videotapes of [the child’s] interviews in Colorado . . . . I believe the admission of the tapes into evidence constituted another instance of counsel’s ineffective assistance which resulted in prejudicial error.” Id. (McMorrow, J., dissenting).

178. See id. (McMorrow, J., dissenting). “In the instant case, [the counselor’s] testimony that [the child] reported instances of sexual contact and penetration was properly admitted at trial as corroboration that [the child] had reported the abuse. However, there appears to be no justification for supplementing [the counselor’s] and [the child’s] trial testimony with the entirety of the videotaped interviews.” Id. (McMorrow, J., dissenting).
to objections or contemporaneous cross-examination;\textsuperscript{179} and (3) the videotaped testimony gave the prosecution an advantage because the child "testified" twice.\textsuperscript{180}

III. DISCUSSION

A. The Facts of the Case and the Lower Courts' Decisions

In \textit{People v. Bowen},\textsuperscript{181} the prosecution charged the defendant with aggravated criminal sexual assault.\textsuperscript{182} Andy Bowen, nicknamed "Andy Bow,"\textsuperscript{183} babysat for the minor D.M.P. three times around May and June of 1992.\textsuperscript{184} According to D.M.P.'s mother, the defendant was supposed to baby-sit a fourth time, but she canceled the arrangement when D.M.P. started crying and became hysterical at the sight of the defendant.\textsuperscript{185} About one month later, D.M.P. allegedly told her mother that "Andy Bow made [me] kiss his pee pee."\textsuperscript{186} The mother testified that she did not report the incident at that time because she thought too much time had passed for anybody to do anything about it.\textsuperscript{187}

In January 1995, D.M.P. was placed in foster care for unrelated reasons,\textsuperscript{188} and on March 29, 1995, D.M.P.'s caseworker began to suspect that D.M.P. had been sexually abused.\textsuperscript{189} On March 30, 1995, the caseworker reported it to her supervisor.\textsuperscript{190} The following day, a police officer interviewed D.M.P. twice, the second of which

\textsuperscript{179} See id. (McMorrow, J., dissenting).
\textsuperscript{180} See id. at 547 (McMorrow, J., dissenting). "By also submitting the videotaped sessions in toto, the State enjoyed the advantage of having [the child] 'testify' twice; once in the courtroom, under oath and subject to contemporaneous cross-examination, and then again in the form of the lengthy, open-ended format of the Colorado Springs police department's interviews." \textit{Id.} (McMorrow, J., dissenting).
\textsuperscript{182} See id. at 579.
\textsuperscript{183} See id. at 580.
\textsuperscript{184} See id.
\textsuperscript{185} See id.
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} See id.
\textsuperscript{188} See id. The court did not explain the unrelated reasons. See id.
\textsuperscript{189} See id. The caseworker was driving D.M.P. and her brother Donnie to visit their mother when she heard Donnie say "so, [D.M.P.], you licked [defendant's] lizard," to which D.M.P. responded 'so, he made me do it.'" \textit{Id.}
\textsuperscript{190} See id.
he videotaped. That videotape is the evidence in controversy in this case.

The trial court admitted the videotape into evidence as part of the officer’s testimony under section 115-10 of the Illinois Code of Criminal Procedure of 1963. The trial court eventually convicted the defendant, who appealed on two grounds. The defendant alleged first, that the admission of the videotape into evidence violated either section 115-10 or, alternatively, his Sixth Amendment confrontation rights, and second, that the State failed to prove his guilt beyond a reasonable doubt. The appellate court affirmed the conviction, finding that there was evidence to support the conviction and that the admission of the videotape into evidence was proper.

B. The Majority Opinion

The Illinois Supreme Court affirmed the rulings of the lower courts, holding that the admission into evidence of a videotaped statement fell within the purview of section 115-10 and that such an admission does not violate the defendant’s rights under the Confrontation Clause.

In its decision, the majority analyzed: (1) the statutory interpretation of section 115-10; (2) the compatibility of the admission of videotaped interviews under section 115-10 with the defendant’s confrontation ...

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191. See id. at 580-81. The officer conducted the first interview at D.M.P.’s foster home and the second interview at the police station. See id. at 580. The officer testified that the interviews were basically the same, except that in the first interview D.M.P. said that “pee” had come out of the defendant’s “area,” and in the second interview she denied such an occurrence. See id. at 581.

192. See id. at 581-82.

193. See id. at 581. Prior to admitting the evidence, the trial court held a hearing pursuant to section 115-10 and found that the “time, content and circumstances of the videotape provided sufficient safeguards of reliability.” Id. at 579.

194. See id. at 581; see also supra note 141 (providing the text of section 115-10).

195. See Bowen, 699 N.E.2d at 580.

196. See id. at 581-82; see also supra notes 35-45 and accompanying text (discussing the confrontation rights of defendants).

197. See Bowen, 699 N.E.2d at 587.


199. See id. at 457-59. The appellate court found that there was “no reasoned distinction between a videotape of a child’s statements and a third person testifying verbatim to those same statements.” Id. at 459.

200. See Bowen, 699 N.E.2d at 582-87.

201. See id. at 582-83.
rights;\textsuperscript{202} and (3) the videotape's reliability.\textsuperscript{203}

1. Statutory Interpretation

The Illinois Supreme Court first addressed the defendant's argument that interpreting the statute to include videotapes would be contrary to the legislature's intent in promulgating section 115-10.\textsuperscript{204} The defendant contrasted section 115-10 with 115-10.1\textsuperscript{205} and former statute 106A-2,\textsuperscript{206} and stated that the latter two provisions expressly provided for videotaping, whereas section 115-10 lacked such a provision.\textsuperscript{207} Accordingly, the defendant argued that interpreting section 115-10 to include videotaped interviews runs counter to the legislature's intent to exclude videotapes by omitting such a provision in the statute.\textsuperscript{208} The majority first stated that the rules of statutory interpretation instruct a court to give effect to the legislature's purpose in enacting the law.\textsuperscript{209} As the majority determined that section 115-10 differs in its purpose from the other two statutes, it rejected the defendant's arguments by stating that section 115-10 should not be interpreted in the same manner as the other two statutes.\textsuperscript{210}

\textsuperscript{202} See id. at 583-86.

\textsuperscript{203} See id. at 586-87.

\textsuperscript{204} See id. at 582.

\textsuperscript{205} Section 115-10.1 concerns the admissibility of prior inconsistent statements in trial proceedings, but it is not limited to certain cases involving children or specified crimes. See 725 ILL. COMP. STAT. 5/115-10.1 (West 1998); see also supra note 142 (providing the relevant text).

\textsuperscript{206} See ILL. REV. STAT. 1987, ch. 38, para. 106A-2 (held unconstitutional by the Illinois Supreme Court in People v. Bastien, 541 N.E.2d 670 (Ill. 1990)); see also supra note 139 (providing the text of the statute); supra notes 163-74 (discussing People v. Bastien, the case in which the Illinois Supreme Court held section 106A-2 unconstitutional).

\textsuperscript{207} See Bowen, 699 N.E.2d at 582.

\textsuperscript{208} See id.

\textsuperscript{209} See id. "In applying rules of statutory interpretation, we strive to give effect to the legislature's purpose in enacting the law. In order to facilitate this process, we endeavor to determine the objective the legislature intended to accomplish and the evils it sought to remedy." Id. "In seeking to ascertain legislative intent, courts consider the statutes in their entirety, noting the subject they address and the legislature's apparent objective in enacting them." State v. Mikusch, 562 N.E.2d 168, 170 (Ill. 1990).

\textsuperscript{210} See Bowen, 699 N.E.2d at 582. "[W]e find the comparison of section 115-10 with sections 115-10.1 and 106A-2 to be unavailing, because each of these sections pertains to different subject matter." Id. After distinguishing the purposes behind sections 115-10 and 106A-2, however, the court failed to engage in a similar comparison between sections 115-10 and 115-10.1. See id. at 582-83; see also In re Judgment and Sale of Delinquent Properties, 656 N.E.2d 1049, 1053 (Ill. 1995) ("Statutes should . . . be construed in conjunction with other statutes addressing the same subject."); Mikusch, 562 N.E.2d at 170 ("[S]tatutes which relate to the same subject are
In distinguishing section 106A-2, the majority noted that the legislature enacted it to allow a child to testify in court through a videotape instead of requiring the child to suffer the trauma of telling the story in open court.\textsuperscript{211} Conversely, the majority noted that the purpose of section 115-10 is to admit the corroborative statements of child victims into court.\textsuperscript{212} Thus, the majority reasoned that the explicit allowance of videotape in section 106A-2 is inherently necessary to the statute's purpose, whereas the same is not true with respect to section 115-10.\textsuperscript{213} Accordingly, the majority concluded that the mere omission of an express provision providing for videotaped statements in section 115-10 does not reflect the legislature's intent to exclude evidence offered in that medium.\textsuperscript{214}

The majority also agreed with the appellate court's determination that there is little difference between the admission of a videotaped interview and the admission of third-party testimony describing the interview.\textsuperscript{215} Finally, the majority stated that the videotape could actually be better evidence than the testimony of a witness recounting the interview because it enables the trier of fact to observe the nature of questions posed to the child, the child's actual responses, and the child's demeanor during the interview.\textsuperscript{216}

2. Constitutionality

Before addressing the constitutionality of section 115-10 when interpreted to allow for the admission of videotaped interviews,\textsuperscript{217} the majority noted that although the defendant did not directly challenge the statute, the primary basis for his appeal was the Illinois Supreme
Court's decision in People v. Bastien. Accordingly, the majority summarized Bastien, and then proceeded to distinguish it from the current case. First, the majority distinguished section 115-10 from former section 106A-2, the statute held unconstitutional in Bastien, on the basis that there are fundamental differences in the provisions and purposes of each statute. The majority stated that the legislature created former section 106A-2 to shield the child from relating his story in open court and in front of the defendant, whereas the legislature created section 115-10 to provide corroborative evidence of the child's abuse.

The majority also emphasized that section 115-10 requires the child to testify under direct and cross-examination unless the court finds the child unavailable, whereas in 106A-2 the child merely has to be available for cross-examination. In the latter scenario, the defense may be faced with the difficult choice of either calling the child on its own and risking the possibility of infuriating the jury, or foregoing its right to cross-examination, a difference that the majority considered to be constitutionally significant. Finally, the majority differentiated the statutes by noting that section 115-10 provides that statements cannot be admitted unless the court finds that they are sufficiently trustworthy and reliable, whereas former section 106A-2 lacked a similar provision. Accordingly, the majority dismissed the Bastien decision by determining that it was distinguishable from the present case.

218. See Bowen, 699 N.E.2d at 583; see also supra notes 163-74 and accompanying text (discussing Bastien).
219. See Bowen, 699 N.E.2d at 583-86.
220. See id. at 584; see also supra note 139 (providing the text of former section 106A-2); supra note 141 (providing the relevant text of section 115-10).
221. See Bowen, 699 N.E.2d at 584.
222. See id.; see also supra notes 77-107 and accompanying text (discussing the unavailability rule).
223. See Bowen 699 N.E.2d at 584; see also infra notes 352-56 and accompanying text (positing a situation where the out-of-court statements can be admitted under section 115-10 without the child being subject to cross-examination if the child is found unavailable).
224. See Bowen, 699 N.E.2d at 584.
225. See id. It could be argued, however, that former section 106A-2 lacked a specific provision instructing the court to find that the hearsay statements were reliable because the statute itself required that several procedural safeguards be in place before the child victim could make the out-of-court statements. See supra note 139 (providing the text of section 106A-2, including that statements must be made in the presence of the court when the child is under oath).
226. See Bowen, 699 N.E.2d at 584.
Next, the majority highlighted the probative value of the videotaped interviews, given the fact that children can experience memory lapses, excessive trauma, or an inability to effectively communicate with the jury during trial. The majority stated that videotaping interviews at the earliest opportunity allows for a recording of the child's story when it is "fresh in the child's memory," and that the videotape provides its viewers with an opportunity to examine the conditions surrounding the child's initial complaint. The majority then engaged in a brief analysis of the Confrontation Clause. After the majority reviewed the history of the United States Supreme Court's interpretation of the Clause, it determined that the Supreme Court's mission in construing the Confrontation Clause is to balance two conflicting interests. On one hand, the Clause must ensure accuracy and integrity in the truth-seeking process. On the other hand, it must promote effective law enforcement by condoning procedures which aid in eliciting credible testimony.

After reviewing the Supreme Court's general two-prong approach for determining when hearsay statements can be admitted without violating the Confrontation Clause, the majority concluded that section 115-10 satisfies both prongs. First, section 115-10

227. See id.
228. Id.
229. See id. at 585.
230. See id. Specifically, the Bowen court stated:

The [United States Supreme] Court has long recognized that the clause guarantees neither an absolute right to face to face confrontation, nor an absolute right to contemporaneous cross-examination. Moreover, in cases involving firmly rooted hearsay exceptions, the out-of-court statement is considered so inherently trustworthy and probative that it is admissible under the confrontation clause regardless of whether the declarant will be available to testify. Finally, the clause contemplates the opportunity for effective, but not perfect, cross-examination.

Id. (citations omitted). However, the Bowen court neglected to explain the circumstances of the cases in which the United States Supreme Court determined that the defendant's confrontation rights were not absolute. See id.

231. See id.
232. See id.
233. See id.
234. The Ohio v. Roberts two-prong approach states that a court cannot admit hearsay evidence unless it finds that the declarant is unavailable to testify at trial and the proffered evidence is reliable. See Ohio v. Roberts, 448 U.S. 56, 65 (1980); see also supra notes 72-120 and accompanying text (discussing the two-prong approach created by the Supreme Court in Roberts).

235. See Bowen, 699 N.E.2d at 585.
236. See id. at 586.
provides that admission of the child’s hearsay statements is contingent upon the prosecution producing the child as a witness or showing that the child is unavailable.237 Second, the statute requires the trial court to determine in a separate hearing whether the child’s out-of-court statements are reliable.238 Therefore, the majority determined that the trial court’s admission of the videotaped interview properly balanced the state’s mission to present an effective prosecution with the defendant’s right to confront the witnesses against him.239

3. The Videotape’s Reliability

In the last section of its opinion, the Bowen court discussed the reliability of the videotaped testimony.240 The majority’s central concern was that the videotape presented an interview that occurred almost three years after the alleged sexual abuse.241 The majority, however, determined that given the totality of the circumstances, the trial court properly admitted the videotaped interview.242 The majority specifically noted that: (1) D.M.P.’s first outcry occurred only one month after the incident; (2) D.M.P. cried upon seeing the defendant; (3) the recorded interview was only the second interview D.M.P. had with authorities; (4) D.M.P.’s allegations were relayed in language reflective of her age; and (5) there was no evidence of a motive for D.M.P. or her family to fabricate the story.243 The majority held that these factors supported the trial court’s decision to admit the videotaped testimony.244

C. The Dissenting Opinion

Justice Bilandic and Justice McMorrow each wrote separate dissenting opinions.245 Justice Bilandic, with whom Justice Nickels joined, dissented with respect to the majority’s decision that section 115-10 provides for the admission of hearsay statements in the form of

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238. See Bowen, 699 N.E.2d at 586; see also 725 ILL. COMP. STAT. 5/115-10 (b)(2).
239. See Bowen, 699 N.E.2d at 586.
240. See id. at 586-87.
241. See id.
242. See id. at 587.
243. See id.
244. See id.
245. See id. at 587-91 (Bilandic, J., dissenting; McMorrow, J., dissenting). Justice Bilandic’s dissent consisted of only three sentences. See id. at 587-88 (Bilandic, J., dissenting).
videotaped interviews. In his dissent, Justice Bilandic agreed with Justice McMorrow's explanation of why the rules of statutory interpretation do not allow for section 115-10 to be interpreted in the manner that the majority presented. Accordingly, Justices Bilandic and Nickels stated that the proper analysis of the case should have ended with the decision that section 115-10 does not allow for the admission of videotaped interviews.

Justice McMorrow, however, addressed not only the issue of whether the rules of statutory interpretation allow for the interpretation that section 115-10 includes the admission of videotaped interviews, but also the question of the statute's constitutionality when interpreted to include such an admission.

1. Statutory Interpretation

Justice McMorrow stated that section 115-10 should not be extended to admit videotaped interviews into evidence because the legislature did not provide for such an admission anywhere in the text of the statute. Thus, the dissent accused the majority of failing to follow the fundamental rule of statutory construction, which requires the court to give effect to the statute's plain and ordinary meaning. Additionally, the dissent asserted that section 115-10 should be compared with section 115-10.1 and former section 106A-2, because the three statutes address overlapping subject matter.

246. See id. at 587-88 (Bilandic, J., dissenting).
247. See id. (Bilandic, J., dissenting). In his dissent, Justice Bilandic provided, "I dissent. I agree with Justice McMorrow that the language of section 115-10 does not permit the introduction of videotaped statements as corroborative complaints. Having reached that conclusion, I do not believe it necessary to address the constitutionality of the admission of such statements." Id. (Bilandic, J., dissenting).
248. See id. (Bilandic, J., dissenting).
249. See id. at 588 (McMorrow, J., dissenting).
250. See id. (McMorrow, J., dissenting); see also supra note 141 (providing the relevant text of section 115-10).
251. See Bowen, 699 N.E.2d at 588 (McMorrow, J., dissenting). "The primary rule of statutory construction is to ascertain and give effect to the intention of the legislature, and that inquiry appropriately begins with the language of the statute." People v. Woodard, 677 N.E.2d 935, 939 (Ill. 1997). "Where an enactment is clear and unambiguous, the court is not free to depart from the plain language and meaning of the statute by reading into it exceptions, limitations, or conditions that the legislature did not express." Id. (citations omitted).
252. See Bowen, 699 N.E.2d at 588 (McMorrow, J., dissenting); see also In re Judgment and Sale of Delinquent Properties, 656 N.E.2d 1049, 1053 (Ill. 1995) ("Statutes should also be construed in conjunction with other statutes addressing the same subject."); State v. Mikusch, 562 N.E.2d 168,170 (Ill. 1990) ("[S]tatutes which relate to the same subject are to be governed by one spirit and a single policy.").
dissent examined the purposes behind former section 106A-2 and section 115-10, noting that they are more similar than different because both sections address problems that arise during criminal prosecutions where a child is the main witness.\(^\text{253}\) The Illinois legislature enacted former section 106A-2 to protect children from the potential trauma associated with testifying in the courtroom and to compensate for the anxiety, confusion, and memory lapses that frequently interfere with a child’s ability to testify in the courtroom.\(^\text{254}\) The Illinois legislature similarly created section 115-10 in response to the difficulties inherent when children testify.\(^\text{255}\) To interpret the statute, the dissent emphasized that statutes that address the same subject should be interpreted in conjunction with each other.\(^\text{256}\) Thus, the dissent stated that the omission of a videotape provision in section 115-10 and the inclusion of it in section 106A-2 was not a mere legislative oversight.\(^\text{257}\)

Similarly, the dissent maintained that sections 115-10 and 115-10.1 are comparable because they both admit hearsay evidence.\(^\text{258}\) Section 115-10.1 governs the admission of prior inconsistent out-of-court statements in a criminal trial and affirmatively provides for the admission of such statements that are videotaped.\(^\text{259}\) Section 115-10 provides for certain hearsay exceptions in child sexual abuse cases,\(^\text{260}\) but lacks a provision expressly allowing that admitted hearsay statements may be videotaped.\(^\text{261}\) Accordingly, the dissent stated that

\(^{253}\) See Bowen, 699 N.E.2d at 588 (McMorrow, J., dissenting); see also 725 Ill. Comp. Stat. 5/115-10 (West 1996) (amended twice in 1998); supra note 139 (providing the text of section 106A-2); supra note 141 (providing the text of section 115-10).

\(^{254}\) See Bowen, 699 N.E.2d at 588 (McMorrow, J., dissenting).

\(^{255}\) See id. (McMorrow, J., dissenting); see also supra notes 121-36 and accompanying text (discussing the special problems that arise when children are the star witnesses in a criminal prosecution).

\(^{256}\) See supra note 252 and accompanying text (discussing statutory interpretation).

\(^{257}\) See Bowen, 699 N.E.2d at 588 (McMorrow, J., dissenting). “The legislature is presumed to know the contents of existing enactments, and I can only conclude that the legislature purposefully excluded videotaped statements from the hearsay exception created in section 115-10.” Id. (McMorrow, J., dissenting) (citations omitted).

\(^{258}\) See id. at 588-89 (McMorrow, J., dissenting); supra note 141 (providing the relevant text of section 115-10); supra note 142 (providing the relevant text of section 115-10.1).

\(^{259}\) See Bowen, 699 N.E.2d at 589 (McMorrow, J., dissenting); see also 725 Ill. Comp. Stat. 5/115-10.1 (West 1996) (amended twice in 1998); supra note 142 (providing the relevant text of section 115-10.1).

\(^{260}\) See Ill. Comp. Stat. 5/115-10; see also supra note 141 (providing the text of section 115-10).

\(^{261}\) See Ill. Comp. Stat. 5/115-10; see also supra note 141 (providing the text of
the legislature consciously provided an express provision for videotapes in section 115-10.1 and omitted such a provision in section 115-10.262

2. Constitutionality

In her dissent, Justice McMorrow asserted that interpreting section 115-10 to permit the introduction of a videotaped interview is not only incorrect in terms of statutory interpretation, but also results in an unconstitutional interference with the defendant’s confrontation rights.263 Her dissent reviewed the reasoning underlying the Illinois Supreme Court’s decision in Bastien,264 and reiterated that the Illinois Supreme Court held former section 106A-2 unconstitutional because: (1) the statute deprived the defendant of his constitutional right to confrontation by prohibiting contemporaneous cross-examination during the making of the child’s testimony;265 (2) the court determined that many months could pass between the videotaping and the trial, thereby increasing the probability that any false testimony given by the child on the videotape would solidify in the child’s mind and become unyielding to the questions asked during subsequent cross-examination;266 and (3) the court concluded that the admission of the videotaped interview was purposeless from an evidentiary standpoint because former section 106A-2 mandated that the child be available to testify at trial,267 thereby rendering the videotaped testimony an inferior

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262. See Bowen, 699 N.E.2d at 589 (McMorrow, J., dissenting). The dissent noted:
As our appellate court stated in People v. Mitchell, “It would have been a simple matter for the legislature to indicate that videotaped statements were admissible under section 115-10. The legislature did not do so. We must, therefore, conclude that section 115-10 . . . does not contemplate or allow the admission of such evidence.
Id. (McMorrow, J., dissenting) (citations omitted).

263. See id. (McMorrow, J., dissenting). “My objection to the majority’s overly expansive reading of section 115-10 is not merely academic. More important than the affront to [the] rules of statutory construction rendered by the majority opinion is the fact [that] the opinion condones a breach of [the] defendant’s sixth amendment rights.” Id. (McMorrow, J., dissenting).


265. See Bowen, 699 N.E.2d at 589 (McMorrow, J., dissenting); see also supra notes 163-74 and accompanying text (discussing the Illinois Supreme Court’s decision in Bastien).

266. See Bowen, 699 N.E.2d at 589 (McMorrow, J., dissenting).

267. See id. (McMorrow, J., dissenting).
version of evidence compared to the live testimony presented at trial.  

Justice McMorrow then noted that because section 115-10 allows for the admission of any out-of-court statements made by the child relating to any act or element of the crime in question, prosecutors could offer into evidence under section 115-10 out-of-court statements that are indistinguishable from the type of testimony usually elicited by direct examination at trial. Because such statements were not subject to contemporaneous cross-examination, their admission was unconstitutional because the court previously determined in *Bastien* that subsequent cross-examination could not adequately substitute for contemporaneous cross-examination. Accordingly, the dissent asserted that section 115-10 should be held unconstitutional, as was former section 106A-2 in *Bastien*, when it is interpreted to include the admission of videotaped interviews.

Next, Justice McMorrow rejected the majority’s contention that section 115-10 should not be compared to section 106A-2 because section 106A-2 admits the videotape into evidence in lieu of the child’s testimony, whereas section 115-10 merely provides for the admission of some out-of-court statements under certain hearsay exceptions. The dissent asserted that the majority’s explanation described “a distinction without a difference” because both statutes provide for the admission of hearsay statements into evidence at trial. The *Bastien* court identified the videotape in question as hearsay evidence and recognized that section 106A-2 was created to admit such hearsay evidence. The legislature similarly enacted section 115-10 to admit certain hearsay evidence.

Justice McMorrow then addressed the majority’s argument, based on the *Roberts* two-prong approach, that hearsay exceptions are permissible provided the state complies with the “unavailability rule”
and the statement is shown to be reliable. The majority determined that because section 115-10 satisfies these two requirements, statements admitted under its provision do not violate the defendant’s confrontation rights. In response, Justice McMorrow asserted that blind adherence to such a rule creates circumstances where the exception swallows the rule. The form of the statute by which the prosecution admits hearsay evidence is irrelevant to the effect that the evidence has on the defendant’s rights. Accordingly, Justice McMorrow concluded that section 115-10, when interpreted to include the admission of videotaped hearsay evidence, is unconstitutional for virtually the same reasons that the Bastien court held section 106A-2 unconstitutional. In other words, the admission of videotaped interviews under section 115-10 similarly violates the defendant’s right to contemporaneous cross-examination, creates the danger that the child’s testimony may solidify in an untruthful manner during the interim between direct questioning and subsequent cross-examination, and results in the admission of a weaker version of the evidence. Because the court did not overrule Bastien, however, Justice McMorrow expressed concern that the majority’s decision leaves a legacy of inconsistency and confusion for lower courts.

Finally, Justice McMorrow reiterated the concern that she had raised in a previous case: that under the majority’s decision, the state may

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276. See id. (McMorrow, J., dissenting). Although the majority referred to the Roberts two-prong general approach in its opinion, it cited to the United States Supreme Court’s rendition of the test in Idaho v. Wright, 497 U.S. 805 (1990). See id. at 585; see also supra notes 72-120 and accompanying text (discussing the Roberts two-prong approach). Thus, the dissent referred to the majority’s argument as based on Wright, but it is the same two-prong approach the United States Supreme Court created in Roberts.

277. See Bowen, 699 N.E.2d at 590 (McMorrow, J., dissenting).

278. See id. (McMorrow, J., dissenting). “The hearsay ‘exception’ articulated in section 115-10 is so broad as to render the general rule barring hearsay meaningless.” Id. (McMorrow, J., dissenting).

279. See id. (McMorrow, J., dissenting). “[M]erely relabeling the video testimony as a ‘hearsay exception’ not only exalts form over function, but also ignores the real consequences of this court’s actions.” Id. (McMorrow, J., dissenting).

280. See id. (McMorrow, J., dissenting). “In Bastien, this court found virtually identical facts constitutionally infirm.” Id. (McMorrow, J., dissenting).

281. See id. at 589-90 (McMorrow, J., dissenting).

282. See id. at 590 (McMorrow, J., dissenting). “While I do not advocate overruling Bastien, it is only by doing so that we can avoid an inconsistency between the holding in Bastien and the result urged by the majority in the present appeal.” Id. (McMorrow, J., dissenting).

283. See supra notes 176-80 and accompanying text (discussing People v. Kerwin, 639 N.E.2d 539 (Ill. 1994)).
benefit from having the child "testify" twice. For example, the child could testify first in court and under oath, and second via videotape, in the form of a lengthy narration lacking procedural safeguards. Justice McMorrow concluded her dissent by stating that the admission of the videotaped interviews under section 115-10 serves only to bolster the State's case while violating the defendant's confrontation rights.

IV. ANALYSIS

In *People v. Bowen*, the Illinois Supreme Court faced the very important issues of whether a videotaped interview with a child victim could be admitted into evidence under section 115-10 as a hearsay exception, and if so, whether such an admission violates the defendant's confrontation rights under the United States Constitution. In answering these questions, the court analyzed section 115-10 according to the rules of statutory interpretation and with respect to the effect the statute would have on the defendant's confrontational rights. Although the majority attempted to balance the defendant's constitutional rights with the State's mission to present an effective prosecution, the Illinois Supreme Court's decision is not judicially sound.

A. Statutory Interpretation

The rules of statutory interpretation require the court to give effect to the legislature's meaning and intent when it originally enacted the statute. For unambiguous statutes, this process requires the court to interpret the statute by the plain and ordinary meanings of its terms.

284. See Bowen, 699 N.E.2d at 591 (McMorrow, J., dissenting).
285. See id. (McMorrow, J., dissenting).
286. See id. (McMorrow, J., dissenting).
287. See id. at 580. In discussing the constitutionality of section 115-10, this Note refers only to the constitutionality of the admission of videotaped interviews.
288. See id. at 582-87.
289. See id. at 586.
290. See In re Judgment and Sale of Delinquent Properties, 656 N.E.2d 1049, 1053 (Ill. 1995). "In interpreting a statute, the primary rule of construction, to which all other rules are subordinate, is to ascertain and give effect to the true intent and meaning of the legislature." Id.
291. See People v. Woodard, 677 N.E.2d 935, 942 (Ill. 1997). "[A]bsent some ambiguity, the task of discerning legislative intent is normally limited to reading a statute's plain language." Id.; see also People v. Haynes, 673 N.E.2d 318, 326 (Ill. 1996), cert. denied, 117 S.Ct. 1826 (U.S. 1997). "In determining [legislative] intent, a court must look first to the language of the statute and interpret that language in
If a statute is ambiguous, however, the court must look beyond the words of the statute to discern the legislative intent. In Bowen, the majority began its analysis by looking beyond the plain words of the statute to the legislature’s objective in promulgating the statute, including the evils it sought to address. Thus, the majority presumed the ambiguity of the statute without explaining the source of its ambiguity. Conversely, the dissent found that the legislature’s omission of an express provision allowing for the admission of videotaped statements under section 115-10 unambiguously meant that the legislature did not intend to permit the admission of videotaped interviews into evidence. Interestingly, applicable case law supports both the majority’s and the dissent’s positions.

Both the majority and the dissent agreed that a statute should be analyzed in accordance with other statutes addressing the same issue, and each position compared section 115-10 to section 115-10.1 and former section 106A-2. While section 115-10.1 and former section 106A-2 both expressly provide for the admission of videotaped statements, section 115-10 does not. Had the statute been analyzed in accordance with its plain and ordinary meaning, Haynes, 673 N.E.2d at 326.

292. A statute is ambiguous when it can reasonably be interpreted in two contrary ways. See People v. Holloway, 682 N.E.2d 59, 63 (Ill. 1997).

293. See id. “Once a statute is found to be ambiguous, it is appropriate to look beyond its plain language to ascertain legislative intent.” Id.

294. See Bowen, 699 N.E.2d at 582.

295. It is possible that the majority found that the statute was ambiguous because it could be interpreted as including or excluding videotaped interviews, but neglected to include a discussion about the statute’s ambiguity in its analysis.

296. As Justices Bilandic and Nickels agreed with Justice McMorrow’s analysis regarding the correct statutory interpretation of section 115-10, the analysis in this Note is primarily centered on the dissenting opinion written by Justice McMorrow.

297. See Bowen, 699 N.E.2d at 588 (McMorrow, J., dissenting).

298. See infra note 299 and accompanying text (discussing the rules of statutory construction when statutes are about the same subject matter).

299. See In re Judgment and Sale of Delinquent Properties, 656 N.E.2d 1049, 1053 (Ill. 1995). “Statutes should also be construed in conjunction with other statutes addressing the same subject.” Id.; see also People v. Mikusch, 562 N.E.2d 168, 170 (Ill. 1990) (“Statutes which relate to the same subject are to be governed by one spirit and a single policy.”).

300. See Bowen, 699 N.E.2d at 582-83 (discussing the majority’s treatment of the statutes); id. at 588-89 (McMorrow, J., dissenting) (discussing the dissent’s treatment of the statutes).

301. See supra note 142 (providing the text of section 115-10.1); supra note 139 (providing the text of former section 106A-2).

302. See supra note 142 (providing the text of section 115-10.1); supra note 141 (providing the text of section 115-10); supra note 139 (providing the text of former section 106A-2).
majority found the statutes similar, rules of statutory construction would compel the court to find that the legislature’s specific inclusion of the videotape provisions in section 115-10.1 and former section 106A-2 and its omission of such a provision in section 115-10 reflected its intent to exclude the admission of videotaped interviews in section 115-10. Accordingly, the majority distinguished section 115-10 from the other two sections, while the dissent focused on the similarities among the statutes and set forth the interpretation the majority avoided. While both the majority’s and the dissent’s reasoning is arguably valid, the dissent’s holding more accurately reflects the rules of statutory construction.

The majority’s statutory analysis does not comply with a basic doctrine of statutory construction, *expressio unius est exclusio alterius*, which means that the expression of one thing necessitates the exclusion of others. Section 115-10 provides for certain hearsay exceptions. Under the doctrine of *expressio unius est exclusio alterius*, exceptions other than those designated by the statute shall not be read into the statute. Accordingly, because the legislature failed to provide an express provision for admitting videotaped interviews as a hearsay exception under section 115-10, the majority erroneously expanded the meaning of the statute to include that exception.

**B. Constitutionality**

In analyzing the constitutionality of section 115-10, the majority first noted that the defendant did not directly challenge the statute’s constitutionality, choosing instead to base his appeal on the Illinois

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303. See supra note 299 (discussing the rules of statutory interpretation).
304. See Bowen, 699 N.E.2d at 582-83.
305. See id. at 588-89 (McMorrow, J., dissenting).
307. See Tilliski v. Martin, 61 N.E.2d 24, 28 (Ill. 1945). “[O]ther exceptions than those designated by statute cannot be read into [the statute] under the rule expressio unius exclusio alterius.” Id.
308. See 725 ILL. COMPI. STAT. 5/115-10 (West 1996) (amended twice in 1998); see also supra note 141 (providing the relevant text of section 115-10).
309. See Tilliski, 61 N.E.2d at 28.
310. See Bowen, 699 N.E.2d at 588-89 (McMorrow, J., dissenting).
Supreme Court’s holding in People v. Bastien. Accordingly, the majority attempted to contravene the precedential impact of the Bastien decision by distinguishing its facts from those in Bowen. After distinguishing Bastien on the tenuous ground that the purposes of former section 106A-2 and section 115-10 were so different as to render an analogy between the two cases improper, the majority emphasized the probative value of the videotape, briefly reviewed some recent United States Supreme Court decisions, and then held that section 115-10 constitutionally provides for the admission of videotaped interviews into evidence.

1. Distinguishing Bastien and Former Section 106A-2

The majority attempted to avoid the precedential impact of the Bastien decision by distinguishing it from the facts presented in the Bowen case. First, the majority briefly summarized that the Bastien court held section 106A-2 unconstitutional for three reasons: (1) there had not been a case-specific finding that the videotape procedure was necessary to protect the child’s welfare; (2) the United States Supreme Court’s decision in California v. Green was not dispositive of the case; and (3) the videotaped testimony was only a weaker version of the live testimony which would accompany it at trial.

Then, the majority superficially distinguished the Bastien holding on the basis that the legislature’s purpose in promulgating section 106A-2 was fundamentally different from its purpose in enacting section 115-10. The majority contended that because the purpose of section

311. See id. at 583; see also supra note 164 and accompanying text (stating that the Bastien court held section 106A-2 unconstitutional because it infringed on the defendant’s confrontation rights).
312. See Bowen, 699 N.E.2d at 583-84.
313. See id.
314. See id. at 584.
316. See Bowen, 699 N.E.2d at 586.
317. See id. at 584.
318. See id. at 583.
319. See id. The Bastien court reasoned that Green stands for the proposition that the Confrontation Clause is not violated as long as there is an opportunity for cross-examination when the evidence at issue is prior inconsistent testimony. See id. at 583-84.
320. See id. at 584.
321. See id.
106A-2 was to shield a child from relating his story in open court, whereas the purpose of section 115-10 was to admit corroborative hearsay evidence of the abuse into court, the decision of the *Bastien* court did not dispose of the issue presented in *Bowen*.

The dissent correctly pointed out that the majority’s analysis makes a “distinction without a difference,” because the form of the statute under which the evidence is admitted is irrelevant to the subsequent effect that the evidence has on the defendant’s rights. As both former section 106A-2 and section 115-10 allow for the admission of videotaped hearsay statements, both statutes pose a threat to the defendant’s confrontation rights, and the two cases are not so easily distinguished. Thus, the majority erroneously concluded its analysis before discussing whether a videotape admitted under section 115-10 avoids the constitutional problems which plagued the videotape at issue in *Bastien*.

For example, the majority failed to discuss how videotaped interviews admitted under section 115-10, which, like former section 106A-2, requires the live testimony of an available witness prior to the admission of the offered evidence, are not a weaker version of the live testimony as held in *Bastien*. Similarly, the majority failed to discuss how videotaped interviews admitted under section 115-10 avoid the danger that the Supreme Court recognized in *California v. Green* that false accusations in the child’s statements may solidify in the child’s mind before the defendant has a chance to cross-examine the child at trial. The *Bastien* court explained that such a danger was present in statutes, such as section 115-10, designed to elicit testimony consistent with that presented at trial. The majority failed to discuss

322. See id. at 584; see also supra note 139 (providing the text of section 106A-2).
323. See *Bowen*, 699 N.E.2d at 584; see also supra note 141 (providing the text of section 115-10).
324. See *Bowen*, 699 N.E.2d at 590 (McMorrow, J., dissenting).
325. See *id.* (McMorrow, J., dissenting).
326. See *id.* at 589-90 (McMorrow, J., dissenting); see also *MUELLER & KIRKPATRICK, supra* note 19, § 8.74, at 1450. "The confrontation clause obviously bears on the problem of using hearsay against a defendant. Any such use might be seen as infringing [on] his right to face and cross-examine his accusers." *Id.*
327. See supra notes 162-74 and accompanying text (discussing the *Bastien* court’s reasoning for holding former section 106A-2 unconstitutional).
328. See supra note 174 (discussing why the *Bastien* court considered the videotaped interview to be a weaker version of the evidence).
330. See supra note 172 and accompanying text (discussing the *Bastien* court’s explanation of the danger identified in *Green* and its applicability to former section
how the defendant’s inability to engage in contemporaneous cross-
examination during the videotaping under section 115-10 did not
violate the defendant’s constitutional rights, as had the videotaping
procedure in Bastien. In sum, the majority tried to contravene the
Bastien holding by distinguishing Bastien on superficial rather than
substantive grounds. In so doing, the majority failed to address the
substantial constitutional violations that lay beneath the surface of
section 115-10 when interpreted to permit the admission of videotaped
interviews into evidence.

2. The Majority Opinion Disregarded Supreme Court Precedent

a. The Videotaped Interview is Weaker Evidence.

The United States Supreme Court has stated that the unavailability
rule specifically applies to the admission of prior testimony because
there is little justification for relying on a weaker version of the
evidence when the prosecution can obtain the live testimony of a
witness. The videotaped interview admitted into evidence in Bowen
was not exactly prior testimony, because the child was not under oath
or subject to cross-examination, but it was largely cumulative of the
testimony the child gave at trial. Although the majority acknow-
ledged this fact, it ignored that the admission of such evidence runs
contrary to the United States Supreme Court’s prohibition on the
admission of weaker versions of evidence.

b. An Incomplete Analysis

While correctly indicating that the United States Supreme Court has
never guaranteed a defendant an absolute right to cross-examination

331. See People v. Bastien, 541 N.E.2d 670, 676 (Ill. 1989); see also supra notes 173-74 and accompanying text (discussing Bastien’s reasoning for finding delayed cross-examination inadequate).


333. See supra note 87 and accompanying text (discussing United States v. Inadi, 475 U.S. 387 (1986)).

334. See Bowen, 699 N.E.2d at 586.

335. See id.


or face-to-face confrontation, the majority failed to recognize that the United States Supreme Court has found that a defendant’s rights are inviolable except under certain narrow fact situations. Instead, the majority simply restated the Roberts two-prong general approach to determining when hearsay evidence can be admitted without violating the defendant’s confrontation rights, and determined that section 115-10 is constitutional because it incorporates the two-prong test within the statute.

The dissent correctly observed that the majority’s blind adherence to the two-prong approach allowed the exception in section 115-10 to swallow the rule of hearsay inadmissibility. In other words, in Bowen, the court admitted evidence that satisfied the requirements of the Roberts two-prong approach, but nonetheless violated the defendant’s confrontation rights. The Bowen dissent, however, neglected to specifically explain how admission of the child’s statements violated the defendant’s rights.

Indeed, both the majority and the dissent failed to discuss the consequences to the defendant’s confrontation rights if the child is found to be constitutionally unavailable. In such a situation, if the trial court finds in a separate hearing that the statement provides “sufficient safeguards of reliability,” and there is other corroborative evidence that the act of which the defendant is accused occurred, the court could admit the videotaped statement into evidence. Because a videotape can be formatted in a narrative style with child victims responding in their own voice and with their own words, the videotape could essentially serve as the child’s direct testimony. In this situation, the admission of the videotape would violate the defendant’s confrontation rights in a number of ways.

First, the admission of this type of videotaped testimony would interfere with the defendant’s right to face-to-face confrontation because the child would not testify at trial and the defendant would not

338. See id. (citing Maryland v. Craig, 497 U.S. 836, 847 (1990)).
339. See id.
340. See id. at 585 (noting that the Roberts two-prong approach permits the admission of hearsay evidence when the witness is unavailable to testify in court and the court finds the hearsay statements sufficiently reliable).
341. See id. at 586.
342. See id. at 590 (McMorrow, J., dissenting).
343. See id. (McMorrow, J., dissenting).
344. 725 Ill. Comp. Stat. 5/115-10 (West 1996) (amended twice in 1998); see also supra note 141 (providing the text of section 115-10).
345. See Bowen, 699 N.E.2d at 589-90 (McMorrow, J., dissenting).
be present when the videotape was made. The United States Supreme Court has determined that a defendant’s right to face-to-face confrontation can be outweighed in certain situations by the state’s interest in protecting its children if the state can show that the procedure which interferes with the defendant’s right would lessen the trauma experienced by a particular child. For example, the United States Supreme Court has allowed a child witness to testify through a one-way closed circuit television. It permitted, however, the use of such a procedure largely because the witness was subject to contemporaneous cross-examination at trial. Conversely, the Court has permitted the admission of hearsay statements into evidence when the declarant does not testify, but only when the statements themselves are inherently reliable and cross-examination is unnecessary to ensure their reliability. Thus, the Court allows the violation of the defendant’s face-to-face rights only when other safeguards of the Confrontation Clause are in place. Videotaped interviews admitted under section 115-10 when the child is unavailable lack the required constitutional protections because they are neither subject to cross-examination nor are inherently reliable.

Second, the presentation of videotaped statements when the child is unavailable denies the defendant a chance to contemporaneously or subsequently cross-examine the child about the statements. In California v. Green, the Supreme Court stated that the defendant’s right to contemporaneous cross-examination of the declarant could be replaced by subsequent cross-examination, but it was referring to a situation in which the admitted statements were inconsistent with the trial testimony. When the declarant was in court, under oath, subject to cross-examination, and in front of the jury, the Court

347. See id. at 860.
348. See id. at 857.
350. See id.
351. See Idaho v. Wright, 497 U.S. 805, 816 (1990); see also supra notes 108-20 and accompanying text (discussing the presumptive reliability of statements admitted under firmly rooted hearsay exceptions and the presumptive unreliability of statements admitted under other hearsay exceptions); supra note 110 (providing examples of firmly-rooted hearsay exceptions).
352. Section 115-10 does not require videotaped interviews to be conducted in the defendant’s presence. See 725 ILL. COMP. STAT. 5/115-10 (West 1996) (amended twice in 1998).
353. See California v. Green, 399 U.S. 149, 158-160 (1970); supra notes 48-56 and accompanying text (discussing the Green decision).
reasoned that the out-of-court statements regained the protections of the Confrontation Clause.\textsuperscript{354} Admitted videotaped interviews under section 115-10 when the child is unavailable are an affront to the defendant's confrontation rights because they lack all the procedural safeguards guaranteed by the Confrontation Clause.\textsuperscript{355} The videotaped interview would be made without the child being under oath, subject to cross-examination, or physically present and observed by the jury.\textsuperscript{356} The majority, however, failed to consider this situation because it concluded its analysis before considering the full impact of its erroneous decision to hold section 115-10 constitutional when interpreted to allow for the admission of videotaped interviews.

In sum, the majority failed to consider the fact-specific situations in which the United States Supreme Court has held that the defendant's rights are not absolute when it erroneously determined that the admission of videotaped hearsay evidence under section 115-10 is constitutional because the statute incorporates the two prongs of the Roberts approach.\textsuperscript{357} Conversely, the dissent correctly stated that blind adherence to the two-prong rule may lead the courts to inadvertently violate the defendant's confrontation rights by admitting videotaped interviews under section 115-10, even when the child is unavailable, the interview is found to be trustworthy, and there is other corroborative evidence of the abuse.\textsuperscript{358} Accordingly, the majority's holding allows for hearsay evidence admitted during the prosecution of a defendant for child sexual abuse to violate the defendant's rights.

3. The Admission of a Videotape of the Interview and the Interviewer's Testimony about the Interview are not the Same

The majority asserted that, with respect to the defendant's confrontation rights, there is little or no difference between admitting a witness's testimony about an interview with a child and admitting a videotape of the same.\textsuperscript{359} This assertion is incorrect for two reasons. First, as the dissent correctly noted, the breadth of the statements

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  \item \textsuperscript{354} See Green, 399 U.S. at 158-59; supra notes 48-56 and accompanying text.
  \item \textsuperscript{355} See supra notes 31-34 and accompanying text (discussing the protections of the Confrontation Clause).
  \item \textsuperscript{356} See supra notes 31-34 and accompanying text.
  \item \textsuperscript{358} See id. at 590 (McMorrow, J., dissenting).
  \item \textsuperscript{359} See id. at 583. "[W]ith regard to the impact on defendant's rights, there is little difference between introducing the statement on videotape or allowing it to be recounted in detail through the testimony of a third party." Id.
allowed under section 115-10 is so wide that the statement made during the videotaped interview can be similar to those that are elicited during direct examination. Accordingly, when the prosecution plays the videotaped statements in court, it is as if the child is giving direct testimony. When a third party testifies about the out-of-court statements made by the child, however, such testimony is less likely to appear to the jury as the child's direct testimony because it is not presented in the child's own voice. Accordingly, there is a significant difference between introducing the child's testimony through videotape and introducing it through the testimony of a third party.

Second, recent studies indicate that if the prosecution plays the videotape, the jury may rely too much upon the child's account during the interview because many jurors tend to perceive what they see on television as accurate. If so, fairness dictates that the jury be able to observe the defendant cross-examine the child on videotape as well.

In sum, the majority erroneously distinguished the Bastien decision on superficial rather than substantive grounds, and thereby failed to address the constitutional violations that accompany the admission of videotaped interviews under section 115-10. Moreover, the majority neglected to thoroughly analyze the fact-specific decisions of the United States Supreme Court regarding the correct balance between the admission of hearsay evidence and the defendant's confrontation rights. Finally, the majority failed to recognize the basic difference between a witness's description of an out-of-court interview with a child victim and a videotape of the same. Accordingly, the majority reached a decision that is neither judicially nor constitutionally sound.

V. IMPACT

As long as the Bowen decision remains law, Illinois courts risk violating a defendant's constitutional right to confront his accusers by admitting videotaped hearsay evidence under section 115-10. In Bowen, the majority attempted to balance the opposing interests of eliciting credible testimony from a child victim and protecting the
defendant’s confrontation rights, but its reasoning in reaching its decision was not constitutionally sound and should be overturned. Until then, the Bowen decision serves only to create a method by which the judicial system can violate a defendant’s constitutional rights with the approval of the Illinois Supreme Court. Additionally, the decision will create both confusion and inconsistency in future decisions by the lower courts of Illinois.

The impact of this decision is two-fold. First, the Bowen decision makes a finding that the child witness is constitutionally unavailable to testify particularly appealing for the prosecution. In such a situation, if the court finds the videotape reliable and there is other corroborative evidence of what the child says in the interview, the prosecution can admit the videotape of the interview and the jury can hear the child’s version of the abuse without the prosecution ever having to put the child on the stand or subject the child to cross-examination. As the United States Supreme Court expands the definition of constitutional unavailability, especially with respect to child witnesses, the State may be able to satisfy this requirement fairly easily. Accordingly, the State can blatantly violate all four of the defendant’s confrontation rights in a manner approved by the Illinois Supreme Court.

Second, the majority created a confusing precedent for the lower courts to follow because it distinguished Bastien from Bowen on superficial grounds instead of on substantive differences between the two cases. For example, the Bastien court found that videotaped

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367. See supra Part IV.B.2.
368. See supra Part IV.B.2.
369. See infra notes 374-77 and accompanying text.
370. See Mosteller, supra note 45, at 777-78. If the prosecution can admit videotaped interviews into evidence under a general exception to hearsay evidence, the chance that a child will not testify increases. See id. “Through a videotaped interview of the child, the prosecution can develop a very effective case without calling the child as a witness, and the prosecution thereby gains the additional advantage of denying the defense an opportunity to challenge directly the child’s testimony.” Id.
372. See supra notes 77-85 (discussing the unavailability-rule requirement that the prosecution either produce the witness whose statements it intends to introduce at trial or demonstrate the witness’s constitutional unavailability prior to introducing the witness’s out-of-court statements).
373. See supra notes 31-34 and accompanying text (discussing the procedural protections of the Confrontation Clause).
testimony procured from the child witness under oath in court and both attorneys unconstitutional, whereas the Bowen court held that the admission of a videotaped interview between a police officer and a child victim who was not under oath or in front of court was constitutional. While the court clearly explained the basis for its decision in Bastien, the Bowen court only stated that the admission of the videotape achieved the correct balance between the defendant’s rights and the prosecution’s goal in prosecuting the defendant, especially because the trial court held that the statements were reliable. Accordingly, the lower courts are left with the undesirable job of determining when the cases before it present a problem more similar to the issues the Illinois Supreme Court considered in Bastien or in Bowen.

Given the Illinois legislature’s apparent commitment to expanding the reach of section 115-10, a case in which videotaped hearsay statements are at issue will likely arise again. Unfortunately, the Bowen court missed an opportunity to establish clear precedent governing when such statements should be admitted. For example, the court could have made the admission of a videotaped interview contingent upon the satisfaction of five requirements: (1) the defendant must be able to cross-examine the child when the out-of-court statement is made; (2) the prosecution must present the child to testify as a witness in front of both the defendant and the jury; (3) the child must testify in an adversarial setting; (4) the defendant’s cross-examination must not be impeded by the child’s refusal to testify or claim of memory failure; and (5) the defendant must be able to exercise his right to cross-examination concurrently with the introduction of the videotape at trial. Instead, the Bowen decision merely confused the important issue of when a defendant’s confrontation rights should be outweighed by a legislative and judicial concern for getting effective testimony from a child witness.
VI. CONCLUSION

While attempting to balance the interests of presenting an effective prosecution for child sexual assault and protecting the defendant’s constitutional right to confrontation, the Illinois Supreme Court incorrectly expanded section 115-10 to allow for the admission of videotaped interviews into evidence and erroneously held that such an expansion was constitutional. In finding the admission of videotaped interviews of a child sexual assault victim constitutional, the majority missed the opportunity presented by Bowen to clarify the important issue of when videotaped out-of-court testimony can be admitted into evidence without violating a defendant’s confrontation rights. Instead, the Illinois Supreme Court ignored the rules of statutory construction and failed to thoroughly examine United States Supreme Court precedent in its analysis of the case thereby rendering a decision which is not constitutionally sound. Unfortunately, because the court failed to thoroughly distinguish this case from the one it was presented with in Bastien, lower court decisions will be confusing and inconsistent when courts face similar cases with slightly different facts.

ELIZABETH J.M. STROBEL