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68 Vol. 7, No. 5, February 8, 1999

Case Name: [Jeffrey Steven Marx v. The State of Texas](#)

- OFFENSE: Aggravated Sexual Assault of a Child
- COURT OF APPEALS: Austin 1997
- C/A CITATION: 953 S.W.2d 321
- C/A RESULT: Conviction Affirmed
- COUNTY: Burnet
- CRIM. APPEALS No. 0994-97
- DATE OF OPINION: February 3, 1999
- JUDGE: Mansfield, J.
- DISPOSITION: Court of Appeals Affirmed

68/ 306.01 [Witnesses / Children as Witnesses / Testimony by Closed Circuit Television](#): Prior to trial the State moved to examine two witnesses by closed circuit television. One was the 13 year old victim; the other was a 6 year old witness whom the defendant was alleged to have also assaulted. Appellant objected on two basis: first, he argued first that use of such testimony would deny him his Sixth Amendment right to confront the witnesses against him; second; he argued that use of such testimony would violate Article 38.071, as the statute permitted only testimony by a victim who was less than twelve. Immediately before trial, Appellant also claimed that to permit the closed circuit testimony would deny his right to due process by impairing his Fourteenth Amendment right to the presumption of innocence "because for a child to be presumed to be harmed [by testifying in his presence], then [one must] presume that this offense did, in fact, occur." The Court of Appeals considered and rejected all three claims (see [Greenwood & Schulman](#), Vol. [5, No. 28](#); July 21, 1997).

[Holding \(Confrontation\)](#): The Confrontation Clause reflects a preference for face-to-face confrontation at trial, but that preference must occasionally give way to considerations of public policy and the necessities of the case. a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only when denial of such confrontation is necessary to further an important public policy and the reliability of the testimony is otherwise assured. In particular, "if the State makes an adequate showing of necessity, 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." The requisite necessity to justify the use of such a special testimonial procedure in a child abuse case may be shown if the trial court determines that use of the procedure is necessary to prevent significant emotional trauma to the child witness caused by the defendant's presence. Ibid. The requisite reliability of the child witness' testimony may be assured absent a face-to-face encounter through the combined effect of the witness' testimony under oath (or other admonishment, appropriate to the child's age and maturity, to testify truthfully), subject to cross-examination, and the factfinder's ability to observe the witness' demeanor,

even if only on a video monitor. Applying these settled principles to the case at bar, we discern no Sixth Amendment violation in the District Court's admission of the two-way closed circuit television testimony.

Notes: Judge Keller delivered a dissenting opinion in which she concludes that, based on the facts of this case, admitting the testimony of the 6 year non-victim violated Appellant's rights under the Confrontation Clause. As she interprets the facts, there is nothing to show that the 6 year old witness would be any more traumatized by having to testify than any other victim of a violent crime having to confront the person who assaulted them. Judge Holland also delivered a dissenting opinion, in which she was joined by Judges Womack and Johnson. She, too, concludes that admission of the testimony of the 6 year non-victim violated Appellant's right to confrontation.

Comments: ([David A. Schulman](#)) I also believe that admitting the 6 year old's testimony violated the confrontation clause. However, besides the fact that I agree with Judge Keller that the State failed to prove the child would be unusually traumatized by having to testify, I would hold that, because the 6 year old wasn't the victim named in the indictment, the State failed to show any real necessity, as there is no showing that the State would have been in any way harmed if it lost the testimony.

Holding (Due Process): The right to due process of law includes within it the right to a fair trial, and basic to a fair trial is the presumption of the defendant's innocence. If a particular practice tends to brand the defendant with an unmistakable mark of guilt, it impairs the presumption of innocence and violates the Fourteenth Amendment's guarantee of due process of law, unless it furthers an essential state interest. We discern no due process violation in the District Court's admission of the closed circuit testimony, as the District Court carefully instructed the jury that the closed circuit television procedure about to be employed was authorized by statute "in these types of cases . . .," [which] likely conveyed to the jury the state's general desire to protect children from the intimidating courtroom environment rather than implying that the procedure was necessary because of the defendant's guilt.

Holding (Art. 38.071): we agree with the concurring opinion of Judge Benavides, joined by Judges Campbell and Overstreet, in [Gonzales v. State](#), 818 S.W.2d 756 (Tex.Cr.App. 1991): "If the legislature had elsewhere clearly expressed a policy that no courtroom testimony should be allowed except in the physical presence of the defendant, I might be inclined to think that Article 38.071 was meant as a list of specific exceptions to that general rule. But, in this instance, the general rule is expressed only in the Constitution, and the legislature has no authority to make exceptions. It follows that Article 38.071 cannot seriously be taken as an attempt by the legislature to prohibit the use of closed-circuit television [testimony] except under the enumerated circumstances. If that were the case, one might have expected it to say so explicitly, rather than to list exceptions against an unarticulated policy. And, although Article 38.071 might actually have been intended to limit the Constitution, it clearly cannot be effective to such end. Consequently, the only permissible interpretation of the statute, no matter how counterintuitive, is that it prescribes a specific alternative testimonial procedure under certain defined circumstances, leaving the courts free to develop different procedures under other circumstances, constrained only by constitutional prohibitions."