OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

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CAPTION: IDAHO, Petitioner, V. LAURA LEE WRIGHT

CASE NO: 89-260

PLACE: Washington, D.C.

DATE: April 18, 1990

PAGES: 1 thru 50

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 IDAHO, :

4 Petitioner :

5 v. : No. 89-260

6 LAURA LEE WRIGHT :

7 ------------------------------x

8 Washington, D.C.

9 Wednesday, April 18, 1990

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 11:03 a.m.

13 APPEARANCES:

14 JAMES. T. JONES, ESQ., Attorney General of Idaho, Boise,

15 Idaho, on behalf of the Petitioner.

16 WILLIAM C. BRYSON, ESQ., Deputy Solicitor General,

17 Department of Justice, Washington, D.C.; as amicus

18 curiae, supporting the Petitioner.

19 ROLF MICHAEL KEHNE, ESQ., Boise, Idaho; appointed by this

20 Court, on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 next in No. 89-260, Idaho against Laura Lee Wright.

5 General Jones. You may proceed whenever you're

6 ready.

7 ORAL ARGUMENT OF JAMES T. JONES

8 ON BEHALF OF THE PETITIONER

9 MR. JONES: Mr. Chief Justice, may it please the

10 Court.

11 We are here today because the Idaho Supreme

12 Court has misread the requirements of the confrontation

13 clause of the Sixth Amendment. By imposing three rigid

14 preconditions to the admissibility of hearsay statements

15 of unavailable child witnesses, the court has made it

16 almost impossible to get this kind of evidence into the

17 fact-finding process.

18 In essence, the court has held that the

19 confrontation clause requires the hearsay declarations of

20 child sex abuse witnesses to be videotaped, the product of

21 non-leading, open-ended questions and elicited by an

22 interviewer with no preconception of what the child should

23 be disclosing.

24 The State of Idaho submits that this three-part

25 test cannot be sustained by a reasonable reading of the

1 confrontation clause, and that it is in fact in conflict
2 with the purpose of the clause to advance the accuracy of
3 the truth determining process in criminal trials.
4 In its effort to protect the confrontation
5 rights of the defendant, the court has made it extremely
6 difficult to get reliable hearsay statements made by child
7 victims and witnesses before the trial courts. And of
8 course that is evidence that is critical in many of these
9 cases.
10 QUESTION: General Jones, may I ask, initially
11 there were two counts, were there not?
12 MR. JONES: Yes.
13 QUESTION: And the conviction under the first
14 count was reversed, was it?
15 MR. JONES: The conviction for the lewd conduct
16 with the younger daughter was reversed.
17 QUESTION: Yes.
18 MR. JONES: The conviction for lewd conduct with
19 the older daughter, the five-and-a-half-year old, was not
20 appealed from.
21 QUESTION: Well, at some stage, and I'm not
22 quite clear from the record when, the second count was
23 dismissed, was it not?
24 MR. JONES: No, Your Honor, the second count was
25 not dismissed. Laura Lee Wright is in the state

1 penitentiary on her conviction on the count of molesting
2 the five-and-a-half-year old. The count of molesting the
3 two-and-a-half-year old is before the Court. The
4 conviction was reversed on that count.
5 QUESTION: And that's before us, is it?
6 MR. JONES: That is the count that is before the
7 Court at this point.
8 QUESTION: Now, was there a dismissal on the --
9 by the local prosecutor after the remand from the Supreme
10 Court of Idaho, and then that dismissal was vacated?
11 MR. JONES: Oh, I see what you're getting at.
12 After -- after the Court granted certiorari, we found out
13 that the prosecutor and the defense counsel had gone into
14 the court and had stipulated for a dismissal in exchange
15 for an agreement that had to do with termination of the
16 parental rights of Mrs. Wright to the two-and-a-half-year
17 old daughter.
18 The matter was brought to the attention of the
19 trial court. There was a hearing --
20 QUESTION: Well was that -- was on that motion
21 to reinstate the count two?
22 MR. JONES: That is correct. That is correct.
23 And then, after a hearing, the charge that was dismissed
24 was reinstated. It was on the ground of inadvertence
25 under rule 60 of the Idaho rules --

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1 QUESTION: Well, didn't the trial court dismiss
2 that count, though, before we granted certiorari?
3 MR. JONES: The count was dismissed before cert.
4 was granted.
5 QUESTION: Yes.
6 MR. JONES: And it was after cert. was granted
7 that we found out that the charge had been dismissed. It
8 was not dismissed by our office, but by the county
9 prosecuting attorney and by defense counsel. We were not
10 notified.
11 QUESTION: Well, he had authority to do what he
12 did, did he not? He had authority to --
13 MR. JONES: Yes, he had the authority to do
14 that.
15 QUESTION: Well, what -- what was left of the
16 case when the count was dismissed?
17 MR. JONES: Well, we -- we went into the --
18 QUESTION: I mean this all happened while cert.
19 was pending, but before we had acted on the petition for
20 certiorari, did it not?
21 MR. JONES: Let's see. The dismissal took
22 place, I believe, in November of last year. And cert. was
23 granted after the dismissal, but before the charge was
24 reinstated.
25 QUESTION: Yes.

1 MR. JONES: Right.

2 QUESTION: What was the case that was here while

3 the count was dismissed, before it was reinstated?

4 MR. JONES: We believe that -- that, while there

5 was still the ability to go into the court to seek

6 reconsideration of the dismissal order, and while we were

7 operating under the inadvertent impression that the case

8 was still pending, that the dismissal was not final.

9 QUESTION: Sort of a contingent future case or

10 controversy in a way.

11 (Laughter.)

12 MR. JONES: I --

13 QUESTION: The case is presently pending for

14 retrial in the Idaho District Court, depending on the

15 outcome of the case here?

16 MR. JONES: That is correct. That is correct.

17 QUESTION: And when you filed your petition, the

18 -- the count was still --

19 MR. JONES: The count was still pending at the

20 time we filed out petition.

21 QUESTION: Exactly. And -- and at the time the

22 response to the petition was filed?

23 MR. JONES: There was no response. The court

24 requested the response to the petition, but none was

25 filed. Now, had there been one, presumably all of us

1 would have known that the case had been -- that the
2 dismissal order had been made. But we were not advised.
3 The counsel for the -- for Wright was requested on at
4 least one occasion to file the response. None was filed.
5 I think it was after the second request for a response
6 that the case was dismissed.
7 QUESTION: Was the dismissal with the
8 understanding that a new trial would follow? And was that
9 conceded?
10 MR. JONES: The dismissal was without prejudice,
11 which would have given the prosecutor, had it wished, the
12 ability to go ahead and --
13 QUESTION: Even though the case had proceeded to
14 judgment?
15 MR. JONES: That is correct. We pointed out to
16 the court that the dismissal had been made without
17 prejudice, and that certainly the understanding was that
18 that could have been refiled. It was primarily an
19 exchange of getting the case resolved so that they could
20 terminate the parental rights of the mother.
21 And as I take it now, the question of whether
22 parental rights have been fully terminated depends on
23 whether this Court affirms or reverses.
24 QUESTION: Unless there are further questions
25 from the Court, why don't you proceed to the merits of the

1 case, Mr. Jones?

2 MR. JONES: Thanks, Mr. Chief Justice.

3 Essentially, we're saying that the Idaho Supreme

4 Court, in looking at the case, had obtained the

5 misimpression that instead of looking at all of the

6 circumstances to see whether the hearsay statement was

7 admissible, only focused on three circumstances.

8 That is, whether leading questions had been

9 involved, whether there was a videotaping of the interview

10 between the young girl and the pediatrician and whether he

11 had a preconception of what was going to be disclosed.

12 I'd like to go into basically the -- the

13 testimony that's at issue.

14 QUESTION: (Inaudible) -- as the case comes to

15 us, are we -- must we assume that these witnesses were

16 unavailable?

17 MR. JONES: I'm going to cover that, Justice

18 White.

19 QUESTION: Are you going to get to that? All

20 right.

21 MR. JONES: Because -- in fact, I was doing a

22 little bit of quick research during the previous argument.

23 The older girl, the five-and-a-half-year old,

24 Jeannie, testified at trial as to the acts that had been

25 carried out -- the sexual acts that had been carried out

1 against her and against her younger sister, by both of the
2 defendants.
3 A number of witnesses, a couple of police
4 officers, three doctors and a social worker came in and
5 essentially verified that Jeannie had told them basically
6 the same thing during interview sessions shortly after the
7 sexual abuse became known.
8 The younger girl, Kathy, was found by the trial
9 judge to be not capable of communicating to the jury and
10 was not permitted to testify. However, Dr. Jambura, a
11 pediatrician, testified as to statements that had been
12 made to him by Kathy during an examination that took place
13 after she was taken from Wright's home, a day after.
14 During the course of the examination he checked
15 out the medical situation, and found that there had been
16 some abrasions in the vagina. And after that he asked her
17 some questions. And four of those are relevant today.
18 The first question was: "Do you play with
19 Daddy?" -- referring to Giles, the co-defendant. "Does
20 Daddy play with you? Does Daddy touch you with his pee-
21 pee?" And at this point, in order to aid in answering the
22 question, he drew a picture, and she added a penis to it.
23 And the final question was: "Do you touch his
24 pee-pee?" After making no initial response to the last
25 question, the girl said, "Daddy does do this with me, but

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1 he does it a lot more with my sister than with me."
2 Her responses were admitted by the trial judge
3 under Idaho's residual hearsay exception on the court's
4 finding that they were reliable and that their
5 circumstantial guarantees of trustworthiness were
6 equivalent to statements permitted under some of the
7 firmly rooted hearsay exemptions.
8 QUESTION: Why was she -- why was she
9 unavailable for -- for testifying in trial?
10 MR. JONES: The trial judge, in the presence of
11 the attorneys and the parties conducted -- but out of the
12 presence of the jury, conducted a voir dire examination
13 and asked the young girl, Kathy, the -- three years old at
14 that time, a number of questions, and at the time of trial
15 he determined that she was not capable of communicating
16 with the jury and made that determination under Idaho law
17 --
18 QUESTION: You mean that child was just an
19 incompetent witness? Is that it?
20 MR. JONES: The child was not incompetent. The
21 judge did not hold that. The judge held that her
22 testimony in the courtroom setting would not have been
23 useful, that she could not have communicated to the jury,
24 and any --
25 QUESTION: Well, isn't that tantamount to,

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1 quote, "incompetence of a witness" as that term is
2 normally understood?
3 MR. JONES: Well, under Idaho law there are two
4 parts of incompetence. Number one, inability to
5 communicate with the jury. Number two, which the Court
6 did not find, inability to understand what you're talking
7 about.
8 QUESTION: But either one means that the witness
9 is not able to be called as a witness in a trial.
10 MR. JONES: That would be correct.
11 QUESTION: And we take the case on that
12 assumption, that this young child had been determined not
13 to be someone who could be called to testify at trial?
14 MR. JONES: At that time, that's correct.
15 QUESTION: But you're making the argument that
16 that same child at an earlier time, outside the courtroom
17 setting, would be competent, in effect, and that her
18 testimony should come in under some hearsay exception?
19 MR. JONES: Right, the judge was making --
20 QUESTION: Is that right? Is that your
21 argument?
22 MR. JONES: That's correct. That's correct.
23 QUESTION: Now, have most courts held that if a
24 witness is found to be incompetent that the only kind of
25 out-of-court statements that could come in would be what

1 we call the excited utterance, or res gestae statements?

2 MR. JONES: Most of the courts have dealt with

3 those kinds of statements, but there have been two circuit

4 decisions -- Nelson against Farrey and U.S. against

5 Dorian, Seventh and Eighth Circuit cases, where a child

6 has not come in, been essentially determined incompetent

7 to testify in the courtroom setting, but their hearsay

8 statements were admitted as being reliable at the time

9 that they were made.

10 QUESTION: Competence was -- based on -- was it

11 based on the fact that testifying in the presence of the

12 defendant would render -- that she just would be incapable

13 of doing that in the presence of the defendant?

14 MR. JONES: The Court didn't specifically say,

15 in the presence of the defendant. The Court essentially

16 said that in the courtroom setting this particular child,

17 based upon his voir dire at that time, would not be

18 productive, that --

19 QUESTION: Do you suppose he would have come out

20 if -- if -- if the -- if -- would that child have been

21 competent to testify under the Maryland procedure?

22 MR. JONES: It's a possibility. There was no

23 determination by the judge as to the particular effect

24 that the parents or the defendants would have on that

25 child, whether the child would be traumatized. The -- the

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1 inquiry was not so much the trauma to be visited on the
2 child, but the ability of the child to relate at that
3 particular time and place the facts that --
4 QUESTION: Yes, but that -- and that's what
5 incompetence to testify usually means. It means that the
6 child is too young to give a coherent account, that the
7 child's understanding of questions and -- and sense of
8 reality to frame the responses is inadequate. It has
9 nothing to do with whether it's in a courtroom setting or
10 not, does it?
11 MR. JONES: Well, it does to a degree, because
12 here we were looking at a particular statement made by
13 this child in an interview session between the child and a
14 pediatrician, and we were not looking at the total range
15 of everything that the child said.
16 QUESTION: No, I'm not talking about at that
17 stage. I'm talking about the stage the judgment of
18 incompetence to testify is made. I had thought that
19 usually that means, when a court makes that determination,
20 that this child is -- is just -- or it could be an
21 incompetent person. That the person doesn't understand
22 questions, cannot intelligently respond to answers. It
23 has nothing to do with courtroom trauma, that he could do
24 it in another setting but can't do it in a courtroom.
25 Now, which did your court find here?

1 MR. JONES: Well, the court found that the child
2 would not be competent to relate facts in the courtroom
3 setting.
4 QUESTION: Just in the courtroom setting? Well,
5 that's --
6 MR. JONES: In the courtroom setting.
7 QUESTION: Well, that's not really incompetence
8 as I normally understand it, incompetence to testify.
9 MR. JONES: The judge did, however, look very
10 carefully at all circumstances surrounding the making of
11 the statement to the pediatrician, and he said this
12 statement, when considering it in the totality of the
13 circumstances, is a reliable statement and should be let
14 in. He made a distinction between -- between competence
15 and reliability.
16 I'd like to just point out the things that he
17 looked at to determine that the statement was reliable.
18 He said, number one, that there was physical evidence to
19 corroborate that sex abuse occurred. Number two, that
20 there was no motive for the two-and-half-year-old younger
21 daughter to make up a story of this nature. Number three,
22 the nature of the statements themselves as to the sexual
23 abuse are such that they fall outside the general
24 believability that a child could make them up, or would
25 make them up. Number four, that the younger daughter was

1 in the custody of the defendants at the time the injuries
2 occurred. Number five, that the older daughter testified
3 that it was the younger daughter's mother and father who
4 were the perpetrators of the sexual abuse. And number
5 six, that the perpetrators were well-known to the victim.
6 He said, looking at that statement in that
7 context, the statement is reliable. It meets the
8 reliability requirements of the Ohio against Roberts case,
9 and therefore it should be admitted. He also found that
10 essentially she was unavailable, and I would submit --
11 QUESTION: And the -- the Idaho Supreme Court
12 proceeded on the basis that -- that if the procedures they
13 thought should have been followed had been followed, that
14 the statements perhaps could be admitted --
15 MR. JONES: Certainly, if it had --
16 QUESTION: So they didn't -- they didn't decide
17 on the basis that that -- of incompetency?
18 MR. JONES: No. As a matter of fact, in the
19 companion case --
20 QUESTION: And that's the decision we're
21 reviewing, is --
22 MR. JONES: Right. In the decision in the
23 companion case, Giles, they said the testimony was
24 properly admitted. That was three months prior. No
25 problem for hearsay purposes. The only difference between

1 this case is, they looked at it from the confrontation
2 clause standpoint and said, well, it was fine for hearsay
3 rules but it's not fine for confrontation clause purposes.
4 If I might, Mr. Chief Justice, I'd like to
5 reserve the rest of my time.
6 QUESTION: Very well, General Jones.
7 Mr. Bryson?
8 ORAL ARGUMENT ON BEHALF WILLIAM C. BRYSON
9 AS AMICUS CURIAE, SUPPORTING THE PETITIONER
10 MR. BRYSON: Thank you, Mr. Chief Justice, and
11 may it please the Court:
12 In our view, the Idaho Supreme Court made a
13 legal error in this case that's best summed up by pointing
14 to three critical factors that the court did not consider
15 or even mention in its opinion:
16 First, the corroboration in this case. This
17 Court and others have pointed out again and again in the
18 confrontation clause context and others that the degree of
19 corroboration for a particular statement is a very
20 important indicium of reliability of the statement.
21 The second, the spontaneity of the statement.
22 While the Idaho Supreme Court is very critical of the
23 doctor for asking leading questions, the court overlooks
24 the fact that the one -- the one response that the child
25 made which is the critical response in this case, "He does

1 it with me but he does it more with my sister than with
2 me", wasn't in response -- wasn't responsive to a leading
3 question. It was blurted out in the course of the
4 doctor's questioning. It was --
5 QUESTION: But it -- it's not what we'd call an
6 excited utterance or a res gestae --
7 MR. BRYSON: No. Normally, that's right,
8 and -- and we're not urging that it should be construed in
9 that way.
10 But I think what's important in term --
11 determining whether it bears the indicia of reliability is
12 that it was spontaneous and volunteered. It was not a nod
13 or a yes, sir, yes, sir, yes, sir type response to a
14 doctor's leading questions.
15 Third is the fact that this child, the younger
16 child was in the custody of the defendants until just
17 before the physical examination, and so the theory of the
18 case, the theory of defense in this case, which is that
19 the second set of parents must have -- or somebody else
20 must have programmed this child to make these statements,
21 just won't wash with respect to this child, this younger
22 child, because she wouldn't have had any opportunity to be
23 programmed. She was with the defendants throughout the
24 period up until the time that she went to the doctor.
25 QUESTION: Mr. Bryson, what you refer to as

1 these -- this corroboration resembles to a certain extent
2 a harmless error analysis.
3 MR. BRYSON: Well, there is -- there is a
4 certain degree of -- of parallelism. I think in Dutton
5 v. Evans, Justice Stewart's opinion points out that one of
6 the reasons that the evidence was admissible was that it
7 really did not --
8 QUESTION: Didn't prove much.
9 MR. BRYSON: It didn't prove much, I guess is
10 the point, and I think Justice Blackmun wrote a separate
11 opinion in that case pointing out and relying on the
12 harmless error factor.
13 It is true that where you have overwhelming
14 evidence, corroborative evidence that supports the
15 reliability of a statement, you may also have something
16 that approaches harmless error. Of course, harmless error
17 isn't an issue in this case as it comes to this Court.
18 But, nonetheless, I think it's important to focus on each
19 of the various features of corroboration to show how
20 reliable this statement was even though, of course, it
21 wasn't subject to cross-examination.
22 QUESTION: Well, do you -- do you think here
23 that the out-of-court statements fall within the state's
24 residual hearsay exception?
25 MR. BRYSON: I think they -- the out-of-court

1 statement fell -- the state did hold in the other case,
2 the Giles case, that it fell within the state's residual
3 hearsay exception. I think it would also -- they would
4 also fall within the Federal exception. I don't -- In
5 other words, the --
6 QUESTION: And would you take the position that
7 anytime it falls within such an exception that it
8 automatically can come in under the confrontation --
9 despite the confrontation clause?
10 MR. BRYSON: Your Honor, the way --
11 QUESTION: Is it a firmly rooted exception if
12 it's in the residual exception category?
13 MR. BRYSON: Your Honor, my answer to that
14 question is that the residual exceptions are written in
15 order to try to incorporate this Court's confrontation
16 clause jurisprudence. In other words, they require, among
17 other things, specific indicia of reliability.
18 So I think if a court, a Federal court, let's
19 say, applying the Federal residual exceptions correctly,
20 finds that something falls within the residual exception,
21 it would almost necessarily have also made the findings
22 necessary to satisfy the confrontation clause.
23 But now, of course, a state would be free to
24 construe its residual exception more broadly than that,
25 and if it did then you would have to view the

1 confrontation clause inquiry separately.

2 So I would say normally my answer to your

3 question is yes but not necessarily, particularly

4 depending on the way the particular clause was -- was

5 construed in the case.

6 QUESTION: Well, what -- what's the effect of

7 the finding that the witness is incompetent to testify?

8 MR. BRYSON: Well, Your Honor, I think where the

9 finding is -- and by the way, the finding in this case was

10 -- was not objected to by -- indeed, both sides concurred

11 that the witness was incapable of testifying in court.

12 Where the finding is simply that the witness

13 cannot communicate in court and it doesn't suggest what

14 normally we think of by incompetence, which is that the

15 witness is incapable of observing or reporting in any

16 context, then the problem is just one of unavailability.

17 It doesn't -- in other words, the finding of incompetence

18 in this case, if that's what it was, was not a finding

19 that went to the child's ability to -- to observe and

20 communicate. It went to the child's ability to testify in

21 court, and on that there was no dispute among the parties.

22 Now, if I may point to the -- the corroboration

23 that's present in this case. Number one, there's clear

24 physical -- evidence of physical abuse to the younger

25 daughter. The pediatrician found strong basis for a

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1 belief that there had been physical abuse.
2 Two, testimony in court from the older daughter,
3 which is essentially, you could use the expression, an
4 interlocking statement with that of the younger daughter
5 because both of them said that the parents had abused each
6 of them. That was the testimony of the older daughter.
7 It was the statement of the younger daughter. They were
8 interlocking in that sense.
9 The third piece of corroborative evidence, there
10 was physical abuse of the older child. Again, the medical
11 evidence on this is clear, and the -- by the way, that was
12 corroborated not by -- just by Dr. Jambura but by two
13 other doctors.
14 And fourth, out-of-court statements, which were
15 admitted without objection, of the older daughter
16 detailing in -- extensively to a number of different
17 people, including the therapist, the various incidents of
18 -- of abuse with respect to both daughters.
19 So this is a very well corroborated out-of-
20 court statement. You seldom see this degree of
21 corroboration.
22 QUESTION: Mr. Bryson, I'm sorry to interrupt
23 again and to ask a question on this, but it troubles me,
24 and I'm going to do it anyway.
25 What if the finding of the trial court is in the

1 traditional sense of incompetence of a witness to testify?
2 Would you be here urging that if you find all these
3 outside things, then that testimony ought to come in?
4 MR. BRYSON: If the -- if the trial court finds
5 that the witness is truly incapable of observing -- let's
6 take it out of the child area and say this is the person
7 of such low mental capacity that the person is -- the
8 trial judge's judgment is that person is incapable of
9 making observations and reporting them to anyone in any
10 context.
11 Then I would think that would be a serious
12 problem for admissibility in that setting because the
13 judge would have found that there is no basis for
14 believing that the statement is reliable because the judge
15 would have found that this can't have happened.
16 QUESTION: And do we know for sure what the
17 finding was here?
18 MR. BRYSON: Yes. The judge at joint appendix
19 39 makes a finding that the child is incapable of
20 communicating with the jury, and that was the whole thrust
21 of the -- of the colloquy that preceded it, and it was the
22 basis on which the Idaho Supreme Court took this case.
23 Now, I want to emphasize again, there are --
24 QUESTION: What page is that (inaudible) on?
25 MR. BRYSON: I think it's JA 39, I believe, is

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1 the place where the actual finding is made, the
2 unobjected-to finding. on the top of the right-hand side,
3 I think.
4 The -- there was, according to the Idaho Supreme
5 Court, a flaw in the interrogation, and I'd like to
6 address that briefly. The principal claim is the doctor
7 must have been biased, and here I think the Idaho Supreme
8 Court really went wrong. Doctors do get as much
9 information about a case in advance to aid their diagnosis
10 as they can; and yet, the Idaho Supreme Court seemed to
11 take the view that if this doctor had advance information
12 that suggested there may have been child abuse in this
13 case, that his report of the statement was somehow
14 impeached, somehow unreliable.
15 QUESTION: Did it say automatically --
16 MR. BRYSON: No.
17 QUESTION: -- or was it just one of the factors?
18 Don't you think it is a proper factor in deciding whether
19 a prior examination was reliable or not, whether the
20 person had an objective in mind in making the examination?
21 MR. BRYSON: I think those are two different
22 things. I don't think there's any indication in this
23 record that this doctor had an objective in mind. This
24 doctor -- there's no suggestion that this doctor was
25 trying to find child abuse.

1 QUESTION: Well, no, but he was looking for
2 child abuse.
3 MR. BRYSON: He certainly was, just as a doctor
4 would look for evidence of whatever particular malady the
5 person -- the patient came to him complaining of. But
6 that doesn't mean that it's more like that you are
7 suspicious of the doctor --
8 QUESTION: Oh, it's a lot more reliable if the
9 child blurts out something relating to sex abuse in a --
10 in a conversation that had nothing to do with that
11 subject, where the doctor was trying to find something
12 else.
13 MR. BRYSON: That -- that --
14 QUESTION: And she said, you know, daddy --
15 daddy did something else to me.
16 That would -- wouldn't that be more reliable?
17 MR. BRYSON: That would be very reliable, but
18 you're going to have a lot of cases in which a child will
19 be taken to a doctor for a question of whether
20 this -- there's evidence of child abuse where the doctor
21 knows that there is a suggestion of child abuse.
22 QUESTION: That's right.
23 MR. BRYSON: And the medical exception, and I
24 would -- I would --
25 QUESTION: But without saying that that

1 disqualifies it automatically, don't you agree that that
2 renders it less reliable than the same information
3 elicited in the different context?
4 MR. BRYSON: Well, it -- to the extent that if
5 it's blurted out in the context where no questions on that
6 subject had been asked at all, I would think it would be
7 extremely reliable. So yes to that extent.
8 But the Idaho Supreme Court said something very
9 different. They said you have to be dubious of this
10 evidence because of the doctor's advance knowledge, and I
11 would point out --
12 Thank you very much.
13 QUESTION: Thank you, Mr. Bryson.
14 Mr. Kehne.
15 ORAL ARGUMENT OF ROLF MICHAEL KEHNE
16 ON BEHALF OF THE RESPONDENT
17 MR. KEHNE: May it please the Court:
18 I have two general responses to our state
19 attorney general and Mr. Bryson. First of all I'd like to
20 talk about this notion that we can cure a confrontation
21 violation by corroboration. I would submit, as Professor
22 Burger pointed out very eloquently for -- for her brief
23 for the ACLU, that all the corroboration in the world will
24 not cure a violation of the confrontation clause.
25 If we take the state's argument to its extreme,

1 then we will have trial judges saying, I believe this
2 defendant is guilty and I am sure of it beyond a
3 reasonable doubt. Therefore, it is okay for me to allow
4 in hearsay evidence of robbery victims, eye witnesses,
5 anybody else that the state says we cannot procure today.
6 They are unavailable to us.
7 And according to the state's theory, this Court
8 should affirm because the trial judge had a lot of other
9 evidence to corroborate that determination that yes, well,
10 it doesn't matter, this defendant's guilty anyway. And I
11 don't think this Court's opinions have ever suggested that
12 that could be the case.
13 It may be that we can imagine some way of
14 conducting criminal trials that will lead to just as
15 reliable results as the way we do it, but the fact is, in
16 this country we do it by allowing defendants to confront
17 their accusers. It doesn't matter --
18 QUESTION: We haven't -- we have used language
19 like that, though. How do you explain that language in
20 our cases? We have talked about corroboration as being
21 one of the elements that will allow in hearsay.
22 MR. KEHNE: If it is corroboration surrounding
23 the circumstance of the making of the statement.
24 Let me submit to the Court that the true
25 standard is whether or not confrontation and cross-

1 examination would be useful to the accused and would be
2 useful to the jury. If the truth or falsity of the
3 statement is determined solely by the nature of its
4 making, the circumstances of its making and so forth, it
5 really doesn't matter if we don't confront and cross-
6 examine.
7 I think of the classic example of the little kid
8 who is too young to testify who comes running out of the
9 perpetrator's bedroom holding a genital area and saying,
10 he hurt me, he hurt me. I don't see any need for us to
11 cross-examine that statement. Nor would it do us any
12 good, nor would it give the jury any better information,
13 because all the things relevant to whether or not the
14 statement is reliable evidence are found in the
15 circumstances of the making of the statement (inaudible).
16 QUESTION: So you say there's a difference
17 between the kind of indicia of reliability which attend
18 the exception itself and corroboration by just other
19 accumulated evidence?
20 MR. KEHNE: Exactly, Mr. Chief Justice. So I
21 think it's wrong for the state to argue that we can allow
22 this statement in because another witness -- an entirely
23 other witness -- corroborates the statement, either the
24 medical doctor's physical findings or the girl's sister.
25 That would be more like the situation I brought

1 up before, where the trial judge rules, I believe the
2 person is guilty because I see all this corroborative
3 evidence, therefore I'll let in hearsay from the victims
4 of the crime, the eye witnesses and so forth. And I don't
5 think the Court has ever suggested that we could do that.
6 The other matter I'd like to bring to the
7 Court's attention to start out with is, we submit the
8 Attorney General of the State of Idaho has misrepresented
9 to the Court the opinion of the Idaho Supreme Court. And
10 I challenge Mr. Jones in his rebuttal to the Court to show
11 us any place in the text of the opinion -- now, I'm not
12 talking about what one justice wrote in a dissent or
13 another justice wrote in a concurrence in another case,
14 but in the text of the opinion that says, we will not let
15 in any of these statements if there are any leading
16 questions.
17 QUESTION: It's not an easy set of opinions to
18 figure out, Mr. Kehne.
19 MR. KEHNE: I agree with that. It could have
20 been drafted a little more elegantly. But it never
21 suggests -- the court below never suggests that these
22 three criteria -- absence of leading questions, absence of
23 preconception by the interviewer and of existence of a
24 videotape -- are hard, fast, inflexible criteria, the
25 absence of one of which would mean that the statement

1 can't be admitted into evidence no matter how reliable it
2 is, based on other circumstances.
3 QUESTION: Do you disagree with what the court
4 seems to have indicated, that if -- that if these
5 deficiencies hadn't existed, if there had to have been
6 videotape, no leading questions and no preconception, that
7 the statement could have been admitted?
8 MR. KEHNE: No, I don't disagree that if there
9 had been all those I would have no problem with them
10 letting this statement in. I -- I have a problem, I
11 disagree with the state's position that the Idaho Supreme
12 Court is holding that if only one was missing --
13 QUESTION: What would -- what would the presence
14 of those -- what would the presence of those procedures
15 have done that would make you say it would be all right?
16 MR. KEHNE: All right --
17 QUESTION: It would -- really just reliability,
18 isn't it?
19 MR. KEHNE: It -- it's just reliability, that -
20 - that we could see --
21 QUESTION: And we do judge this case on the
22 basis that the witness is unavailable?
23 MR. KEHNE: Yes, we do.
24 QUESTION: Um-hum.
25 MR. KEHNE: But it's reliability that comes from

1 the circumstances in which the statement was made, as
2 opposed to corroboration by other witnesses. We take the
3 instance of leading questions --
4 QUESTION: So you say that even if this -- you
5 say that as long as there was a -- that the -- that there
6 was this indicia of reliability -- sufficient indicia of
7 reliability, that the confrontation clause would not be
8 violated by admitting the testimony?
9 MR. KEHNE: That is my opinion, and I believe
10 that is what the Idaho Supreme Court said, contrary to
11 what the Attorney --
12 QUESTION: Even though -- even though it would
13 be sort of a new sort of a holding?
14 MR. KEHNE: It would be an expansion of an
15 exception to the confrontation clause, yes.
16 The problem with leading questions is, as
17 research shows, you can create a memory in a child. If
18 you have the child repeat it, and the child is young
19 enough, the child will not be able to tell whether that --
20 won't be able to distinguish that memory from an event
21 that really happened. In other words --
22 QUESTION: Mr. Kehne, anybody who's tried
23 lawsuits knows that you have to lead to a certain extent
24 to get the witness to focus on, you know, what -- what's
25 the subject of the inquiry, rather than whether it's

1 raining or sunny outside.

2 MR. KEHNE: I agree with that completely, and I
3 believe the Idaho Supreme Court does, too, that it is okay
4 to use sparing, judicious use of leading questions. Our
5 point is that if you use them, even if you have to use
6 them to a great deal, we will be protected if you
7 videotape the entire procedure so we can see it again, so
8 our experts can see it again and talk to the jury about
9 it, and so the jurors themselves can see it and they can
10 say, okay, the experts say you can lead a child into
11 saying something that wasn't true. Let me see exactly
12 what happened, and I'll decide for myself if that happened
13 in this case.

14 QUESTION: Of course, you could have cross-
15 examined the doctor here.

16 MR. KEHNE: No. I -- I disagree with that, Mr.
17 Chief Justice. I could -- we could have cross-examined
18 the doctor till we were blue in our faces, but it wouldn't
19 have shown the doctor's nonverbal communications, which
20 everybody agrees is pertinent, the child's nonverbal
21 communication, and while it might have shown the doctor --
22 if he was intentionally manufacturing evidence, it might
23 have shown that, but if he's innocently doing it, and he's
24 doing it without even being aware of, all the cross-
25 examination in the world won't help us there.

1 QUESTION: But you could ask him why he used
2 these leading questions, and you could also argue to the
3 jury, perhaps not as effectively as with a videotape, that
4 this is something that can produce untruthful answers.
5 MR. KEHNE: That's right. We can make that
6 argument, and it is so less effective that I don't think
7 it's fair or within what the court ought to allow in the
8 confrontation clause because it just seems rational that
9 the state's going to come back and say well, it could have
10 happened, but have you shown us any evidence that it did?
11 QUESTION: Well, of course a video --
12 MR. KEHNE: Well, of course we haven't.
13 QUESTION: A videotape wouldn't show you that
14 either, unless it's a very unusual videotape, maybe a
15 split screen with one half of it on the questioner and the
16 other half on the child.
17 You're talking about nonverbal suggestions made.
18 That wouldn't come out on the video. What kind of a
19 videotape are you talking about?
20 MR. KEHNE: Well, that's exactly how we do it in
21 Idaho now, is a split screen, where both --
22 QUESTION: With one showing the questioner and
23 the other half showing the --
24 MR. KEHNE: Yes.
25 QUESTION: -- the person being interrogated?

1 MR. KEHNE: Yes, Justice Scalia. Both people
2 are on the videotape and the entire thing is
3 video-recorded from the very time the interviewer meets
4 the child until the end of the interview.
5 QUESTION: Excuse me. You say that that's the
6 way you do it in Idaho for -- for --
7 MR. KEHNE: In our local community. Partly as a
8 result of the decision below we now have a central
9 screening facility called Children at Risk Evaluation
10 Screening, and if a social worker even suspects sex abuse,
11 a doctor, a minister, a divorce lawyer -- anybody involved
12 in this whole system -- the child is taken to the CARES
13 program for the screening, which is done on videotape.
14 It's a practical thing, a practical result that
15 has happened as a result of the decision below, and it's
16 something that could happen nationwide if the Court
17 affirms.
18 QUESTION: Well, Mr. Kehne, it obviously is
19 desirable, if -- if the testimony can be obtained that
20 way. Do you take the position that the Federal
21 Constitution requires it?
22 MR. KEHNE: Absolutely, I do.
23 QUESTION: Despite any other indicia of
24 reliability that a particular case might pose?
25 MR. KEHNE: Excuse me, Justice O'Connor. I may

1 have misstated myself. Am I -- if you're asking me do I
2 require or do I say the Constitution requires videotaping
3 in every circumstance, my answer is no. It is one of the
4 factors that the Court should look at in deciding
5 admissibility under the Constitution. But if it is
6 necessary to use leading questions, if instead of an
7 inadvertent --
8 QUESTION: And in examining children I think
9 almost all states and the Federal Rules as well would
10 allow the use of leading questions in examining child
11 witnesses, would they not?
12 MR. KEHNE: Yes, they would. Of course, if this
13 child, as was talked about earlier, if the child comes up
14 with a statement about sexual abuse on his own or on her
15 own, that lends a lot of credibility to it. If the
16 examiner is specifically trying to investigate it and the
17 investigator has some beliefs ahead of time, the
18 investigator is more likely to ask leading questions.
19 Again, neither the state -- neither the state
20 supreme court nor I have any problem with that or the
21 preconception, nor do we always say there should be a
22 videotape.
23 Our problem is the interrelationship of those
24 factors. The stronger the interrogator holds a
25 preconception, the more likely the interrogator is to

1 suggest a memory to the child of something it didn't even
2 have, whether consciously and viciously or completely
3 accidentally. If the interrogator believes this is what
4 happens and asks leading questions, it's more likely that
5 that's what he's going to get out. If the interrogator
6 finds that he needs to use extremely blatantly leading
7 questions, well, that may -- in a proper case that may be
8 necessary. And there again, we don't have a problem with
9 that, but videotape it so we can protect ourselves.
10 QUESTION: So you take the position that if a
11 child witness is unable to testify in a courtroom in the
12 presence of a defendant, that it depends on the totality
13 of the circumstances whether the out-of-court statements
14 may come in?
15 MR. KEHNE: Yes, Justice O'Connor. If I may
16 clarify a little bit, the totality of circumstances
17 surrounding the statement, not what other witnesses may
18 corroborate or other witnesses may say --
19 QUESTION: Mr. Kehne --
20 MR. KEHNE: -- and that's how I see the holding
21 below. Excuse me.
22 QUESTION: Mr. Kehne, what happens if you -- you
23 have this -- this videotape and the child does indeed say
24 this but the defendant says the child hasn't been with me
25 for a year now. Let's say it's my son, and I say all of

1 this has been planted in the child's mind. The child does
2 believe it, as you say, but it -- the child's been led to
3 believe it by the parents.
4 Now, how does the defendant possibly establish
5 that if he cannot place the child in front of the jury?
6 Does the defendant have a shot for a private videotaping
7 at which he can get a social worker on his side to try to
8 probe with the same kind of leading questions as to
9 whether, if indeed you can find out that kind of thing,
10 whether the other parent planted this thought in the
11 child's mind.
12 What is -- what is the defense against that kind
13 of activity?
14 MR. KEHNE: In our jurisdiction, the trial
15 courts are pretty nice and kind about giving us access to
16 victims for things such as that. The problem with it is
17 if instead of having this interview videotaped and it's
18 the first interview of the child, if the parents have been
19 feeding the kid -- or somebody else -- has been implanting
20 this in the child's mind for a significant period of time
21 before the video camera comes on, then there is no way to
22 get at the truth at that point.
23 That's why I think it's important that it's the
24 initial interviews that be videotaped or as close to the
25 initial interviews as possible. It does us no good after

1 we've been talking to the child for a year, all of a
2 sudden to turn the video camera.
3 QUESTION: How can you say that there's any
4 inherent indicia of reliability and yet at the same time
5 say what you've just told me? There are inherent indicia
6 of reliability but, to tell you the truth, we can't really
7 tell whether the child knows this because it happened or
8 knows it because somebody has persuaded him that it --
9 What kind of inherent reliability is that?
10 MR. KEHNE: If we have the record of the first
11 time it came out or at least the first time that somebody
12 tried to interrogate the child about it, then we can get
13 to the basis of it. If somebody's been interrogating the
14 child and leading the child for a year before the
15 videotape goes on, then there -- it doesn't help.
16 QUESTION: Well, I wouldn't like to be a
17 defendant in such -- in such circumstances. I get no shot
18 at the child. The child is -- is excluded from the trial,
19 and a videotape is put on, and -- and all I can do is I
20 can just ask the jury to believe that the child's been fed
21 all of this by some malicious person over the past year,
22 and I get no -- no chance to prove it in any other
23 fashion. Right? And that -- that's the system you -- you
24 say is constitutional.
25 MR. KEHNE: Justice Scalia, you're pointing up

1 another possibility not presented by this case, and I
2 don't know if this is where you were going, but I -- I
3 believe the Court should leave this possibility open. And
4 there is a whole 'nother side to the potential of solving
5 this dilemma, and that is to say that state competency
6 rules will just fall in the face of the confrontation
7 challenge, that if you want to let these hearsay
8 statements in, then you put the child on the stand so the
9 jury can see exactly what the trial judge saw that led the
10 judge to believe the child could not testify reliably.
11 Now, I'm excluding the situation where the child
12 is traumatized, but wouldn't it have been helpful for this
13 jury to hear the -- the colloquy on the voir dire to
14 determine competency?
15 "Hi, Kathy. Can you tell me your name?" No
16 response. "Are you kind of scared? Can you tell me your
17 name and tell me how old you are?" "Kathy Wright." "Can
18 you tell me the names of the toys you have that you are
19 holding?" "Kathy Wright." "That's your name, okay. How
20 old are you, Kathy? How old are you?" "My -- Kathy
21 Wright." "Can you tell me the names of your father and
22 your mother?" No response. "Can you tell me what they
23 are?" "What?" "Do you know where you are right now?"
24 "No." "Can you tell me how old you are, Kathy?" "Kathy
25 Wright." "Do you know how many years you've been alive?"

1 "Six. Six years." "How old do you think you are?" "Six
2 years."
3 And, of course, she was three years old.
4 Wouldn't it have been helpful for the jury to
5 see that before they decide whether or not they're going
6 to believe this child?
7 QUESTION: (Inaudible) bit more than just the
8 inability to testify in a courtroom, isn't it?
9 MR. KEHNE: That is the record in the case
10 before the Court.
11 QUESTION: Well, Mr. Kehne, the finding of the
12 court that we have here is basically the statement by the
13 court: "Is there any disagreement that she is not capable
14 of communicating to a jury?" That was the question the
15 trial judge asked. Both counsel agreed that she was not
16 capable of communicating to the jury.
17 What is the nature of that finding? Is it -- is
18 it that she's not able to respond to questions and make
19 observations?
20 MR. KEHNE: The finding is, and amply supported
21 by the record, that child cannot respond to simple
22 questions with simple answers.
23 QUESTION: So you disagree with the
24 characterization of that finding by counsel on the other
25 side?

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1 MR. KEHNE: I certainly do. That's competence
2 like witness competence has always been talked about.
3 QUESTION: I thought you had settled that we --
4 just to the contrary earlier in your argument, that both
5 sides had agreed that this person was unavailable but not
6 that the witness was incompetent in the technical sense?
7 MR. KEHNE: The word "competence" wasn't used.
8 That is our rule. The rule that the judge applied, the
9 trial judge, is our rule of witness competence. We don't
10 have one of those rules that say if you're under ten or if
11 you're under five. It's can you communicate and are you
12 capable of receiving just impressions, and based on that
13 record the trial judge correctly concluded this child was
14 not and is incompetent under Idaho law.
15 QUESTION: Was this -- was it the same judge who
16 conducted the voir dire of the child in person and who
17 later admitted the declaration of the doctor -- the
18 declaration to the doctor?
19 MR. KEHNE: It was, Mr. Chief Justice.
20 QUESTION: So, at the time the trial judge
21 admitted the declaration, he must not have felt that this
22 witness was -- or the declarant was incompetent?
23 MR. KEHNE: It's -- it's hard to tell that.
24 QUESTION: Well, you know, I would think it
25 would be a very strange judge who would admit a statement

1 to a doctor by a witness whom he regarded as incompetent
2 or by a declarant whom he regarded as incompetent.
3 MR. KEHNE: Well, if a child is incompetent at
4 one time, that doesn't necessarily mean she's incompetent
5 at another time. And what is important is what this judge
6 looked at in order to rule that that statement is
7 admissible, and that is the testimony of the girl's
8 sister, the testimony of the doctor and his physical
9 findings -- in other words, all this corroboration from
10 other unrelated evidence which we should not look at in a
11 confrontation clause analysis.
12 For hearsay rule purposes, it's fine. And the
13 Idaho Supreme Court said under our hearsay rule that's
14 fine and it will be admitted. When we're talking
15 confrontation, whether the defendant will have the right
16 to have that person in front of the jury where they can
17 see demeanor evidence and the defendant can cross-examine
18 that witness, then we're just talking about the
19 circumstances of the statement, and that's another matter.
20 QUESTION: May I ask you a question? Suppose -
21 - the doctor here testified that, Dr. Jambura, in his
22 professional judgment there had been some kind of abuse of
23 the child. Would the statement made by the child to the
24 doctor have been admissible, in your judgment, if the
25 judge had given an instruction to the jury that it is not

1 admitted for the purpose of deciding the truth of the
2 matter asserted in the statement but rather -- merely as
3 basis for the doctor's professional opinion?
4 MR. KEHNE: Well, I -- first of all, I don't
5 think that would be allowable under Idaho law. Second of
6 all, I think it's stretching the effectiveness of
7 instructions to the jury a little bit to admit it and say,
8 but you have to ignore it, as far as determining what the
9 truth is.
10 QUESTION: Well, that's done all the time with a
11 lot of hearsay statements.
12 MR. KEHNE: It -- it is. But if we're talking
13 about something so direct and central to the crime, my
14 understanding is this Court has put some restrictions on a
15 court's ability to do that. Specifically, the case where
16 --
17 QUESTION: But, see, the witness being
18 confronted, then, would be the doctor, not the child.
19 Because you're asking the doctor for the basis for the
20 doctor's expert opinion, which did get in, which wasn't
21 objected to, that -- namely, that the child had been
22 physically abused and so forth. And one of the things the
23 doctor no doubt relied on is that the child told him he
24 was abused -- told him that she was abused.
25 But you think that would -- that would all be

1 inadmissible, even under that circumstance?

2 MR. KEHNE: Yes, I would. I -- again, it may be

3 that that would be admissible under the hearsay rule.

4 That doesn't mean it would be admissible under the

5 confrontation clause. I submit that it would not.

6 QUESTION: But the issue, I suppose, is which is

7 the witness that the defendant has the right to confront,

8 the doctor or the child?

9 MR. KEHNE: Right. And I think it ought to be

10 the one who says you're guilty. Namely, the child.

11 QUESTION: Well, they're both saying he's

12 guilty.

13 MR. KEHNE: Well, that's true.

14 QUESTION: The doctor says it, too.

15 MR. KEHNE: That's true. But it's the child who

16 made the hearsay statement. So we should -- yes. And for

17 that reason we should have a right to confront them both.

18 QUESTION: Yes.

19 May I ask you another question now that I've got

20 you interrupted? Did you try this case?

21 MR. KEHNE: No, sir, I did not.

22 QUESTION: What sentence did the defendant get?

23 MR. KEHNE: 20 years on each count.

24 QUESTION: On each. And were they concurrent

25 sentences?

1 MR. KEHNE: Yes, sir.

2 QUESTION: What interest does the defendant have
3 in the outcome of this appeal?

4 MR. KEHNE: She is filing a petition for
5 post-conviction relief on the other count. And she is
6 still hopeful of getting completely out of prison. The
7 other count wasn't raised on direct appeal because there
8 were issues that were not properly in the record, one of
9 the worst being that one public defender represented both
10 the defendants, and that never should have happened.

11 And she still intends to file that petition.
12 One reason we're holding off is we're waiting to see the
13 outcome of this proceeding.

14 Our suggestions of videotaping have been
15 objected to by the other side. The child advocate amici
16 have said, well, it's not practical. They've said -- and
17 I'm paraphrasing now -- that, well, these disclosures come
18 out in a variety of circumstances, few of them lend
19 themselves to videotaping.

20 And I'll agree with that. I just wonder what
21 the heck it has to do with the situation before the Court,
22 where young Kathy Wright was ripped out of her parent's
23 home because the cops and the social workers had specific
24 information from Kathy's sister that she'd been sexually
25 abused. They took her into protective custody. They had

1 sole control over her. They chose the doctor and took her
2 to that doctor solely for the purpose of investigating
3 sexual abuse.
4 While I think the child advocates are right to
5 say, we just can't expect videotaping of spontaneous
6 statements, we have no problem with that. What we're
7 concerned about is where leading questions are used and
8 the interrogator had preconceptions. And there is
9 absolutely no good reason on Earth that we can see why the
10 interrogation could not have been videotaped.
11 We would submit that use of videotape fulfills
12 some of the very values that the confrontation clause was
13 designed to secure, and does it in similar ways to cross-
14 examination.
15 QUESTION: (Inaudible). Were you in the
16 appellate proceedings before the Idaho Supreme Court?
17 MR. KEHNE: Yes, sir.
18 QUESTION: And did you make the suggestions that
19 -- of what might -- what might be required, the
20 videotaping, the --
21 MR. KEHNE: Yes, yes.
22 If there is a videotape the jury can see
23 demeanor. Of course, the Court has said again and again,
24 U.S. v. Mattox, just one of many examples, that one of the
25 purposes of the confrontation is preservation of demeanor

1 evidence. If a videotape is presented, it preserves
2 evidence of any tainting, any suggestion by the
3 interviewer. And in that respect, it serves, like cross-
4 examination, as a means for an innocent accused to protect
5 himself or herself.
6 If a memory like this has been suggested to a
7 child and repeated, cross-examination at trial is apt to
8 offer an innocent accused impotent protection, because the
9 memory has already been confabulated and entrenched in the
10 child as a memory of a real event.
11 On the other hand, the videotaping of the actual
12 interview where the suggestion occurred will offer us a
13 lot of protection, akin to that that cross-examination
14 ordinarily offers for other witnesses.
15 We aren't suggesting that all these things have
16 to be videotaped. We're only suggesting that a videotape
17 provides the state or the government an excellent means of
18 proving those indicia of reliability required by this
19 Court's opinions.
20 QUESTION: (Inaudible) insist on there being a
21 trial run before they -- with the defendant in the room?
22 MR. KEHNE: I'm not sure I understand. I'm
23 sorry.
24 QUESTION: Well, you don't think that the
25 defendant -- that -- you wouldn't say the defendant had to

1 be present at the interview?

2 MR. KEHNE: No, because it's impractical.

3 Because these interrogations usually occur before there's

4 any charge, and of course before the defendant has notice

5 of what's going on. It's an investigation. The defendant

6 doesn't have a right to counsel at that point, or at least

7 --

8 QUESTION: But you don't -- you don't -- you

9 wouldn't insist -- you wouldn't insist that after that,

10 that you actually have the -- a pretrial confrontation

11 between the victim and the defendant to see if the

12 defendant -- to see if the victim really is unavailable to

13 testify?

14 MR. KEHNE: If that's what we're relying on. In

15 the case of Kathy it wasn't. She just can't answer

16 questions. If the state is relying on the fact that the

17 child is too afraid to talk in front of the defendant,

18 yes, I would insist on, well, let's actually see it.

19 Prove it. Demonstrate it. If -- I hope that answers your

20 question.

21 If there are no other questions, I'm about out

22 of time, and I have nothing else.

23 Thank you.

24 QUESTION: Thank you, Mr. Kehne.

25 General Jones, you have two minutes remaining.

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1 REBUTTAL ARGUMENT OF JAMES T. JONES
2 ON BEHALF OF THE PETITIONER
3 MR. JONES: Thanks, Mr. Chief Justice.
4 We're not here to suggest that the Court permit
5 all hearsay statements of young children in, or that
6 unreliable statements be permitted in evidence. What
7 we're asking is that the trial court be permitted to look
8 at all of the circumstances surrounding the making of the
9 statement. And if the Court finds that there are
10 guarantees of trustworthiness, as required both by Roberts
11 and by the Idaho Rules of Evidence, that the statement go
12 in.
13 In this case, we had a young girl who was taken
14 out of the home of the defendant. The next day she was
15 examined. The doctor found vaginal injuries that occurred
16 two or three days before, at the time she was in the
17 custody of both of the defendants. At the time the doctor
18 finished his medical examination, he asked her some
19 questions.
20 When he drew a figure, she added a penis to it
21 -- a two-and-a-half-year-old girl doesn't necessarily know
22 what a penis is. She, in response to questions,
23 volunteered a statement that Daddy does this to me, but he
24 does it to my sister a lot more than me.
25 There was corroborating testimony IN -- over and

1 above those circumstances from the older girl to talk
2 about the sexual abuse visited on both of the girls. And
3 in addition to all that, in the Giles case, the Idaho
4 Supreme Court said this statement -- by a majority
5 opinion, they said this statement is reliable. And they
6 gave it their stamp of approval.
7 The only reason we're --
8 CHIEF JUSTICE REHNQUIST: Thank you, General
9 Jones.
10 The case is submitted.
11 (Whereupon, at 12:02 p.m., the case in the
12 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 89-260 - IDAHO, Petitioner V. LAURA LEE WRIGHT

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Alan Friedman

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