COMMITTEE REPORT

HOUSE

(il)

4/22/85

FURTHER:

Date: 5-1-85

The Committee on FINANCE has had HB 67

"An Act relating to hearsay evidence in prosecutions for certain sexual offenses; and amending Rules 803 and 804, Alaska Rules of Evidence, and Rule 6(r), Alaska Rules of Criminal Procedure."

under consideration and recommends:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[X] replace with CS for HB 67 (Fin) [X] same title [ ] new title

and recommends DO PASS

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[X] Zero Fiscal Note Attached 4-1-85 SMC

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

Ronald I Larson

Pat Forbes

MEMBERS HAVING
OTHER RECOMMENDATIONS:

CHAIRMAN

COMMITTEE REPORT

HOUSE

(11)

4/22/85

FURTHER:

Date: 5-1-85

The Committee on FINANCE has had HB 67

"An Act relating to hearsay evidence in prosecutions for certain sexual offenses; and amending Rules 803 and 804, Alaska Rules of Evidence, and Rule 6(r), Alaska Rules of Criminal Procedure."

under consideration and recommends:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[X] replace with CS for HB 67 (Fin) [X] same title [ ] new title

and recommends DO PASS

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[X] Zero Fiscal Note Attached 4-1-85 Same

[ ] reports it back without recommendation

[ ] referred to the ______ Committee

MEMBERS SIGNING DO PASS

Albert P. Adams
John Bergstad
[illegible]
Ronald L. Larson
Pat Pourchot
[illegible]
Glenn Rieger
[illegible]
[illegible]
Mike [illegible]

MEMBERS HAVING OTHER RECOMMENDATIONS:

Albert P. Adams
CHAIRMAN

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

No-1

REQUEST

Bill/Resolution No.: CSHB 67(HESS)

Title: Hearsay Evidence for certain minors under 12

Sponsor: Phillips

Requestor: HESS

Date of Request: April 1, 1985

FISCAL DETAIL

Agency Affected: Court System

Program Category Affected:

BRU, Program or Subprogram(s) Affected:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

It is anticipated that the number of in camera hearings will be few and should have a minor impact on the Court System

Prepared By: Max Gruenberg/Niilo Koponen Phone: 465-3759

Division: House HESS Committee Date: April 1, 1985

Approved by Commissioner: Date:

Agency:

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/34

Original sponsor: Phillips

IN THE HOUSE BY THE FINANCE COMMITTEE

CS FOR HOUSE BILL NO. 67 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the admissibility of hearsay evidence of certain statements by children before grand juries; and amending Rule 6(r), Alaska Rules of Criminal Procedure."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 12.40 is amended by adding a new section to read:

Sec. 12.40.110. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL OFFENSES. (a) In a prosecution for an offense under AS 11.41.410 - 11.41.440 or 11.41.455, hearsay evidence of a statement related to the offense, not otherwise admissible, made by a child under the age of 10 who is the victim of the offense may be admitted into evidence before the grand jury if

(1) the circumstances of the statement indicate its reliability;

(2) additional evidence is introduced to corroborate the statement; and

(3) the child testifies at the grand jury proceeding or the child will be available to testify at trial.

(b) In this section "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion.

* Sec. 2. AS 12.40.110, added by sec. 1 of this Act, has the effect of amending Rule 6(r), Alaska Rules of Criminal Procedure, by changing the circumstances under which hearsay evidence may be introduced in grand jury

proceedings for certain sexual offenses.

Amendment No. 1 for CSHB 67 (JUD)

Page 1, line 14, after "statement" add "related to the offense"

Page 1, line 16 delete "describing the conduct establishing the offense"

so lines 13-17 will read:

(a) In a prosecution for an offense under AS 11.41.410 - 11.41.440 or 11.41.455, hearsay evidence of a statement related to the offense, not otherwise admissible, made by a child under the age of 10 who is the victim of the offense may be admitted into evidence before the grand jury if

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: CS HB No. 67(W)

Title: An Act relating to..... hearsay evidence

Sponsor: HESS

Requestor:

Date of Request: 4/3/85

FISCAL DETAIL

Agency Affected: Health and Social Services

Program Category Affected: Social Services

BRU, Program or Subprogram(s) Affected: Social Services, Juvenile Custody BRU's

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL		-0-	-0-	-0-	-0-	-0-
REVENUE		-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME		-0-				
PART-TIME		-0-				
TEMPORARY		-0-				

ANALYSIS: Attach a separate page if necessary

N/A

Prepared By: Michael L. Price Phone: 465-3170

Division: Family and Youth Services Date: 4/11/85

Approved by Commissioner: John R. Bagg Date: 4-16-85 jcc

Agency: Health & Social Services

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: HB 67

Title: "...admissability of certain hearsay evidence..."

Sponsor: Phillips

Requestor: House HESS

Date of Request: 1-29-85

FISCAL DETAIL

Agency Affected: Public Safety

Program Category Affected: Administration of Justice

BRU, Program or Subprogram(s) Affected: Alaska State Troopers

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

See attachment.

Prepared By: Francis C. Allan F.C.A. Phone: 269-5601

Division: Alaska State Troopers Date: 1/23/85

Approved by Commissioner: R. J. Sundberg Date: 1-30-85

Agency: Department of Public Safety

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

HB 67
Fiscal Note Attachment
01/23/85

No additional costs are directly associated with passage of this legislation. However, it should be noted that the Governor's Requested CIP budget contains a $59,700 Sexual Assault Investigation Equipment Purchase project. This project was submitted in anticipation of passage of this type legislation.

The project involves the purchase of video taping equipment to record interviews with victims. This equipment would be located in the eleven Alaska State Troopers posts throughout the state.

5

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER - CSHB 67 (Jud)

Support

April 30, 1985

CSHB 67(Jud) - "An Act relating to the admissibility of hearsay evidence of certain statements by children before grand juries; and amending Rule 6(r), Alaska Rules of Criminal Procedure."

This Bill will allow the use of hearsay evidence from sexually abused children in grand jury proceedings. It is an attempt to shield victims from additional emotional trauma.

House Bill 67 will allow an individual trained in child abuse cases who has interviewed the victim to testify in his or her place or it will allow the submission of a video tape of the interview. Courtroom atmosphere often inhibits and intimidates the young victims - particularly one who may be discussing a sexual encounter with a parent or relative.

This legislation will not result in abuse of the grand jury system and only addresses cases of sexual abuse of minors. Although the admittance of hearsay evidence is not traditional in grand jury proceedings in Alaska, cases of this type warrant an exception to protect the victims.

Robert J. Sundberg
Commissioner

POSITION PAPER/Department of Health & Social Services

POSITION PAPER

COMMITTEE SUBSTITUTE FOR HOUSE BILL 67

For an Act entitled "an Act relating to the admissibility of hearsay evidence of certain statements by children before grand juries; and amending Rule 6(r), Alaska Rule of Criminal Procedure".

This bill would allow admission at grand jury proceedings of hearsay statements of children under 12 years of age relating to any offense.

The department supports legislation that will increase the protection of children from harm. Initially HB 67 covered hearsay exceptions relating only to sexual offenses, both at grand jury and at trial. The department supported portions of hearsay exception relating to sexual offenders at grand jury but not at trial due to the potential constitutional issues.

RECOMMENDED: Michael L. Price

Michael L. Price, Director
Division of Family
and Youth Services

DATE: April 15, 1985

APPROVED: John R. Pugh

John R. Pugh, Commissioner
Department of Health
and Social Services

DATE: 4-16-85

H+SS

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: CS HB No. 67

Title: An Act relating to..... hearsay evidence

Sponsor: HESS

Requestor:

Date of Request: 4/3/85

FISCAL DETAIL

Agency Affected: Health and Social Services

Program Category Affected: Social Services

BRU, Program or Subprogram(s) Affected: Social Services, Juvenile Custody BRU's

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
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700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL		-0-	-0-	-0-	-0-	-0-
REVENUE		-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME		-0-				
PART-TIME		-0-				
TEMPORARY		-0-				

ANALYSIS: Attach a separate page if necessary

N/A

Prepared By: Michael L. Price Phone: 465-3170

Division: Family and Youth Services Date: 4/11/85

Approved by Commissioner: John R Bagg Date: 4-16-85 jcc

Agency: Health & Social Services

Distribution (by Agency preparing fiscal note):

Legislative Finance

Legislative Sponsor

Requestor

Office of Management and Budget

Impacted Agency(ies)

7/1/84

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER - CSHB 67 (Jud)

Support

April 30, 1985

CSHB 67(Jud) - "An Act relating to the admissibility of hearsay evidence of certain statements by children before grand juries; and amending Rule 6(r), Alaska Rules of Criminal Procedure."

This Bill will allow the use of hearsay evidence from sexually abused children in grand jury proceedings. It is an attempt to shield victims from additional emotional trauma.

House Bill 67 will allow an individual trained in child abuse cases who has interviewed the victim to testify in his or her place or it will allow the submission of a video tape of the interview. Courtroom atmosphere often inhibits and intimidates the young victims - particularly one who may be discussing a sexual encounter with a parent or relative.

This legislation will not result in abuse of the grand jury system and only addresses cases of sexual abuse of minors. Although the admittance of hearsay evidence is not traditional in grand jury proceedings in Alaska, cases of this type warrant an exception to protect the victims.

Robert J. Sundberg
Commissioner

Alaska State Legislature

IN SESSION:
POUCH V
JUNEAU, ALASKA 99811
(907) 465-4949

BOX 142
EAGLE RIVER, ALASKA
99577

Representative Randy Phillips

HOUSE DISTRICT 15

MEMORANDUM

TO: The Honorable Al Adams
Chairman, House Finance Committee

FROM: Representative Randy Phillips R.E.P.

DATE: April 26, 1985

RE: CSHB 67 (Judiciary)

Your office has advised me that the captioned bill will be before the House Finance Committee next Wednesday and that further information regarding the bill was needed.

For your information, I am enclosing the following:

a. February 6, 1985 letter from the Alaska Women's Commission;

b. Position paper, Department of Health & Social Services;

c. Fiscal note/information, from Department of Public Safety;

d. Copy of Washington case, State v. Slider, 38 Wn. 689;

e. Copy of Washington case, State v. Ryan, 103 Wn.2d 165;

f. Copy of Van Hatten v. State, 666 P.2d 1047 (Alaska App. 1983);

g. Copy of 1984 memorandum from Legislative Counsel;

h. Copy of article from Anchorage News, January 26, 1985, "Woman asks abuse victims not be forced to testify"; and

i. Copy of 3/18/85 letter from the Alaska Foster Parents Association.

If you have further questions, please do not hesitate to contact me. I appreciate your cooperation in scheduling this bill for hearing.

RP:jss
Enclosures

BILL SHEFFIELD
GOVERNOR

PHONE
(907) 561-4227

STATE OF ALASKA
OFFICE OF THE GOVERNOR

ALASKA WOMEN'S COMMISSION
3601 C STREET - SUITE 742
ANCHORAGE, ALASKA 99503

February 6, 1985

Representative Randy Phillips
Pouch V
Juneau, Alaska 99811

Dear Representative Phillips:

The Alaska Women's Commission would like to thank you for sponsoring House Bill 67, "An Act relating to hearsay evidence in prosecutions for certain sexual offenses; and amending Rules 803 and 804, Alaska Rules of Evidence, and Rule 6(r), Alaska Rules of Criminal Procedure."

Often in cases of child sexual assault, the very young victim will disclose the incident to a trusted adult. In addition, many cases of child sexual assault are not prosecuted because the child is determined to be too young. The Commission believes House Bill 67 would aid in the successful prosecution of child sexual assault offenders. We appreciate your efforts at addressing this issue.

If we can provide you with additional information, please do not hesitate to contact us.

Sincerely,

Kathy Marshall

Kathy Marshall
Executive Director

la

Fayette Urban Cy. Gov't, 560 S.W.2d 10 (Ky. 1977); *Salorio v. Glaser*, 93 N.J. 447, 461 A.2d 1100 (1983); *Soo Line R.R. v. State*, 286 N.W.2d 459 (N.D. 1979); *Perkins v. County of Albemarle*, 214 Va. 416, 200 S.E.2d 566 (1973); *Gottlieb v. Milwaukee*, 33 Wis. 2d 408, 147 N.E.2d 633 (1967).

These state decisions primarily rely on the great financial and administrative hardship that would be entailed if retroactive effect were allowed, and the taxpayers' or tax authorities' justifiable reliance on a statute which is presumptively constitutional.

To the objection that an unconstitutional statute is void from its inception, the New Jersey Supreme Court noted the importance of recognizing "that we are acting within the framework of appropriate equitable relief with respect to an unconstitutional taxation statute . . ." *Salorio*, at 463. In fashioning an equitable remedy, reliance interest weighs heavily, and the court should seek a blend of what is necessary, fair and workable. *Salorio*, at 464. *See also Lemon*, at 200-03.

Retailers within the border counties and the Department of Revenue have relied on the provisions of RCW 82.04-.2902(1) and (2) since its effective date, March 1, 1983. The liability for the payment of a retail sales tax is upon the buyer, with the duty to collect and remit to the Department of Revenue upon the seller. RCW 82.08.050; *Murray v. State*, 62 Wn.2d 619, 623, 384 P.2d 337 (1963); *Kaeser v. Everett*, 47 Wn.2d 666, 667, 289 P.2d 343 (1955). It would be practically impossible for the border county retailers to collect the tax on transactions occurring prior to this opinion.

Retroactive application of the present decision would impose a substantial hardship on the retailers in the border counties. We will not impose such a burden upon the retailers that cannot legally be passed on to the buyers.

On the basis of the circumstances and equities of this case, the foregoing considerations and authorities persuade us of the appropriateness of prospective effect to our holding that RCW 82.04.2902(1) and (2) are unconstitutional.

Conclusion

We hold that RCW 82.04.2902(1) and (2) are unconstitutional. The statewide retail sales tax rate is 6.5 percent, and shall be uniformly applied and collected in all counties of the state prospectively commencing on January 1, 1985.

Williams, C.J., Rosellini, Utter, Brachtenbach, Dolliver, Dimmick, and Pearson, JJ., and Cunningham, J. Pro Tem., concur.

After modification, further reconsideration denied December 13, 1984.

[No. 50216-1. En Banc. November 26, 1984.]

The State of Washington, *Respondent*, v. John T. Ryan, *Appellant*.

[1] **Criminal Law — Evidence — Hearsay — Right of Confrontation — Test.** The admission of an out-of-court statement incriminating a defendant does not violate his right to confront an adverse witness if the declarant is shown to be legally unavailable to testify in court and the statement is shown to be trustworthy.

[2] **Criminal Law — Evidence — Hearsay — Unavailability of Witness — What Constitutes.** For purposes of determining the availability of a witness for cross examination regarding an out-of-court statement, a witness is not unavailable unless the proponent of the witness has made a good faith effort to obtain or excuse the witness' presence at trial. Unavailability may arise from physical absence or from refusal to testify, but incompetency does not necessarily establish unavailability.

[3] **Juveniles — Witnesses — Competency — Children — Determination.** Children under the age of 10 are competent to testify as witnesses unless the court has examined them and determined that they are incapable of perceiving facts or unable to truthfully relate facts under examination.

[4] **Criminal Law — Evidence — Hearsay — Reliability —**

Competency. Generally, a witness must have been competent at the time of making an out-of-court statement before the statement can be admitted.

[5] **Sexual Offenses — Statement of Child Victim — Reliability — Nature of Crime.** The reliability of an out-of-court statement is no less necessary because it is made by a child who is a sexual offense victim.

[6] **Sexual Offenses — Statement of Child Victim — Reliability — Corroboration.** RCW 9A.44.120, which provides for admission of an out-of-court statement by a child who is a sexual offense victim, requires that the trial court make separate and independent determinations as to reliability and corroboration of the statement.

[7] **Criminal Law — Confessions — Corroboration — Necessity.** A conviction cannot be based on a confession unless at least a prima facie case is established by evidence independent of the confession.

[8] **Statutes — Construction — Judicial Procedure — Rules on Same Subject.** Procedural statutes are valid unless in direct conflict with court rules.

[9] **Sexual Offenses — Statement of Child Victim — Subject and Title of Act — Sufficiency.** The title of Laws of 1982, ch. 129 provides sufficient notice and evidences a rational unity with the subject of the act, *viz.*, the admissibility of the statement of a child victim of a sexual offense.

DOLLIVER, DIMMICK, UTTER, and DORE, JJ., concur by separate opinions; ANDERSEN, J., did not participate in the disposition of this case.

Nature of Action: Prosecution for committing indecent liberties on two children under the age of 10.

Superior Court: The Superior Court for Okanogan County, No. 7125, James R. Thomas, J., on November 24, 1982, entered a judgment on a verdict of guilty after admitting evidence of out-of-court statements by the victims and finding that the victims were unavailable as witnesses.

Supreme Court: Holding that the victims were not shown to be unavailable, that their statements were not shown to be reliable, and that the conviction could not be sustained on the basis of the defendant's confession alone, the court *reverses* the conviction and *remands* for further proceedings.

John G. Burchard, Jr., for appellant.

Douglas S. Boole, Prosecuting Attorney, for respondent.

James E. Lobsenz of *Washington Appellate Defender Association*, amicus curiae for appellant.

WILLIAMS, C.J.—Hearsay statements of child victims of sexual abuse are conditionally admissible in criminal trials under RCW 9A.44.120. Defendant (appellant) John Ryan was convicted in Okanogan County of two counts of indecent liberties in a trial where hearsay statements of the two alleged victims were admitted under this statutory exception to the hearsay rule. Division Three of the Court of Appeals certified to this court the question whether RCW 9A.44.120 violates the confrontation clauses of the state and federal constitutions. The admission of the statements did not comply with the statute's requirements, and resulted in a denial of defendant's right of confrontation under the sixth amendment to the United States Constitution and Const. art. 1, § 22 (amend. 10). We, therefore, reverse the convictions.

Count 1 charged that the defendant committed indecent liberties upon 4½-year-old boy "M" on or about June 25, 1982, and count 2 charged the same conduct with a 5-year-old boy "J", on or about June 1, 1982. At trial, in September 1982, neither child testified. Both parties stipulated that the boys were incompetent. The basis for the defendant's stipulation is not apparent, but the State argued that the boys were "statutorily incompetent". Report of Proceedings, vol. II, at 17-18. The State further argued that the children's incompetency rendered them unavailable.[1]

Out-of-court statements made by the two children were

[1]Defendant disputed the issue of unavailability in his trial, but concedes it in his appeal. As amicus correctly points out, and as this opinion confirms, this concession is erroneous.

offered through the testimony of M's mother and aunt, and J's mother. This hearsay testimony, the State argued, was permitted by RCW 9A.44.120, which provides in relevant part:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the state of Washington 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 indicia of reliability; and
> (2) The child either:
> (a) Testifies at the proceedings; or
> (b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

The trial court accepted the State's argument that the children were statutorily incompetent, and also unavailable. In satisfaction of the corroboration requirement, the trial court found that the defendant's knowing and voluntary confession established corroboration. The record reveals that the defendant admitted the charged conduct regarding M to M's mother, and later to a police officer. The record does not disclose an admission of the charged misconduct in regard to J.

The following circumstances surrounded the making of the children's statements: On June 25, 1982, M's aunt, while babysitting, questioned M about the source of some candy he brought to her house. M initially indicated that a person across the street had given it to him, but later said that "John would give it to him" if he permitted certain sexual contact. Report of Proceedings, vol. II, at 10. M's aunt reported these statements to M's mother who again questioned M. M told his mother the same story. M's mother also testified that she had forbidden M to accept candy.

M's mother reported what she had been told to J's mother. On June 27, 1982, J's mother questioned her son, and he told his mother substantially the same thing M had told his mother. J's mother testified that on June 24, she had questioned J about candy in his possession, and he responded that it had been given to him for his birthday. Neither mother was able to state with certainty when the charged acts had occurred, as neither child had a solid conception of time.

Defendant challenges his conviction on several theories: (1) He contends that RCW 9A.44.120 (Laws of 1982, ch. 129, § 2, p. 559, effective June 10, 1982) denies him the right of confrontation under the sixth amendment to the United States Constitution, and the right to face-to-face confrontation guaranteed under Const. art. 1, § 22 (amend. 10). (2) He argues that his confession is inadmissible without the State's first establishing the corpus delicti. (3) He challenges the legislative authority to enact evidentiary rules as violative of separation of powers doctrine. (4) Defendant contends that the passage of the act violated Const. art. 2, § 19 notice provisions. Finally, (5) he argues that the effective date of the act, June 10, 1982, being subsequent to June 1, 1982, the date of the alleged count 2 incident, renders the act ex post facto as to that count.

I

Confrontation

The Sixth Amendment's confrontation clause provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." Const. art. 1, § 22 (amend. 10) provides: "In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . ." Neither clause has been read literally, for to do so would result in eliminating all exceptions to the hearsay rule. *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980). The confrontation clause is more than a codification of common law hearsay rules, and may be violated even though hearsay

statements are admitted under recognized exceptions. *California v. Green*, 399 U.S. 149, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970). The right to confrontation excludes some hearsay, and "countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *Roberts*, at 65, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107, 78 L. Ed. 674, 54 S. Ct. 330, 90 A.L.R. 575 (1934).

[1] The general approach employed by the Supreme Court to test hearsay admissions against confrontation rights requires: (1) Either the production of the out-of-court declarant or a demonstration of unavailability, and (2) assurances of reliability of the statement. *Roberts*, at 66. "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." (Footnote omitted.) *Roberts*, at 66.

RCW 9A.44.120 is not within the category of firmly rooted hearsay exceptions, and by its terms is to be used when the child's out-of-court declaration is "not otherwise admissible by statute or court rule".

The requirements for admission under RCW 9A.44.120 comport with the general approach utilized to test hearsay against confrontation guaranties. The statute requires a preliminary determination "that the time, content, and circumstances of the statement provide sufficient indicia of reliability . . .". It requires the child to testify at the proceedings, or to be unavailable, and does not alter the necessary showing of unavailability. Neither unavailability nor reliability were shown prior to admitting the hearsay testimony.

A

UNAVAILABILITY

The Sixth Amendment requires a demonstration of unavailability when the declarant witness is not produced. *Roberts*, at 65. A witness may not be deemed unavailable

unless the prosecution has made a good faith effort to obtain the witness' presence at trial. *Barber v. Page*, 390 U.S. 719, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968). When a confrontable witness is not produced unavailability must be certain. *State v. Smith*, 85 Wn.2d 840, 540 P.2d 424 (1975).

The State accounted for the children's absence by saying they were not subpoenaed. Report of Proceedings, vol. II, at 17. Apparently, they were not subpoenaed because the prosecutor believed they were "statutorily incompetent", and hence unavailable. Report of Proceedings, vol. II, at 18. The State's equation of unavailability and incompetency is faulty in several respects. First, incompetency and unavailability serve separate purposes, and mean different things. Second, as the discussion on reliability below indicates, a resolution that a witness is incompetent precludes most hearsay statements of that witness whether available or not. Third, the State has misconstrued the statutory definition of incompetency.

[2] Unavailability means that the proponent is not presently able to obtain a confrontable witness' testimony. It is usually based on the physical absence of the witness, but may also arise when the witness has asserted a privilege, refuses to testify, or claims a lack of memory. *See* ER 804(a); 5A K. Tegland, Wash. Prac., *Evidence* § 393 (2d ed. 1982). Unavailability in the constitutional sense additionally requires the prosecutor to make a good faith effort to obtain the witness' presence at trial. *Roberts*, at 74.

Competency, on the other hand, means that the witness "has sufficient mental capacity to understand the nature and obligation of an oath and possessed of sufficient mind and memory to observe, recollect, and narrate the things he has seen or heard." *State v. Moorison*, 43 Wn.2d 23, 28-29, 259 P.2d 1105 (1953). The statutory categories of persons who are incompetent to testify illustrate its meaning:

> (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
>
> (2) Children under ten years of age, who appear incapable of receiving just impressions of the facts, respecting

which they are examined, or of relating them truly.
RCW 5.60.050.

[3] It is clear that children under 10 are not statutorily incompetent. Only those children who are incapable of perceiving or truthfully relating the facts of the case are incompetent.[2] Competency is a matter to be determined by the trial court within the framework of RCW 5.60.050. *State v. Froehlich*, 96 Wn.2d 301, 635 P.2d 127 (1981). Guidelines for the trial court in reaching its determination presume that the court has examined the child, observed his manner, intelligence, and memory. *Laudermilk v. Carpenter*, 78 Wn.2d 92, 457 P.2d 1004, 469 P.2d 547 (1969); *State v. Allen*, 70 Wn.2d 690, 424 P.2d 1021 (1967).

Stipulated incompetency based on an erroneous understanding of statutory incompetency is too uncertain a basis to find unavailability. To excuse production of a witness whose testimony is offered against a criminal defendant through hearsay repetition, a more certain showing is required. *Roberts* recognized that the good faith effort incumbent on the State to produce the witness does not require a futile act. "But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation." *Roberts*, at 74. The unexplained failure of the State to produce the children exemplifies the fears of one commentator that RCW 9A.44.120 may serve as a disincentive to call the child witness. Comment, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception*, 7 U. Puget Sound L. Rev. 387, 398 (1984). Because the State made no apparent effort to produce the children or to excuse their production, the first of the *Roberts* requirements, production or demonstrated unavailability, is not met.

[2]CrR 6.12(c) specifies no age at which children's competency is suspect, providing: "The following persons are incompetent to testify: . . . (2) children who do not have the capacity of receiving just impressions of the facts about which they are examined or who do not have the capacity of relating them truly." Thus the material measure of competency is not age.

B

RELIABILITY

[4] One of the reasons for finding a child incompetent is inability to receive just impressions of the facts concerning the event. RCW 5.60.050(2). If the trial court had examined the children and found them incompetent on this basis, their testimony would be too unreliable for admission.

The declarant's competency is a precondition to admission of his hearsay statements as are other testimonial qualifications.

> The hearsay rule is merely an additional test or safeguard to be applied to testimonial evidence otherwise admissible. The admission of hearsay statements, by way of exception to the rule, therefore presupposes that the assertor possessed the *qualifications of a witness* . . . in regard to knowledge and the like.

(Footnote omitted.) 5 J. Wigmore, *Evidence* § 1424, at 255 (rev. 1974).

[5] If the declarant was not competent at the time of making the statements, the statements may not be introduced through hearsay repetition. 5 J. Wigmore, *supra* at 304. The exceptions to this general rule are res gestae utterances or fresh complaints.[3] *State v. Lounsbery*, 74 Wn.2d 659, 661, 445 P.2d 1017 (1968); *State v. Murley*, 35 Wn.2d 233, 236-37, 212 P.2d 801 (1949); *State v. Beaudin*, 76 Wash. 306, 307, 136 P. 137 (1913). *See also* 4 J. Weinstein & M. Berger, *Evidence* ¶ 804(a)[01], at 804-40 (1981). Exceptions to the general rule are based on the historically established trustworthiness of the statement.

> A review of the subject indicates that cases involving an indecent assault upon a child seem to receive rather special treatment. The courts quite frequently have admitted hearsay statements of a child tending to incriminate the defendant. Usually such statements are

[3]The term "res gestae" has fallen into disuse in favor of the more precise evidentiary rules of present sense impression, excited utterance, then existing mental, emotional, or physical condition, and statements for purposes of medical diagnosis or treatment. *See* ER 803(a)(1), (2), (3), (4); E. Cleary, *McCormick on Evidence* § 288 (2d ed. 1972).

> justified on the basis of *res gestae*, or because they tend to show the condition of the child at the time of the statement. However, some cases leave the impression that the testimony was allowed purely because of abhorrence of the crime involved. The better-reasoned cases seem to require that, with the exception of *res gestae utterances*, all hearsay statements introduced under any exception to the rule should be made by someone competent as a witness at the time the statement was made.

(Footnotes omitted.) Stafford, *The Child as a Witness*, 37 Wash. L. Rev. 303, at 307 (1962). The trial court did not determine whether the children were competent when they made the statements. If they were not, their statements must be excluded as being unreliable.

[6] Adequate indicia of reliability must be found in reference to circumstances surrounding the making of the out-of-court statement, and not from subsequent corroboration of the criminal act. "The circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight." *Huff v. White Motor Corp.*, 609 F.2d 286, 292 (7th Cir. 1979). The trial court stated that it found reliability in the time, content, and circumstances of the statement, but in so finding indicated only one factor—the defendant's confessions. The trial court was apparently persuaded that the statements of the children must be reliable, if, in hindsight they prove to be true. RCW 9A.44.120 demands more.

The statute requires separate determinations of reliability *and* corroboration when the child is unavailable. The word "and" is conjunctive. *State v. Carr*, 97 Wn.2d 436, 436, 645 P.2d 1098 (1982). The Legislature would have used the word "or" had it intended the disjunctive. *Childers v. Childers*, 89 Wn.2d 592, 575 P.2d 201 (1978); *State v. Dixon*, 78 Wn.2d 796, 479 P.2d 931 (1971). Although defendant's confession was offered as corroboration, wholly absent are the requisite circumstantial guaranties of reliability.

The Supreme Court allowed that hearsay exceptions bear adequate indicia of reliability when "marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *Ohio v. Roberts*, 448 U.S. 56, 65, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107, 78 L. Ed. 674, 54 S. Ct. 330, 90 A.L.R. 575 (1934)). The rationale underlying hearsay exceptions is well expressed by Wigmore:

> The purpose and reason of the hearsay rule is the key to the exceptions to it.
>
> The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.

5 J. Wigmore, *Evidence* § 1420, at 251 (rev. 1974). Any statement offered as an exception to the hearsay rule must be made under circumstances comparable in their inherent trustworthiness to serve as a substitute for cross examination.

Where cross examination would be superfluous, the right of confrontation is not offended. Where cross examination would serve to expose untrustworthiness or inaccuracy, denial of confrontation "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." . . .'" (Citation omitted.) *Davis v. Alaska*, 415 U.S. 308, 318, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974) (citing *Smith v. Illinois*, 390 U.S. 129, 131, 19 L. Ed. 2d 956, 88 S. Ct. 748 (1968)).

Recently this court adopted a set of factors applicable to determining the reliability of out-of-court declarations. *State v. Parris*, 98 Wn.2d 140, 654 P.2d 77 (1982). Those factors are: "(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more

than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness." *Parris*, at 146. We added that these factors were not exclusive and should be considered with the additional factors in *Dutton v. Evans*, 400 U.S. 74, 88-89, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970): (1) the statement contains no express assertion about past fact, (2) cross examination could not show the declarant's lack of knowledge, (3) the possibility of the declarant's faulty recollection is remote, and (4) the circumstances surrounding the statement (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

Applying the *Parris* factors to the circumstances of the present case, the statements cannot be deemed sufficiently trustworthy to deprive the defendant of his right of confrontation. First, there was a motive to lie, and each child initially told a different version of the source of the candy they were not supposed to have. Second, all the record reveals about the character of the children is the parties' stipulation that the children were incompetent witnesses due to their tender years. Third, the initial statements of the children were made to one person, although subsequent repetitions were heard by others. Fourth, the statements were not made spontaneously, but in response to questioning. Fifth, as regards timing, both mothers had been told of the strong likelihood that the defendant had committed indecent liberties upon their children *before* the mothers questioned their children. They were arguably predisposed to confirm what they had been told. Their relationship to their children is understandably of a character which makes their objectivity questionable.

The reliability of the statements does not fare better under the *Dutton* factors. The statements were undeniably assertions of past facts. While the defendant admitted to misconduct with M, he denied any wrongdoing as to J. Cross examination was appropriate regarding this dispute.

There is no contention that the statements were either spontaneous or against interest.

The State argues that the factors used to test reliability in *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979) are more appropriate because that case involved the out-of-court statements of a young child victim of sexual abuse. *Nick*, however, is a very different case from the present one. There, the statements fell into two well recognized hearsay exceptions—excited utterances and statements made to a physician for purpose of diagnosis. Fed. R. Evid. 803(a)(2) and (4). *See* ER 803(a)(2) and (4). In addition, the child's statement in *Nick* was made in direct response to the mother's observation of the child's soiled clothing, upset condition, and apparent pain and distress shortly after the mother discovered him asleep in a locked room with the defendant, and with his pants unzipped. *Nick*, at 1204. In the present case, an indeterminate amount of time elapsed between the alleged act and the child's reporting of it, and there were apparently no observable indications of assault, pain, or distress.

The most important distinction between *Nick* and the case before us is the hearsay statements offered in *Nick* fell into existing hearsay exceptions grounded in reliability in the circumstances of their making. RCW 9A.44.120 requires the trial court to examine the circumstances of the statement for indicia of reliability. The measure of reliability is that which is equivalent to other firmly rooted hearsay exceptions. The time, content, and circumstances of the statements offered against Ryan do not bear adequate indicia of reliability sufficient to make cross examination and face-to-face confrontation superfluous. The trial court erred in permitting the introduction of the children's statements through hearsay repetition.

II

Corpus Delicti

Defendant is correct in contending that a conviction cannot be sustained on a confession alone.

[7] Some corroborative evidence establishing the corpus delicti is necessary to sustain a conviction based on a confession. *State v. Bean*, 89 Wn.2d 467, 474, 572 P.2d 1102 (1978). The independent evidence need only establish a prima facie case that a crime has been committed. *State v. Goranson*, 67 Wn.2d 456, 460, 408 P.2d 7 (1965). The corpus delicti need not be proven beyond a reasonable doubt, or even a preponderance of the evidence, but a confession alone does not establish it. *State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951). Without the hearsay statements of the children, the State has not established the corpus delicti, and we must reverse the conviction.

III

Separation of Powers

Defendant argues that the enactment of RCW 9A.44.120, a hearsay exception, violates the separation of powers doctrine in that the statute is a legislative invasion of the judicial province. We disagree.

[8] Where a rule of court is inconsistent with a procedural statute, the court's rulemaking power is supreme. *Petrarca v. Halligan*, 83 Wn.2d 773, 522 P.2d 827 (1974). Nonetheless, apparent conflicts between a court rule and a statutory provision should be harmonized, and both given effect if possible. *Emwright v. King Cy.*, 96 Wn.2d 538, 543, 637 P.2d 656 (1981).

Legislative enactment of hearsay exceptions is specifically contemplated by the Rules of Evidence. ER 802 states: "Hearsay is not admissible except as provided by these rules, by other court rules, or *by statute*." (Italics ours.) Nevertheless, statutory enactments of evidentiary rules are subject to judicial review, this court being the final arbiter of evidentiary rules.

Defendant suggests that the statute is in conflict with court rules regarding competency. *See* CrR 6.12. The statute does not provide that an incompetent's statement is admissible, and as this opinion makes clear, such a statement is inadmissible absent particularized guaranties of trustworthiness.

IV

Sufficiency of Title of Act

[9] Defendant contends that the title of the act was insufficient to give notice of its contents as required by Const. art. 2, § 19, which provides: "No bill shall embrace more than one subject, and that shall be expressed in the title." The title of Laws of 1982, ch. 129, begins "Child Abuse—Admissibility of Child's Statement".

The test of the title's sufficiency is whether it provides sufficient notice to lead an interested person to inquire into the bill's contents. *State v. Lounsbery*, 74 Wn.2d 659, 664–65, 445 P.2d 1017 (1968). The title of the present act was clearly sufficient to put the public on inquiry, and evidences a "rational unity" between the general subject and its contents. *See Barde v. State*, 90 Wn.2d 470, 584 P.2d 390 (1978).

V

Ex Post Facto Application

Defendant argues that the application of RCW 9A.44.120 was ex post facto as to count 2. We need not decide whether the application of RCW 9A.44.120 would be ex post facto as the State attempted to prove the charged conduct occurred after the effective date of the act. In any event, an application of this statute would not be ex post facto, as it neither increases punishment, changes the nature of the crime charged, nor alters the necessary degree of proof required. *State v. Clevenger*, 69 Wn.2d 136, 142, 417 P.2d 626 (1966).

Conclusion

We reverse and remand for further proceedings. RCW 9A.44.120 facially conforms to the requirements of the constitutional right to confrontation. Nonetheless, the State did not meet the statutory and constitutional burdens of showing unavailability, and reliability preliminary to introduction of the hearsay statements. As a conviction cannot

be sustained on an uncorroborated confession alone, defendant's conviction must be reversed. The enactment of RCW 9A.44.120 neither violates the separation of powers doctrine, constitutional notice requirements, nor ex post facto restrictions.

ROSELLINI, BRACHTENBACH, and PEARSON, JJ., and CUNNINGHAM, J. Pro Tem., concur.

DOLLIVER, J. (concurring)—I concur with the result reached by the majority. This concurrence is based solely on the fact the record does not disclose that in fact the prosecution made a "good faith effort" to obtain M's presence at the trial. *See Barber v. Page*, 390 U.S. 719, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968). While I agree the parties and the court apparently misunderstood RCW 5.60.050 (persons incompetent to testify), it is appropriate to point out that both parties, at trial, *stipulated* as to the incompetence and thus the unavailability of M at the trial. Furthermore, on appeal defendant *conceded* "the State has met the constitutional unavailability standard required under *Barber v. Page*" (Brief of Appellant, at 12), *i.e.*, the good faith standard. Given these stipulations and admissions by defendant, it is a long reach for the court to find M was not unavailable as a witness. Nonetheless, since the record is devoid of any underlying justification for the stipulation and concession by counsel on behalf of the defendant, I am constrained to join the majority in its reversal of defendant's conviction on both counts.

There are two other items which I believe need comment: (1) Although in this case the parties and the court misconstrued the statute on competency, RCW 5.60.050, it is my belief that if it is shown the meaning of the statute is understood and a finding of incompetency is made by the court, this then may be considered the legal equivalent of unavailability. *See, e.g., Lancaster v. People*, 200 Colo. 448, 615 P.2d 720 (1980). *See* Joint Hearings on SB 4461 before the Washington State Senate Judiciary Comm. & Washington State House Ethics, Law & Justice Comm., 47th Leg., January 28, 1982. *See also* ER 804.

(2) I disagree with the majority's finding that the statements of M did not contain sufficient indicia of reliability. Since the matter is to be reversed, no purpose would be gained by detailing the sordid record in this case. I believe the statements of M, however, had a ring of verity and that the trial court properly exercised its discretion in so finding. *See United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979); Comment, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 Colum. L. Rev. 1745 (1983); Comment, *Sexual Abuse of Children—Washington's New Hearsay Exception*, 58 Wash. L. Rev. 813 (1983). *Compare* RCW 9A.44.120(1) *with* ER 803 and ER 804.

UTTER, DORE, and DIMMICK, JJ., concur with DOLLIVER, J.

[En Banc. December 6, 1984.]

DIMMICK, J. (concurring)—I concur with the majority. Reversal is appropriate under the circumstances of this case, in which the trial court made a legal error as to the competence and availability of child witnesses. Justice Dolliver's concurring opinion touches on issues that concern me, but does not reach all of them. While I agree with the majority's interpretation of the statute to conform with the federal and state constitutions, I would reverse solely on the basis of misinterpretation of the law on competency. In addition, I write to emphasize the distinction between the present and past competence of a child witness.

The statute in conformity with the confrontation clause dictates that a witness testify at trial unless unavailable. RCW 9A.44.120. A witness is unavailable only when the prosecutor has made a good faith effort to secure his presence. *Barber v. Page*, 390 U.S. 719, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968). *See also State v. Smith*, 85 Wn.2d 840,

851, 540 P.2d 424 (1975) (unavailability must be certain to excuse nonproduction of a witness).

The trial court and the parties erred in determining unavailability of the child witnesses on the basis of statutory incompetence. The judge had not examined the children and determined them to be incompetent. That is, he had not found them "incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." RCW 5.60.050. Had he found them incompetent, however, the children would have been unavailable as witnesses.[4] This is not to say, however, that a determination of incompetency at the time of trial necessarily indicates that a child was incompetent at the time of making the hearsay statement.

I consider this to be the significance of the new statute RCW 9A.44.120. In effect, the trial judge faced with a child victim of sexual misconduct must make two separate determinations: First, is the child competent to take the stand as a witness? (If he is competent, then he must testify.) Second, was there sufficient indicia of reliability surrounding the child's out-of-court statement to admit it as evidence?

In this respect, I find the majority's opinion lacks clarity. It could be misconstrued as implying that present incompetence presumes incompetence or unreliability at the time the statement was made. But one does not necessarily follow from the other. Young children present special problems as witnesses because of their short memories and possible traumatic reaction as victims. The statute has been written to recognize the possible validity of a child's earlier statements (not unlike the hearsay exceptions allowed for excited utterances or present sense impressions).

Reliability may be indicated by the spontaneity of the out-of-court statement, a recitation of acts generally unknown to children, or other circumstances surrounding the statement. A finding of incompetence at time of trial would not invalidate an out-of-court statement by a child which had the mark of reliability at the time it was made.

The accused is protected by the law's requirements that the hearsay statement be examined in a special hearing to determine its reliability. Additionally, the accused will have the opportunity to challenge the circumstances in which the statement was made, the possible motives of the recounter of the statement, and, finally, to confront any child witness determined to be competent to testify.

I would reverse on the basis of the faulty legal premise of incompetency leading to a faulty conclusion of unavailability. I form no conclusion as to the evidence of the children's reliability on retrial.

[4]On this issue, I agree with Justice Dolliver's interpretation of ER 804.

[No. 50105-0. En Banc. December 6, 1984.]

WALTHEW, WARNER, KEEFE, ARRON, COSTELLO AND THOMPSON, *Respondent*, v. THE DEPARTMENT OF REVENUE, *Appellant*.

[1] **Statutes — Construction — Administrative Construction — Effect.** A construction of a statute by the agency charged with enforcing it is not binding on the courts.

[2] **Attorney and Client — Taxation — Business and Occupation Tax — Reimbursements — Expenses of Litigation.** Under RCW 82.04.080 and .090, which define "gross income of the business" and "value proceeding or accruing" for purposes of the business and occupation tax, reimbursements by clients for advances for expenses of litigation specifically limited by CPR DR 5-103(B) are not a part of the attorney's gross income for purposes of computing the business and occupation tax. Administrative regulations implementing the statutes are construed to exclude reimbursement for such litigation expenses when incurred by the attorney acting solely as an agent for the client and passed through directly to the client without additional charge.

DORE, J., concurs by separate opinion.

Mr. Harris has not demonstrated that the federal government did not consent to his transfer to the state for the purposes of prosecution on the rape charge. In addition, prior to the date of the judgment and sentence in this case, the federal government had paroled Mr. Harris. He has failed to demonstrate prejudice on any of the issues raised with respect to the conviction.

In challenging the minimum term set by the Board of Prison Terms and Paroles, Mr. Harris contends the board improperly enhanced his minimum term by adding various periods of time after finding the offense involved violence, forethought, physical force, major or permanent injury and "additional fondle". Mr. Harris admits receiving notice of the adverse information to be considered by the board and that he refused to comment on it. Nonetheless, he contends the board relied upon "impermissible criteria" in arriving at its minimum term calculation based on those findings.

The contention is frivolous. The report of proceedings and presentence investigation indicate the victim was forced to have sex with Mr. Harris, that forethought was evident, that the victim suffered some injury and that in addition to the intercourse, Mr. Harris fondled his victim. The board was justified in calculating the minimum term as it did with respect to the offense.

[3] Next, Mr. Harris contends the board calculated his prior criminal history without the use of certified judgements and sentences or warrants of commitment. There is no such requirement. In *In re Acosta*, 37 Wn. App. 378, 680 P.2d 423 (1984), Division Two of this court ruled that the use of an FBI rap sheet to establish a minimum term (as opposed to a *mandatory* minimum term) was permissible and copies of certified judgments and sentences were unnecessary. Due process is satisfied by the prisoner's opportunity to contest the information to be used in setting the term. Mr. Harris indicates he was advised of that information, and the record confirms he received a copy but

ferred to a penal or correctional institution within such State or District.

refused to comment on the information. In addition, the FBI rap sheet supports the board's determination of Mr. Harris' criminal background.

The petitions are dismissed as frivolous.

GREEN and MCINTURFF, JJ., concur.

[No. 12888-4-I. Division One. September 24, 1984.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK A. SLIDER, *Appellant*.

[1] Evidence — Hearsay — Excited Utterances — Passage of Time — Leading Questions. Only spontaneous declarations caused by a startling event are admissible under the excited utterance exception to the hearsay rule (ER 803(a)(2)). Although neither of these factors is dispositive by itself, the combined effect of the passage of time and the leading nature of the questions asked may render the declarations untrustworthy.

[2] Sexual Offenses — Statement of Child Victim — Unavailability as Witness — What Constitutes. For purposes of admitting a child's statement regarding criminal sexual contact under RCW 9A.44.120, the child is "unavailable as a witness" if he has no recollection of the event.

[3] Constitutional Law — Ex Post Facto Law — Evidentiary Change. A new statute affecting the admissibility of evidence in a criminal case is not an ex post facto law unless it increases the punishment, changes the elements of the offense, or changes the degree of proof needed to convict.

[4] Sexual Offenses — Statement of Child Victim — Validity — Ex Post Facto Law. Admitting the statements of a child victim of a sex crime under RCW 9A.44.120 in a prosecution for a crime committed before the statute was enacted does not violate the constitutional prohibition against ex post facto laws.

[5] Evidence — Rules of Evidence — Authority of Legislature.

The Legislature has authority to enact evidentiary rules.

[6] **Constitutional Law — Right of Confrontation — Hearsay Evidence.** The admission of hearsay evidence which does not fall within a firmly rooted exception to the hearsay rule does not violate the defendant's constitutional right to confront the witnesses against him if particularized guaranties of trustworthiness, consisting of more than corroborative evidence, are present.

[7] **Sexual Offenses — Statement of Child Victim — Review — Discretion of Court.** A trial court's decision to admit the statements of a child victim of a sex crime under RCW 9A.44.120 is subject to reversal only for a manifest abuse of judicial discretion.

RINGOLD, J., concurs in the result only.

Nature of Action: Prosecution for first degree statutory rape. The 2½-year-old victim had implicated the defendant in answers to her mother's questions on the morning after the defendant had acted as her babysitter.

Superior Court: The Superior Court for King County, No. 82-1-02540-9, Charles V. Johnson, J., on February 8, 1983, entered a judgment on a verdict of guilty.

Court of Appeals: Holding that the victim's statements did not constitute excited utterances but that they were admissible under the statutory child abuse exception to the hearsay rule, the court *affirms* the judgment.

Michael Frost and *Jan P. Olson*, for appellant (appointed counsel for appeal).

Norm Maleng, Prosecuting Attorney, and *David H. Smith, Deputy*, for respondent.

SWANSON, J.—Frank A. Slider appeals his conviction of statutory rape in the first degree (RCW 9A.44.070), alleging that prejudicial hearsay evidence was erroneously admitted under the excited utterance exception (ER 803(a)(2)) and under the statutory child sexual abuse exception (RCW 9A.44.120). We affirm.

On the evening of May 19, 1979, Slider babysat Roberta's 2½-year-old child, Trina. When Roberta returned, she noticed blood on the back of Trina's underwear and promptly replaced it with clean underwear. As Roberta left the room, Trina began "screaming and hollering" and kept fighting as Roberta picked her up in an attempt to mollify her. Shortly thereafter Trina fell asleep.

While trying to get Trina ready to go to daycare on the following morning, Trina struggled to keep herself covered and, when finally uncovered, pointed to her vaginal area and said "Owee". Roberta then noticed more blood and, when cleaning Trina, noticed some swelling in that area. Roberta testified, over defense objection, that at that time she also asked Trina

> if Frank had done a no-no, and she said yes, and I said, "Did he touch you?" and she said, "Yes," and I said, "Did he use his finger?" and she said, "Yes, finger," and pointed to the vagina area.

Verbatim Report of Proceedings, at 118-19.

Dr. Turner, who examined Trina the day following the injury, testified that Trina had suffered a superficial laceration of her hymenal ring, which he believed was caused by the insertion of a sharp instrument. The trial court also admitted Slider's October 4, 1979 confession to having inserted the little finger of his right hand into Trina's vagina while babysitting her on the evening of May 19, 1979.

[1] The first issue before us is whether Trina's statements fell within the "excited utterance" exception to the hearsay rule. ER 803(a)(2) describes an excited utterance as "[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." Although this hearsay exception comports with previous Washington law, *Johnston v. Ohls*, 76 Wn.2d 398, 405, 457 P.2d 194 (1969); Comment, ER 803, it is not to be interpreted as restrictively as the common law exception. *State v. Dixon*, 37 Wn. App. 867, 683 P.2d 1144 (1984).

> [N]evertheless, ER 803(a)(2) should be interpreted in a sufficiently restrictive manner as not to lose sight of the

lack of memory of the subject matter of his statement; . . ." Trina's testimony at a pretrial hearing clearly showed that she lacked any memory of the event, although she did remember Slider having babysat her. Therefore, the court properly ruled that Trina was "unavailable" as a witness.[2]

B. Ex Post Facto

The United States Supreme Court defined ex post facto laws as those falling within the following four categories:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that changes the punishment, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence* and receives less, or different testimony, than the law required at the time of the commission of the offence, *in order to convict the offender.*

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648 (1798), quoted in *State v. Clevenger*, 69 Wn.2d 136, 141, 417 P.2d 626 (1966).

[3, 4] In *Clevenger*, the defendant claimed that the application of a statute, which was passed after the commission of the crime but before trial and which made his wife competent to testify against him, ran afoul of the fourth category above. Rejecting his argument, our court quoted from *Hopt v. Utah*, 110 U.S. 574, 590, 28 L. Ed. 262, 4 S. Ct. 202 (1884):

> Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charged.

Clevenger, at 142. *See also State v. Pope*, 73 Wn.2d 919, 924, 442 P.2d 994 (1968). Because RCW 9A.44.120 did not increase the punishment nor alter the degree of proof essential for a conviction, its application in the present case did not amount to a perversion of the prohibition against ex post facto laws.

C. Legislative Power To Enact RCW 9A.44.120

[5] Slider argues that the "separation of powers" doctrine prohibits the Legislature from promulgating evidentiary rules, and that our Supreme Court's refusal to adopt the federal "catch-all" hearsay exceptions (Fed. R. Evid. 803(24) and 804(b)(5))[3] prohibits the application of this particular statute. By adopting ER 802, however, our Supreme Court implicitly, if not expressly, recognized the Legislature's authority to promulgate evidentiary rules. "Hearsay is not admissible except as provided by these

[2]No question has been raised concerning Trina's competence to testify. Nevertheless, the fact that Trina may have been incompetent to testify at the time she made her declaration or at the time of trial is not dispositive with respect to the admission of the hearsay declarations, provided the circumstances sustain the theory upon which the exception was founded. *Beck v. Dye*, 200 Wash. 1, 14, 92 P.2d 1113, 127 A.L.R. 1022 (1939) (Jeffers, J., dissenting); *State v. Bloomstrom*, 12 Wn. App. 416, 418-19, 529 P.2d 1124 (1974).

[3]Fed. R. Evid. 803(24) and 804(b)(5) provide in part:

"Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

rules, by other court rules, *or by statute.*" (Italics ours.) ER 802. Our Supreme Court has also recognized (implicitly) the Legislature's authority to enact evidentiary rules when it analyzed the rape shield statute, RCW 9A.44.020. *See, e.g., State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983). Accordingly, we find that the Legislature has not overstepped its authority as limited by the "separation of powers" doctrine.

D. Witness Confrontation

[6] A defendant's right to confront witnesses against him (guaranteed by the sixth amendment to the United States Constitution and article 1, section 22 (amendment 10) of the Washington State Constitution) is not absolute. *Chambers v. Mississippi*, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); *State v. Carter*, 23 Wn. App. 297, 299, 596 P.2d 1354 (1979). The United States Supreme Court recently ruled on the admissibility of hearsay statements with respect to the confrontation clause:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Ohio v. Roberts, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980), quoted in *State v. Parris*, 98 Wn.2d 140, 145, 654 P.2d 77 (1982).

It cannot be disputed that the child sexual abuse exception is not a "firmly rooted" hearsay exception. Therefore, "particularized guarantees of trustworthiness" are required before the hearsay is admissible. It has been suggested that this phrase ("particularized guarantees of trustworthiness") requires a higher standard of reliability as a substitute for the traditional hearsay exceptions. Comment, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception*, 7 U. Puget Sound L. Rev. 387, 402 (1984). We are inclined to agree.

The fact that the act requires "corroborative evidence of the act" does not fulfill this higher standard. Corroboration of the sexual abuse alone "does not lend particular trustworthiness to the child's statement regarding the identity of the abuser". 7 U. Puget Sound L. Rev. at 402. Nevertheless, this corroborative evidence may certainly be considered in the trial court's balancing process.[4]

To fulfill the judicial interpretations of a defendant's confrontation rights requiring "particularized guarantees of trustworthiness," our Legislature mandated that the trial court evaluate "in a hearing conducted outside the presence of the jury . . . the time, content, and circumstances" surrounding the child's statement.

First, although the "time" between the event and declarations may be too great to fulfill the strict requirements of the excited utterance exception, the declarations were made while the child was in some pain or discomfort as a result of the incident, with no intervening events, other than sleep, to impugn her memory or ability to relate the incident accurately.

Second, although the leading nature of the questions raises some concern, we find the "content" of both the declarations and questions to be framed in language that a child of tender years would be expected to use and understand. *See United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979).

Finally, the "circumstances" surrounding the declarations do not suggest that the child's statements were the result of fabrication or influence, or the exercise of choice or judg-

[4]Several attendant circumstances to be considered in this balancing process were set forth in footnote 10 in the case of *United States v. Alvarez*, 584 F.2d 694, 702 (5th Cir. 1978). These guidelines for the determination of the trustworthiness of extrajudicial statements include: (1) whether the out-of-court declarant had any apparent motive to misrepresent the matter; (2) the general character of the speaker; (3) whether other people heard the out-of-court statement; (4) whether the statement was made spontaneously; and (5) the timing of the declaration and the relationship between the speaker and the witness. These are not exclusive, however. *State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982).

ment. Trina initiated the questioning with a spontaneous declaration, *i.e.*, "owee", and pointing to the area of pain. Also, Trina's very young age strongly militates against the likelihood of fabrication, as well as against a motivation to lie; such experiences would likely not be within her ability to invent nor would she be likely to have the capacity to lie to her mother.

[7] The determination that statements fall within the "excited utterance" exception is one within the trial court's sound discretion and will not be reversed absent a finding of manifest abuse of that discretion. *State v. Bouchard*, 31 Wn. App. 381, 639 P.2d 761 (1982). Similarly, a finding that the statements are within the statutory child sexual abuse exception should not be reversed absent a showing of manifest abuse of that discretion.

Because the trial court admitted the declarations under the strict "excited utterance" exception, it follows that it would also have admitted the declarations under the less strict statutory child sexual abuse exception. Therefore, it is appropriate to consider whether the trial court would have abused its discretion by admitting the evidence under the statutory child sexual abuse exception.

The trial court complied with the statutory requirements, holding a pretrial hearing outside the presence of the jury, finding sufficient indicia of reliability, and finding Trina to have been unavailable as a witness.

Balanced against the "particularized guarantees of trustworthiness" attending this case, particularly in light of Slider's confession, we find that the trial court would not have abused its discretion by admitting the hearsay and conclude that Slider's confrontation right was not contravened to an unconstitutional degree.

Accordingly, the judgment is affirmed.

SCHOLFIELD, J., concurs.
RINGOLD, J., concurs in the result.

[No. 12677-6-I. Division One. September 24, 1984.]

JAMES A. LEE, *Appellant*, v. JULIETTE SAUVAGE, *Respondent*.

[1] **Municipal Corporations — Landlord and Tenant — Ordinance Limiting Evictions — Conflict With State Law.** A municipality may validly legislate an additional defense to a landlord's eviction action provided the legislation does not purport to expand or contract the jurisdiction of the superior court or regulate its practice and procedure.

[2] **Landlord and Tenant — Eviction — Grounds — Landlord's Residence — Necessity.** Legislation requiring a landlord to intend to reside on property in order to evict an existing tenant is unconstitutional.

[3] **Statutes — Construction — Constitutionality.** A statute will be construed so as to be constitutional if possible.

[4] **Trial — Taking Case From Jury — Judgment n.o.v. — Sufficiency of Evidence.** A motion for judgment n.o.v. claiming insufficient evidence requires that the evidence be considered most favorably to the nonmoving party.

[5] **Evidence — Relevance — Determination.** The relevance of evidence lies within the trial court's discretion.

[6] **Costs — Depositions — In General.** The cost of a deposition is not recoverable unless it is used as substantive evidence.

[7] **Costs — Attorney Fees — Bad Faith — Determination.** Whether a party has pursued litigation in bad faith so as to provide equitable grounds for awarding attorney fees is a matter for the trial court's discretion.

Richard VAN HATTEN, Appellant,

v.

STATE of Alaska, Appellee.

No. 5877.

Court of Appeals of Alaska.

July 15, 1983.

Defendant was convicted in the Superior Court, Fourth Judicial District, Warren W. Taylor, J., of attempted sexual assault in the first degree and sentenced to serve a term of ten years imprisonment, with eight years suspended on condition that he be placed on probation for five-year period following release from prison, and he appealed. The Court of Appeals, Bryner, C.J., held that: (1) defendant's constitutional right of confrontation was not violated by use of prior testimony before grand jury when witness feigned loss of memory; (2) trooper's testimony concerning defendant's decision to remain silent until he obtained attorney was inadmissible, but testimony did not constitute plain error; and (3) trial judge was not clearly mistaken in imposing sentence of ten years with eight suspended.

Affirmed.

Serdahely, Superior Court Judge, concurred in part and dissented in part and filed opinion.

1. Witnesses ⇐386

Where witness deliberately seeks to avoid testifying by claiming loss of memory in response to specific questions, prior statements of witness relating to subject matter of question are inconsistent, within meaning of Rules of Evidence governing use of prior inconsistent statement. Rules of Evid., Rules 613, 801(d)(1)(A).

2. Criminal Law ⇐662(1)

In attempting to determine whether defendant's constitutional right of confrontation will be violated by use of prior extrajudicial statements of witness as substantive evidence of guilt when witness is evasive or suffers from loss of memory, best approach lies in case-by-case analysis, focusing on extent to which witness actually testifies and can be cross-examined, as well as on nature and reliability of his prior, out-of-court statement; relevant factual inquiry in such an analysis is whether, under the circumstances, jury will be afforded satisfactory basis for evaluating truth of out-of-court statement. Rules of Evid., Rules 613, 801(d)(1)(A); U.S.C.A. Const.Amend. 6; Const. Art. 1, § 11.

3. Criminal Law ⇐662(6)

Defendant's constitutional right of confrontation was not violated by use of prior testimony before grand jury after witness feigned loss of memory, where witness' prior statement was given under oath and was based on her personal observations, her testimony was corroborated, and, more significantly, despite her stated intention to refuse to testify, and despite her numerous lapses of memory in response to particular questions, witness offered substantial testimony concerning alleged assault and her prior grand jury statements. Rules of Evid., Rules 613, 801(d)(1)(A); U.S.C.A. Const.Amend. 6; Const. Art. 1, § 11.

4. Criminal Law ⇐407(1), 1036.1(5)

Trooper's testimony concerning defendant's decision to remain silent until he obtained attorney was inadmissible, but admission of testimony did not constitute plain error, where testimony only referred to, but did not comment on, defendant's decision to remain silent and evidence of defendant's guilt, while less than overwhelming, was certainly compelling. Rules Crim.Proc., Rule 47(b); U.S.C.A. Const. Amend. 5.

5. Criminal Law ⇐1030(1)

Party relying on plain error must go beyond mere showing that error was committed and that error involved constitutional right. Rules Crim.Proc., Rule 47(b).

6. Criminal Law ⇐1030(1)

Correct measure of obvious prejudice under plain-error rule falls closer to more

flexible standard of harmless error employed in cases where nonconstitutional error is involved: whether it can be fairly said that alleged error did not appreciably affect jury's verdict. Rules Crim.Proc., Rule 47(b).

7. Criminal Law ⇐1208.2

Trial court is assigned primary responsibility for sentencing; included in this responsibility is task of weighing and determining priorities to be given to various sentencing goals.

8. Rape ⇐64

Given defendant's conduct, given his longstanding history of similar conduct, and given his prior record of criminal misconduct, trial judge was not clearly mistaken in imposing sentence of ten years with eight suspended, on defendant convicted of attempted sexual assault in first degree. AS 11.41.410.

Geoffry B. Wildridge and Mary E. Greene, Asst. Public Defenders, Fairbanks, and Dana Fabe, Public Defender, Anchorage, for appellant.

Peter A. Michalski, Asst. Atty. Gen., Office of Sp. Prosecutions and Appeals, Anchorage, and Wilson L. Condon, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., SINGLETON, J., and SERDAHELY, Superior Court Judge.*

OPINION

BRYNER, Chief Judge.

Richard Van Hatten was convicted of attempted sexual assault in the first degree, a class B felony. AS 11.41.410. He was sentenced to serve a term of ten years' imprisonment, with eight years suspended on condition that he be placed on probation for a five-year period following release from prison. On appeal, Van Hatten raises three contentions: (1) that he was deprived of his right to confront and cross examine[1] the state's key witness; (2) that certain testimony elicited by the prosecution violated his rights to counsel[2] and to remain silent;[3] and (3) that his sentence was excessive.

FACTS

A review of the facts is necessary for consideration of Van Hatten's first argument. The indictment against Van Hatten alleged that he attempted to have non-consensual sexual intercourse with his stepdaughter, T.M.W., on October 1, 1980, at the family's home in Fairbanks. At the time, T.M.W. was seventeen years old.

T.M.W. appeared as a witness before the grand jury and testified in support of the indictment. She stated that, in the early morning hours of October 1, 1980, Van Hatten entered her room and sat down on her bed. He reached under her robe, attempting to touch her vagina. T.M.W. struggled and managed to slide off her bed onto the floor. Van Hatten left the room, but returned shortly. He picked T.M.W. off of the floor, placed her on the bed and climbed into bed on top of her. T.M.W. was terrified. She struggled with Van Hatten, bit him in the area of his shoulder, and screamed loudly. Van Hatten terminated his attack when T.M.W.'s mother entered the room.

Adrianna Van Hatten, Richard Van Hatten's wife and T.M.W.'s mother, also testified before the grand jury, corroborating her daughter's statements. According to Mrs. Van Hatten, she was awakened by her daughter's screams and went to her bedroom. She found Van Hatten on the bed, clad in a t-shirt and underpants. T.M.W. was crying and trembling; she told her mother that Van Hatten had tried to rape

* Serdahely, Superior Court Judge, sitting by assignment made pursuant to article IV, section 16 of the Constitution of Alaska.

1. U.S. Const. amend. VI; Alaska Const. art. I, § 11.

2. U.S. Const. amend. VI; Alaska Const. art. I, § 11.

3. U.S. Const. amend. V; Alaska Const. art. I, § 9.

her. Mrs. Van Hatten immediately summoned the Alaska State Troopers.

Officer Adams and Sergeant Murphy of the Alaska State Troopers went to the Van Hatten residence in the early morning hours of October 1, 1980, in response to Mrs. Van Hatten's complaint. Sergeant Murphy interviewed T.M.W., who gave him a statement substantially similar to the testimony which she later gave to the grand jury. Sergeant Murphy also interviewed Mrs. Van Hatten. Upon completion of the interviews, Van Hatten was arrested and taken to trooper headquarters. An examination of Van Hatten disclosed fresh scratches on his face and a distinct bite mark on his left arm.

Immediately before the scheduled start of Van Hatten's jury trial, T.M.W. and Mrs. Van Hatten informed Superior Court Judge Warren Taylor that they did not want the prosecution of Van Hatten to proceed. Both indicated that they did not desire to testify and that, if called to testify, they would refuse to do so. At the state's request, depositions of T.M.W. and Mrs. Van Hatten were taken; both witnesses responded to questions concerning the specifics of Van Hatten's assault either by claiming an inability to remember or by expressly refusing to answer.

Trial was thereafter commenced. After Officer Adams and Sergeant Murphy testified, T.M.W. was sworn as a witness for the prosecution. She answered preliminary questions without reluctance but when questioning turned to the specific occurrences of October 1, 1980, she maintained that she was unable to recall most details. Over objections by defense counsel, the prosecutor then played a recording of T.M.W.'s grand jury testimony for the jury. The recording was ruled admissible as a prior inconsistent statement.

After T.M.W. testified, the prosecutor recalled Sergeant Murphy, who, again over objection by the defense, testified as to the substance of T.M.W.'s statements to him on the morning of the assault. This testimony was also admitted as proof of a prior statement by T.M.W. inconsistent with her trial testimony.

Adrianna Van Hatten was later called as a witness for the defense. Much like T.M.W., Mrs. Van Hatten denied any ability to recall the particulars of the October 1 incident. The thrust of her testimony, however, was that she had quarreled with Van Hatten over domestic problems on the night of the alleged assault, that she had been drinking and was extremely upset with Van Hatten at the time, and that, for these reasons, it was likely that she had exaggerated Van Hatten's conduct in her complaint to the troopers. During cross-examination, the prosecution was allowed to impeach this testimony by playing the recording of Mrs. Van Hatten's testimony before the grand jury.

ADMISSIBILITY OF T.M.W.'S GRAND JURY TESTIMONY

In his first point on appeal, Van Hatten challenges the admissibility at trial of the grand jury testimony given by T.M.W. Van Hatten asserts that T.M.W.'s lapses of memory at trial were not inconsistent with her prior testimony, since they effectively constituted a refusal to answer and did not amount to testimony. He further asserts that T.M.W.'s unwillingness or inability to recall the details of the alleged assault rendered her functionally unavailable for cross-examination, thereby depriving him of his constitutional right to confront and cross-examine prosecution witnesses.

The admissibility of prior inconsistent statements for impeachment of a witness is generally governed by Alaska Rule of Evidence 613(a), which states:

> (a) *General Rule.* Prior statements of a witness inconsistent with his testimony at a trial, hearing or deposition ... are admissible for the purpose of impeaching the credibility of a witness.

Under the provisions of Evidence Rule 801(d)(1)(A), prior inconsistent statements may be used not only as impeachment, but also for proof of the facts contained in the prior statements. In relevant part, Rule 801(d)(1)(A) states:

(d) *Statements which are not hearsay.* A statement is not hearsay if

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and the statement is

(A) inconsistent with his testimony....

Thus, if T.M.W.'s statements at trial can properly be regarded as testimony, and if her testimony was inconsistent with her prior testimony before the grand jury, recordings of T.M.W.'s grand jury testimony were admissible not only to impeach her testimony at trial, but also to prove the substance of the matters addressed in her grand jury testimony.

With respect to the admissibility of T.M.W.'s grand jury testimony under Evidence Rule 801(d)(1)(A), the state has argued, and we are inclined to agree, that the Alaska Supreme Court's ruling in *Richards v. State*, 616 P.2d 870 (Alaska 1980), is highly significant. In *Richards*, the defendant was accused of manslaughter in connection with the death of his six-week-old son. The incident had been viewed by the defendant's eight-year-old son, who was called by the prosecution as a witness at trial. In his testimony, however, the boy had forgotten much of what he had witnessed. The state was permitted to show a videotape of the boy, made shortly after the incident, in which he reenacted what he had seen. The videotape was the primary evidence supporting the state's manslaughter charge. On appeal, the supreme court upheld admission of the videotape as a prior inconsistent statement of the witness. Although the offense occurred before adoption of the Alaska Rules of Evidence, the Alaska Supreme Court noted the similarity of Evidence Rule 801(d)(1)(A) to former Civil Rule 43(g)(11)(C), which applied to the case. *See Richards*, 616 P.2d at 871 n. 1.

Van Hatten urges that *Richards* is distinguishable for two reasons. First, Van Hatten asserts that the witness' inability to remember in *Richards* was genuine. Van Hatten contends that, by contrast, T.M.W.'s loss of memory was obviously feigned and amounted to a refusal to testify. Second, Van Hatten points to the fact that the witness in *Richards* was available at trial and could be cross-examined about his lack of memory. He contends that, in this case, T.M.W.'s disingenuous memory loss made her unavailable for effective cross-examination, thereby depriving him of his constitutional right to confrontation. Neither of these distinctions is persuasive in the context of the present case.

We first consider whether T.M.W.'s statements at trial indicating an inability to recall the events of October 1, 1980, can properly be considered inconsistent with her grand jury testimony, in which her recollection was intact. As Van Hatten has correctly pointed out, a number of courts have adopted a narrow definition of inconsistency and would not hold that a loss of memory at trial is inconsistent with a previous ability to recall. *See, e.g., United States v. Palumbo*, 639 F.2d 123 (3rd Cir.), *cert. denied*, 454 U.S. 819, 102 S.Ct. 100, 70 L.Ed.2d 90 (1981); and *State v. Lomax*, 227 Kan. 651, 608 P.2d 959, 966 (1980).

Other courts, however, have distinguished between outright refusal to testify and evasive answers, holding that only refusal will preclude a finding that prior statements of a witness are inconsistent with his trial testimony. *See, e.g., United States v. Insana*, 423 F.2d 1165, 1169–70 (2d Cir.), *cert. denied*, 400 U.S. 841, 91 S.Ct. 83, 27 L.Ed.2d 76 (1970). Similarly, many decisions have expressly concluded that inconsistency may be found when a witness is unable to recall at trial matters contained in prior testimony or statements. *See, e.g., United States v. Distler*, 671 F.2d 954, 958 (6th Cir.1981); *United States v. Dennis*, 625 F.2d 782, 794–96 (8th Cir.1980); *United States v. Morgan*, 555 F.2d 238, 242 (9th Cir.1977); *United States ex rel. Thomas v. Cuyler*, 548 F.2d 460, 463 & n. 2 (3rd Cir.1977); and *United States v. Rogers*, 549 F.2d 490, 496 (8th Cir.1976), *cert. denied*, 431 U.S. 918, 97 S.Ct. 2182, 53 L.Ed.2d 229 (1977). As stated by Judge Weinstein:

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> the two statements and the only possible inference. The better view, urged by Wigmore, McCormick, and others, and followed by the federal courts, allows the prior statement whenever a reasonable man could infer on comparing the whole effect of the two statements that they had been produced by inconsistent beliefs. In other words, the keystone for impeachment use is relevancy—would the prior statement of the witness help the trier of fact evaluate the credibility of the witness .... The approach under [Federal Rule of Evidence 801(d)(1)(A)] should be the same. Here the question is not whether the statement is helpful in evaluating credibility, but whether it is helpful in resolving a material, consequential fact in issue ....
>
> 4 J. Weinstein & M. Berger, *Weinstein's Evidence* § 801(d)(1)(A)[01], at 801–88—801–89 (1981) (footnotes omitted).

We believe that an intent to adopt a broad definition of inconsistency, such as that favored by Judge Weinstein, is implicit in the supreme court's decision in *Richards v. State*. Nor is there any reason to impose a stricter standard in cases involving deliberate failure to recall. To the contrary, commentators have indicated that in some cases genuine forgetfulness or loss of memory may not justify a finding of inconsistency for purposes of introducing a prior statement, but that intentional loss of memory will. As Judge Weinstein has written:

> [I]t would seem that the prior statement should not be included under [Federal Rule of Evidence] 801(d)(1)(A) if the judge finds that the witness genuinely cannot remember, and the period of amnesia or forgetfulness is crucial as regards the facts in issue.
>
> 4 J. Weinstein & M. Berger, *supra*, § 801(d)(1)(A)[04], at 801–98 (footnote omitted).

[1] We conclude that where, as here, a witness deliberately seeks to avoid testifying by claiming loss of memory in response to specific questions, prior statements of the witness relating to the subject matter of the question are inconsistent, within the meaning of Evidence Rules 613 and 801(d)(1)(A).

We turn next to Van Hatten's contention that T.M.W.'s lack of memory precluded effective cross-examination and violated his constitutional right of confrontation. In *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), the United States Supreme Court squarely held that the admission into evidence of prior inconsistent statements as substantive evidence of a defendant's guilt is not violative of the confrontation clause as long as the witness who made the prior statements testifies and is subject to cross-examination at trial. The holding of the court in *Green* is reflected in Alaska Rule of Evidence 801(d)(1)(A) and, to a lesser extent, in the corresponding Federal Rule of Evidence.[4]

The primary question left unanswered by the decision in *California v. Green* was the extent to which, under the confrontation clause, a witness must testify and be open to cross-examination before evidence of a prior inconsistent statement could be deemed admissible.[5] Since the ruling in *Green*, however, numerous federal courts have addressed this issue, often with conflicting results. At one end of the spectrum, there are cases holding that feigned memory loss by a witness hampers full and effective cross-examination and is equiva-

4. Fed.R.Evid. 801(d)(1)(A) differs from A.R.E. 801(d)(1)(A) primarily in its requirement that, in order to be admitted as substantive evidence of guilt rather than as impeachment, prior inconsistent statements must have been made under oath and subject to the penalties of perjury. To this extent, the federal rule is narrower than the Alaska rule; it is also narrower than the minimal standards set out in *California v. Green*. *See, e.g., United States v. Distler*, 671 F.2d 954, 959 (6th Cir.1981). For a comparison of A.R.E. 801(d)(1)(A) with Fed.R.Evid. 801(d)(1)(A), *see* Commentary to the Alaska Rules of Evidence, § 801(d)(1)(A) at 220–21.

5. *California v. Green* does, however, make clear the fact that the confrontation clause is satisfied by the availability of a witness for cross-examination as to his memory at the time of trial and does not require an ability to cross-examine as to memory at the time a prior inconsistent statement was made.

lent to a failure to testify, thus precluding introduction of prior inconsistent statements for substantive purposes. *See, e.g., United States v. Palumbo*, 639 F.2d 123, 128 n. 6 (3rd Cir.), *cert. denied*, 454 U.S. 819, 102 S.Ct. 100, 70 L.Ed.2d 90 (1981); *United States v. Fiore*, 443 F.2d 112, 115 (2nd Cir. 1971); and *State v. Lomax*, 227 Kan. 651, 608 P.2d 959, 964–67 (1980). *Cf. United States v. Balano*, 618 F.2d 624, 626–27 (10th Cir.1979), *cert. denied*, 449 U.S. 840, 101 S.Ct. 118, 66 L.Ed.2d 47 (1980), and *United States v. Carlson*, 547 F.2d 1346, 1357 (8th Cir.1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977) (defendant's right to confrontation would preclude introduction of the witness' prior statements, except for the fact that defendant himself procured the witness' refusal to testify at trial). At the opposite end of the spectrum are cases adopting the position advocated by Justice Harlan in his concurring opinion in *California v. Green*[6] and holding, essentially, that the presence of a warm body in the witness chair satisfies the requirements of the confrontation clause, opening the door to introduction of prior, out-of-court statements for substantive purposes. *See, e.g., United States ex rel. Thomas v. Cuyler*, 548 F.2d 460, 463 & n. 2 (3rd Cir.1977) (citing cases); and *United States v. Insana*, 423 F.2d 1165 (2d Cir.), *cert. denied*, 400 U.S. 841, 91 S.Ct. 83, 27 L.Ed.2d 76 (1970). Thus, the court in *Cuyler* stated, 548 F.2d at 463 (footnotes omitted):

> A witness who refuses to be sworn or to testify at all or one who, having been sworn, declines to testify on Fifth Amendment grounds, has not been thus made available for cross-examination. But if he has been sworn and made available the fact that he suffers or feigns a loss of memory does not lessen the fact that the defendant has been confronted with him and presented with the opportunity to cross-examine him to the extent possible, which is all that the Sixth Amendment requires.

[2] As evidenced by the divergent views taken by courts considering the issue, difficult issues are presented in attempting to determine whether a defendant's constitutional right of confrontation will be violated by use of prior, extra-judicial statements of a witness as substantive evidence of guilt when the witness has been evasive or suffers from a loss of memory. These issues do not, in our view, readily lend themselves to resolution by the application of a general formula. We believe that the best approach lies in a case-by-case analysis, focusing on the extent to which the witness actually testifies and can be cross-examined, as well as on the nature and reliability of his prior, out-of-court statement. *See United States v. Rogers*, 549 F.2d 490, 500 (8th Cir.1976), *cert. denied*, 431 U.S. 918, 97 S.Ct. 2182, 53 L.Ed.2d 229 (1977).[7] The

6. In *California v. Green*, 399 U.S. at 189, 90 S.Ct. at 1951, 26 L.Ed.2d at 514, Justice Harlan, in a separate concurring opinion, specifically addressed the principal issue left open by the opinion of the court. Justice Harlan stated:

> The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence. The prosecution has no less fulfilled its obligation simply because a witness has a lapse of memory. The witness is, in my view, available. To the extent that the witness is, in a practical sense, unavailable for cross-examination on the relevant facts ... I think confrontation is nonetheless satisfied.

Justice Harlan concluded that, "the Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to *produce* any *available* witness whose declarations it seeks to use at a criminal trial." 399 U.S. at 174, 90 S.Ct. at 1943, 26 L.Ed.2d at 506 (Harlan, J., concurring) (emphasis in original.)

7. Although reliability is a question to be considered on a case-by-case basis, a number of criteria relevant to evaluating the reliability of prior, out-of-court statements have been suggested by other courts. For example, in *United States v. Snow*, 521 F.2d 730, 734–35 (9th Cir. 1975), *cert. denied*, 423 U.S. 1090, 96 S.Ct. 883, 47 L.Ed.2d 101 (1976), the court dealt with the analogous issue of whether the confrontation clause was violated by admission against the defendant, under the co-conspirator exception to the hearsay rule, of prior statements made by an accomplice. Noting that the co-conspirator exception does not automatically assure compliance with the requirements of the confrontation clause, the court in *Snow* focused on the reliability of the out-of-court statement.

relevant factual inquiry in such an analysis is whether, under the circumstances, the jury will be afforded a satisfactory basis for evaluating the truth of the out-of-court statement. *Id.* at 499.[8]

[3] Reviewing the facts of the present case in this manner, it is apparent that introduction into evidence of T.M.W.'s grand jury testimony was not violative of Van Hatten's confrontation right. T.M.W.'s prior statement was given under oath and was based on her personal observations. Moreover, T.M.W.'s testimony was corroborated by physical evidence obtained shortly after Van Hatten's assault, by statements which T.M.W. made to her mother and to Sergeant Murphy immediately after the assault, and by statements of T.M.W.'s mother in the course of her testimony before the grand jury.[9]

More significantly, despite her stated intention to refuse to testify, and despite her numerous lapses of memory in response to particular questions, T.M.W. offered substantial testimony concerning the alleged assault and her prior grand jury statements. Notably, T.M.W. admitted being present in her home, together with her father at the time of the incident, and she admitted having been interviewed by Alaska state troopers, who had been summoned to her home in the early morning of October 1, 1980. T.M.W. did not deny making the statements attributed to her by Sergeant Murphy or the statements attributed to her in her mother's grand jury testimony. T.M.W. confirmed the fact that prior to testifying before the grand jury she had talked with a prosecutor for the state about Van Hatten's attitudes and sexual advances towards her. T.M.W. stated that she recalled appearing and testifying before the grand jury, and she acknowledged that she was under oath at the time. Furthermore, T.M.W. identified her own voice on the grand jury tape and stated that, when testifying before the grand jury, she told the truth. T.M.W. readily acknowledged that she did not want to testify against Van Hatten. Yet she was willing to state that

The court relied on the United States Supreme Court's plurality opinion *Dutton v. Evans*, 400 U.S. 74, 88–89, 91 S.Ct. 210, 219–220, 27 L.Ed.2d 213, 226–27 (1970), to indicate four factors relevant to the issue of reliability:

> The *Dutton* plurality opinion sets forth a number of factors which were indicative of reliability in that case: (1) the declaration contained no assertion of a past fact, and consequently carried a warning to the jury against giving it undue weight; (2) the declarant had personal knowledge of the identity and role of participants in the crime; (3) the possibility that the declarant was relying upon faulty recollection was remote: and (4) the circumstances under which the statements were made did not provide reason to believe that the declarant had misrepresented the defendant's involvement in the crime.

521 P.2d at 734. While not an exhaustive list of factors bearing on the question of reliability of a prior, out-of-court statement, we think the four considerations listed in *Snow* provide guidance on the issue and can be of assistance to trial courts faced with issues such as that presented in Van Hatten's case.

8. A very similar approach was recently taken by the Arizona Supreme Court in *State v. Allred*, 134 Ariz. 274, 655 P.2d 1326 (1982). In *Allred*, a child who had been sexually assaulted by her father gave testimony at trial exculpating him. She was impeached by statements she had given earlier to an investigating officer and a psychologist. The supreme court approved the use of the child's prior statements, finding, under the circumstances, that the reliability of the prior statements was capable of being sufficiently evaluated through corroborating evidence. The court in *Allred* considered the issue as an evidentiary one calling for determination of whether the probative value of the prior statement outweighed its potential for prejudice under Ariz.R.Evid. 403. *Id.* 655 P.2d at 1329–30.

9. Evidence concerning statements made by T.M.W. to Sergeant Murphy was introduced at trial through testimony of Sergeant Murphy; this testimony was admitted under A.R.E. 801(d)(1)(A) as evidence of a prior statement by T.M.W. inconsistent with her testimony at trial. Evidence of T.M.W.'s statements to her mother following the assault, as well as evidence concerning the observations of T.M.W.'s mother at the time of the incident, was presented at trial in the form of a recording of Mrs. Van Hatten's grand jury testimony; this evidence was also admitted under A.R.E. 801(d)(1)(A), after Mrs. Van Hatten's testimony as a witness for the defense. On appeal, Van Hatten has not challenged the admissibility of Sergeant Murphy's testimony or of the recordings of Mrs. Van Hatten's grand jury testimony.

her reluctance was due to the fact that, prior to testifying before the grand jury, the prosecutor had given her a "verbal guarantee" that if Van Hatten was indicted T.M.W. could later decline to press charges. T.M.W. specifically indicated, both on cross-examination and on re-direct examination, that she had testified against Van Hatten before the grand jury as a means of coercing him into obtaining counseling or psychiatric assistance for his problem.

There is widespread agreement that a defendant's right to confrontation will not be violated by introduction of the prior inconsistent statement of a witness if, in the course of testifying at trial, the witness acknowledges that the statement was made and that it was true. In this regard, the Commentary to the Alaska Rules of Evidence states:

> Considerable controversy has attended the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact, should be classed as hearsay. If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem. The hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth.

Commentary to the Alaska Rules of Evidence, Section 801(d)(1), at 219.

In the present case, T.M.W. acknowledged appearing before the grand jury, admitted that she was under oath, identified her testimony for the jury, and expressly stated that her grand jury testimony was truthful. Moreover, in testifying as to her reluctance to be a witness at trial and her reasons for testifying before the grand jury, T.M.W. afforded the jury with a more than ample basis upon which to evaluate her credibility at trial and the truthfulness of her testimony before the grand jury. Numerous cases support the proposition that admission of prior inconsistent statements under such circumstances is appropriate and does not amount to a denial of the right to confrontation.[10] We therefore hold that introduction of T.M.W.'s grand jury testimony was proper and did not deprive Van Hatten of his constitutional right of confrontation.

TESTIMONY CONCERNING INVOCATION OF RIGHTS TO COUNSEL AND TO REMAIN SILENT

Van Hatten also argues that his conviction must be reversed because evidence presented by the state at trial violated his constitutional rights to counsel and to remain silent. The prosecution's first witness at trial was Alaska State Trooper John Adams. Trooper Adams testified briefly, indicating that early in the morning of October 1, 1980, Mrs. Van Hatten contacted him and complained that her husband had attempted to rape T.M.W. Trooper Adams stated that he went to the Van Hatten residence together with Sergeant Murphy, that he eventually arrested Van Hatten, and that, following the arrest, he observed fresh scratches and an apparent bite mark

10. *See, e.g., United States v. Distler*, 671 F.2d 954 (6th Cir.1981); *United States v. Woods*, 613 F.2d 629, 637 (6th Cir.), *cert. denied*, 446 U.S. 920, 100 S.Ct. 1856, 64 L.Ed.2d 275 (1980); *United States v. Dennis*, 625 F.2d 782, 794–96 (8th Cir.1980); *United States v. Mosley*, 555 F.2d 191, 193 (8th Cir.1977), *cert. denied*, 434 U.S. 851, 98 S.Ct. 163, 54 L.Ed.2d 120 (1978); *United States v. Morgan*, 555 F.2d 238, 242 (9th Cir.1977); *United States ex rel. Thomas v. Cuyler*, 548 F.2d 460, 463 (3rd Cir.1977); *United States v. Rogers*, 549 F.2d 490, 498–500 (8th Cir.1976), *cert. denied*, 431 U.S. 918, 97 S.Ct. 2182, 53 L.Ed.2d 229 (1977); *United States v. Castro-Ayon*, 537 F.2d 1055, 1057 (9th Cir.), *cert. denied*, 429 U.S. 983, 97 S.Ct. 501, 50 L.Ed.2d 594 (1976); *United States v. Payne*, 492 F.2d 449, 454 (4th Cir.), *cert. denied*, 419 U.S. 876, 95 S.Ct. 139, 42 L.Ed.2d 116 (1974); and *United States v. Insana*, 423 F.2d 1165 (2d Cir.), *cert. denied*, 400 U.S. 841, 91 S.Ct. 83, 27 L.Ed.2d 76 (1970). *Cf. United States v. Orrico*, 599 F.2d 113, 117–19 (6th Cir.1979) (witness' alleged grand jury testimony, although properly received in evidence when witness could not recall details of the crime, was insufficient to support a conviction because the evidence was only marginally admissible due to lack of proper foundation and because no other evidence was presented connecting defendant with the crime).

on Van Hatten. At the conclusion of Trooper Adams' direct examination, the following dialogue occurred:

Q Okay. And it was Sergeant Murphy that talked with [T.M.W.].

A Right.

Q Okay. And I take it you did not talk with the defendant about this matter in any detail.

A No. Basically after we woke him up we asked—Sergeant Murphy asked him what happened to his face and that stuff and he stated that a muffler had fell on his face at work.

Q Okay.

A He was then advised of his rights and he requested to have his attorney present ...

Q Okay.

A ... before any more questioning.

Q You did not ask him any further questions?

A No, I did not.

Q MR. MURPHREE: I'll pass the witness.

There was no objection or motion to strike voiced in response to this testimony, nor was it subsequently called to the attention of the trial court.

Van Hatten nevertheless contends on appeal that Trooper Adams' reference to Van Hatten's invocation of his right to remain silent and to obtain counsel constitutes plain error and warrants a new trial. In advancing this argument, Van Hatten relies primarily on *Dorman v. State*, 622 P.2d 448, 457 (Alaska 1981), and *Gunnerud v. State*, 611 P.2d 69 (Alaska 1980). In *Dorman*, the supreme court held that reversal of a murder conviction was required as a matter of plain error when the prosecutor, during his final argument to the jury, specifically referred to the fact that Dorman had remained silent when interviewed by the police. In determining that plain error under Criminal Rule 47(b) existed, the court relied on the fact that the prosecutor had specifically asked Dorman's jury to draw an inference of guilt from exercise of the privilege to remain silent. *Gunnerud v. State* is factually closer to Van Hatten's case but did not involve plain error. In *Gunnerud*, the trial court permitted the jury to hear a tape recording of a search conducted at Gunnerud's apartment. Gunnerud was at the apartment when the search was made, and the recording contained a passage in which she was given *Miranda* warnings and invoked her right to remain silent. Over objection by the defense, the trial court permitted the jury to hear this portion of the recording. 611 P.2d at 75. On appeal, the supreme court found that Gunnerud's constitutional rights to counsel and to remain silent were violated when the jury was allowed to hear her assertion of these rights; finding the evidence against Gunnerud to be strong but not overwhelming, the court concluded that the error was not harmless beyond reasonable doubt. 611 P.2d at 76.

[4] When the circumstances of the present case are considered in the light of *Dorman* and *Gunnerud*, we believe that the question of plain error is extremely close. Criminal Rule 47(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This rule has been interpreted as follows:

> Under the doctrine of "plain error" embodied in Alaska Rule of Criminal Procedure 47(b), this court will not take notice of an error not brought to the attention of the trial court unless it affects a substantive right and is obviously prejudicial. Not all errors of constitutional dimension must be examined in depth under this standard. *See Gilbert v. State*, 598 P.2d 87, 92 (Alaska 1979).

Dorman v. State, 622 P.2d at 457 (footnotes omitted). *Gunnerud v. State*, which was decided by the Alaska Supreme Court prior to Van Hatten's trial, makes clear the fact that Trooper Adams' testimony concerning Van Hatten's decision to remain silent until he obtained an attorney was inadmissible. In this sense, the error was obvious. It is also apparent that the error affected a substantive right, since it directly impinged on Van Hatten's constitutional rights to coun-

sel and to remain silent. In context, however, it is far less obvious that Trooper Adams' testimony was actually prejudicial.

While the court in *Dorman* found plain error where there was an express comment on the defendant's exercise of his right to remain silent, in the present case no comment was involved; Trooper Adams' testimony constituted a reference to, but not a comment on, Van Hatten's decision to remain silent. Moreover, the reference was a brief and passing one, and it was not directly elicited by the prosecutor's questioning. At no point in his final argument did the prosecutor mention this evidence. In fact, the prosecutor made no specific reference to any part of Trooper Adams' testimony during final argument, focusing instead on the statements of T.M.W. and Mrs. Van Hatten.

All of these circumstances significantly diminish the possibility of any prejudicial impact flowing from the improper testimony concerning Van Hatten's decision to remain silent. While the evidence of Van Hatten's guilt was, perhaps, less than overwhelming, it was certainly compelling. Furthermore, it is particularly significant that the basic thrust of the final jury argument made by Van Hatten's counsel was that Van Hatten had been attempting to have sexual contact with T.M.W.—a lesser form of assault than that involved in an attempted rape—but that he did not intend to rape her. Even assuming the jury might have been inclined to infer a consciousness of guilt from Van Hatten's silence, any such inference would have been equally consistent with either an intent to rape or an intent to have sexual contact on Van Hatten's part.[11]

Even given these considerations, the holding in *Gunnerud* makes it evident that, if a timely objection had been made, the error in referring to Van Hatten's silence could not be deemed harmless beyond a reasonable doubt. Van Hatten emphasizes this fact on appeal. Van Hatten insists that he has established plain error and is entitled to relief because the obviousness of the error in this case is uncontroverted and because the error involved the violation of a constitutionally protected right.

[5] We believe, however, that Van Hatten misperceives the requirements of the plain error rule. A party relying on plain error must go beyond a mere showing that error was committed and that the error involved a constitutional right. As held in *Gilbert v. State*, 598 P.2d 87, 92 (Alaska 1979):

> [N]ot all constitutional claims require extensive review under the plain error rule. To say that asserted errors of constitutional dimension must all be examined in depth under the plain error rule would circumvent the strong basic policy which requires that, in order to preserve an error for appeal, an objection must have been made in the trial court.

Thus, the plain error rule has been held to embody the requirement that the error complained of be obviously prejudicial. *Id.* There has been little effort to define the obvious prejudice requirement of the plain error rule. We think it clear, however, that the term obvious prejudice demands the application of a standard more stringent than the harmless beyond a reasonable doubt test applied to determine harmless error in cases where errors of constitutional dimension are preserved for appeal by timely objection. *See Chapman v. California,*

11. Van Hatten did not testify at trial; the jury was given an instruction stating that the defendant had a right not to testify and that no inferences could be drawn from his exercise of that right. We consider this instruction to lessen the possibility that actual prejudice resulted from Trooper Adam's statement. Trooper Adam's testimony constituted a reference to Van Hatten's silence, and did not involve a direct comment on the silence. The testimony was thus less likely to cause prejudice and was more susceptible of being mitigated by a curative instruction. *Cf. Padgett v. State*, 590 P.2d 432, 434-35 (Alaska 1979) (differentiating between an improper comment in testimony and an improper comment during final argument and noting that the former is more Likely to be cured by a jury instruction). *See also Jolley v. State*, 655 P.2d 784, 785-86 (Alaska App.1982) (holding that an error similar to that in the present case was cured by an appropriate jury instruction).

386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[6] The correct measure of obvious prejudice under the plain error rule must, we believe, fall far closer to the more flexible standard of harmless error employed in cases where non-constitutional error is involved: whether it can be fairly said that the alleged error did not appreciably affect the jury's verdict. *See Love v. State*, 457 P.2d 622, 630–32 (Alaska 1969). We think that the *Love* standard of harmless error is particularly well suited for determining whether obvious prejudice has occurred, since the primary goal of the standard is to assure fundamental fairness to the accused, the same basic goal with which the plain error rule is concerned.

The obviousness of the error committed in this case, the ease with which it could have been avoided, and the fundamental nature of the rights which it affected are all factors that weigh heavily in favor of a finding of plain error in this case. However, consideration of the totality of the circumstances presented in this case does not convince us that the improper reference to Van Hatten's silence had an appreciable effect on the jury's verdict. For this reason, we are compelled to find that Van Hatten has failed to make a showing of obvious prejudice, as required by Criminal Rule 47. We hold that Trooper Adam's testimony did not constitute plain error.

EXCESSIVENESS OF SENTENCE

Van Hatten's final contention is that his sentence of ten years' imprisonment, with eight suspended, is excessive. We reject this contention.

Evidence available to the sentencing judge established that Van Hatten had been convicted of robbery in 1959 and of embezzlement in 1963. For the latter offense, he received a sentence of three years' imprisonment. In addition, Van Hatten had accumulated a fairly extensive record of convictions for alcohol-related misdemeanors; most noteworthy were three drunk driving convictions entered against him in the two-year period immediately preceding commission of this offense. Van Hatten's assault of T.M.W. was committed while he was intoxicated.

Evidence presented at trial and at the sentencing hearing also indicated that Van Hatten's assault of T.M.W. was not an isolated incident. Van Hatten had repeatedly assaulted T.M.W. over a period of approximately five years. Moreover, it was revealed that Van Hatten had been involved in a long series of sexual assaults against T.M.W.'s older sister, J.W. In 1976, Alaska State Troopers received a report that Van Hatten had assaulted J.W., who was then fifteen years of age. J.W. was interviewed and stated that Van Hatten had sexually assaulted her with varying degrees of intensity, including sexual intercourse, for approximately two years. T.M.W. was also interviewed at the time and indicated that she had witnessed some of the assaults and that Van Hatten had also attempted to molest her. Van Hatten was then interviewed, and he admitted involvement in the sexual assault of J.W., but explained that J.W. had instigated his conduct by leading him along. Formal prosecution was apparently dropped in return for a promise by Van Hatten to undertake a course of family counseling. According to the pre-sentence report in this case, however, Van Hatten made only one contact with a family counselor.

At the time of sentencing, Van Hatten was forty-two years of age. Despite his long-standing problem of alcohol abuse and his extensive misdemeanor history, he had maintained a good employment record and was active in the Fairbanks business community. Upon review of the circumstances involved in this offense, as well as other pertinent information concerning Van Hatten's background, the probation officer assigned to write Van Hatten's presentence report recommended the sentence that was ultimately imposed by the court.

[7, 8] Van Hatten's initial contention with respect to sentencing is that, in imposing the sentence, Judge Taylor penalized him for exercising his right to have a trial.

A review of the sentencing remarks upon which Van Hatten predicates this claim reveals that it is unfounded. Van Hatten also argues that Judge Taylor improperly failed to give adequate consideration to the sentencing goal of rehabilitation. We are mindful of the fact that the trial court is assigned primary responsibility for sentencing; included in this responsibility is the task of weighing and determining the priorities to be given to various sentencing goals. *Asitonia v. State*, 508 P.2d 1023, 1026 (Alaska 1973); *Nicholas v. State*, 477 P.2d 447, 448–49 (Alaska 1970). Given Van Hatten's conduct in the present case, given his long-standing history of similar conduct, and given his prior record of criminal misconduct, we cannot conclude that Judge Taylor was clearly mistaken in imposing the sentence of ten years with eight suspended. *McClain v. State*, 519 P.2d 811, 813–14 (Alaska 1974).[12]

The conviction and sentence are AFFIRMED.

COATS, J., not participating.

SERDAHELY, Superior Court Judge, concurring in part and dissenting in part.

I generally agree with the majority's treatment of, and conclusions regarding, the issues of the admissibility of T.M.W.'s prior inconsistent statements, confrontation clause and cross-examination considerations regarding such statements, and the claimed excessiveness of Van Hatten's sentence. On the question of the effect of Trooper Adams' testimony, however, I am compelled to respectfully dissent from the majority's conclusions.

More specifically, I generally agree with the majority that "the question of plain error is extremely close" and that pursuant to *Gunnerud v. State*, 611 P.2d 69 (Alaska 1980), "if a timely objection had been made, the error in referring to Van Hatten's silence could not be deemed harmless beyond a reasonable doubt." I further agree with the majority that *Dorman v. State*, 622 P.2d 448 (Alaska 1981) (wherein the prosecutor commented during final argument upon the defendant's invocation of his right to remain silent) is distinguishable from the instant case. And, I also agree with the majority's conclusion that in the absence of a timely objection at trial, a defendant seeking to establish plain error for the first time on appeal should meet a standard more stringent than the "harmless beyond a reasonable doubt" test, i.e., should show some prejudice or that the alleged error could well have affected the jury's verdict.

Given the foregoing, however, I am unable to conclude that the challenged testimony in the instant case was not prejudicial to the defendant or did not, in some meaningful way, affect the jury's verdict. Rather, I believe that the Alaska Supreme Court's comment in *Gunnerud* applies with equal force to this case:

> We can see no reason why it was necessary for the prosecution to introduce the portion of the recording into evidence other than to show an inference of guilt at the expense of the appellant's rights to counsel and to remain silent.

611 P.2d at 76 (footnotes omitted).

Accordingly, consistent with the policy and holding of *Gunnerud*, I would reverse the judgment of the lower court on this issue and remand the case for a new trial.

12. In his reply brief, Van Hatten has argued, for the first time, that his sentence exceeded the presumptive term prescribed for a second offender (four years) and that it therefore violates our holding in *Austin v. State*, 627 P.2d 657 (Alaska App.1981). He also cites *Andrews v. State*, 552 P.2d 150 (Alaska 1976), and maintains that the total length of his sentence, including the eight years of suspended imprisonment, is unjustified. We find no merit in these arguments. *See Tazruk v. State*, 655 P.2d 786, 789 (Alaska App.1982).

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

MEMORANDUM December 5, 1984

SUBJECT: Hearsay evidence in sexual abuse prosecutions (Work Order No. 14-0131)

TO: Representative Randy Phillips

FROM: Michael F. Ford M. F.
Legislative Counsel

As you know, last year the legislature considered a similar bill to the one you have requested, concerning prosecution of sexual abuse crimes and the use of hearsay evidence. At that time, the possibility that the constitution would prohibit use of such evidence was raised. This memo addresses section two of this bill, relating to introduction of hearsay evidence at trial. The first section of the bill deals only with grand jury proceedings, and does not raise a constitutional question.

This bill is based on Washington Criminal Code sec. 9A.44.120. I have been informed by the Department of Law that the Washington statute has been challenged a number of times and upheld in the trial courts, but it has yet to be ruled on by the state's highest court. Therefore the Washington law is of little help in determining the validity of this bill.

In prosecutions for sexual abuse of a minor in any degree, this bill allows the prosecutor to introduce at trial, "hearsay evidence of a statement made by a child under the age of 10 describing an act of sexual contact with the child" if certain criteria are met (AS 12.45.049). Before the hearsay evidence may be introduced, the court must determine that the circumstances of the child's statement indicate its reliability, and the child must either testify at the proceeding, or be unavailable as a witness. If the evidence is admitted on the basis that the child is

unavailable, there must be some further evidence introduced to corroborate the child's statement.

Existing Rules of Evidence provide that hearsay is inadmissible, but provide for certain exceptions (Rules of Evidence 803 and 804). The apparent purpose of the bill is to make it easier to prosecute sexual abuse cases by allowing in evidence that the jury would otherwise not be permitted to consider. For example, under present law, if a child tells a teacher that the child's parent is sexually abusing the child, but the child refuses or is emotionally unable to repeat the story at the parent's sexual abuse trial, the teacher would not be permitted to repeat the child's story at the trial because it would be hearsay and does not fall under one of the existing exceptions. The bill would allow the teacher to testify if (1) the court determines that the child's statement appears reliable, and (2) the child either testifies (on some other matter) or is unavailable and there is some further evidence that the child's statement is true.

The sixth amendment to the United States Constitution and Article I, sec. 11 of the Alaska Constitution both provide that a defendant in a criminal trial may not be denied the right "to be confronted with the witnesses against him." This bill is in potential conflict with this constitutional right because it permits the statements of a child to be used against a criminal defendant without giving the defendant the opportunity to cross-examine the child.

The Alaska Supreme Court has summarized the right to confrontation as follows:

> This right of confrontation protects two vital interests of the defendant. First, it guarantees him the opportunity to cross-examine the witnesses against him so as to test their sincerity, memory, ability to perceive and relate, and the factual basis of their statements. Second, it enables the defendant to demonstrate to the jury the witness' demeanor when confronted by the defendant so that the inherent veracity of the witness is displayed in the crucible of the courtroom. (Footnotes omitted).

Lemon v. State, 514 P.2d 1151, 1153 (Alaska 1973). The Court in Lemon analyzed the United States Supreme Court decisions on the right to confrontation as it relates to the introduction of hearsay evidence and concluded that

> ...while the demeanor interest of the right of confrontation is not a crucial element, the right to effective cross-examination is essential unless the testimony falls within certain established exceptions to the hearsay rule. (Footnote omitted).

Lemon, supra, at 1154. The Court ruled that Lemon had been denied the right of confrontation because of the admission of a hearsay statement against him that did not fall within the established exceptions to the hearsay rule.

This bill does contain certain protections for the defendant, but these may not be enough to survive a constitutional challenge. Since the bill permits the prosecution to use hearsay evidence that does not fall within one of the established exceptions to the hearsay rule against the defendant, the Lemon case seems to prohibit it. Even if the criteria for the admission of the hearsay evidence contained in the bill are met, a court could still find that the defendant has been denied the right to confrontation. Although the question is an open one, there is a strong possibility that the bill could be found unconstitutional if challenged.

If you have further questions, please contact me.

MFF:ojb
J9/095

JANUARY 26, 1985
ANCH. NEWS

Woman asks abuse victims not be forced to testify

Bill aimed at protecting children from psychological damage in grand jury proceedings

By DEAN FOSDICK
The Associated Press

JUNEAU — Traumatized children who are the victims of sexual abuse should not be made to testify before grand juries although they would be required to undergo cross-examination during trials, a Senate committee was told.

Beth Kerttula, a lawyer and aide to Sen. Jay Kerttula, D-Palmer, told members of the Senate Health, Education and Social Services Committee on Thursday that hearsay evidence from sexually abused children should be allowed in grand jury proceedings.

"It would apply only in cases where the child is traumatized," she testified. "And it's only aimed at grand jury proceedings. It doesn't go any farther than that."

Kerttula told the committee he was proposing several changes in his bill, one of which would drop the age of children allowed to submit hearsay evidence from 10 to 13.

"The younger the child, the more likely trauma will occur," Kerttula said.

Two similar bills are weaving their way through the legislature. One, introduced by Gov. Bill Sheffield, specifies age 16. Another, by Rep. Randy Phillips, R-Eagle River, specifies age 10.

"The younger the child, the more potential for trauma and the less chance for fabrication," said Gayle Horetski, an assistant attorney general. "On the other hand, you have to balance that off on individual children. Some are more fragile than others."

While Horetski wouldn't recommend an optimum age, she did say prosecutors "wouldn't want to go under 10 in any circumstances."

Hearsay evidence would not replace the use of videotapes in such cases, she said in response to a question from Sen. Joe Josephson, D-Anchorage.

"Videotaping is preferred," Horetski said. "But in Bush areas, authorities often don't have videotaping equipment. And ... a child may make a telling statement when videotaping equipment isn't available.

"You don't have a tape around when a kid is talking to a school nurse," she said. "Although it's a good tool, it may not be appropriate to narrow it to that."

"I don't want it (bill) to erode grand jury proceedings," Josephson said. "I'm worried about that."

The committee deferred action on the bill Thursday, pending the introduction of Kerttula's amendments.

Alaska Foster Parents Association

P.O. BOX 8651 • ANCHORAGE, ALASKA 99508

3-18-85

Rep. Randy Phillips
Pouch V
Juneau, Ak. 99811

Dear Rep. Randy Phillips:

I am writing to you in regards to HB 67, regarding hearsay evidence for certain sexual offenses. We agree in principle that young children are very traumatized when they must testify, and that their testimony can be picked apart by the defense because of confusion of the issues in young children's minds. However, we feel there are several problems with pieces of this legislation. Refering to line number and page are the following comments:

pg. 1 line 15 - we suggest an age of 7, which would follow other rules regarding children and their legal rights to make decisions and be considered competent. Age 7 is the age a child is considered to know the difference between fact and fiction and therefore competent to testify. Even adults find it traumatic to testify in these situations, but by age 7 a child can be reasoned with and explained to so the emotional pressure is lessened.

pg. a line 25 "statement" should be a verified record such as video taping or cassette tape where exact content can be verified. The interview should be conducted by a professional experienced in gaining information from children.

Pg. 2 line7 - we feel this is very broad to "unable to procure the child's attendance by reasonable means. What about the child who refuses.

Same comments as above for Sec. 12.45 .

Please consider the above comments and feel free to contact me if you need more information. THANKS!

Sincerely.

Miriam Sumner
AFPA Legislative Chairman

cc: Rep. Koponen
Gruenberg
Taylor
Hurley

Alaska Foster Parents Association

P.O. BOX 8651 • ANCHORAGE, ALASKA 99508

3-18-85

Representative Gruenberg
Pouch V
Juneau, Alaska 99811

Dear Rep. Gruenberg:

Alaska Foster Parents Association has several concerns over HB 88. Overall concern centers around criminalizing endangering the welfare of a minor--treatment and prevention should be the major concern of us all. Bringing the age of "endangering the welfare of a minor" to 18 brings up some problems that would be normal child rearing practises. For example--"intentionally deserts the child...creating a substantial risk of physical injury" could be construed to mean leaving a child/youth to shop, walk to the store, letting them out of the car to walk, etc. could be a criminal offense if anything happened. "Exposing a child (under 18) to circumstances creating a substantial risk of physical injury or sexual abuse" for teens is difficult if you let them spend the night, date, etc. We would suggest a reduction of age to 12 or thereabouts.

"Exposes the child (under 18) to physical injury by failing to provide...Necessary food, care, clothing, shelter, or medical attention" depends on interpretation and could be especially wrong from licensed facilities such as day care homes and foster homes who are not toally responsible for all of these items--either physically responsible or financially.

Hearsay evidence principle is very good but we suggest the age of 7, which is the age a child is considered to know fact from fiction and be able to testify. We realize it is traumatic to testify in sexual cases, but even adults find it very emotionally traumatizing. A child being unavailable for testimony could be interpreted for most children/youth as it is always emotional harm. And what about the child that just refuses to testify--even if a teenager and could testify?

Sec. 12.45.045 only updates wording the existing law, but is very dangerous at times for foster parents. Often foster parents do not have information of a child prior to placement and may get into situations that appear to be wrong but were from lack of knowledge. Occasionally foster parents are falsely accused of sexual abuse but a formerly abuse child who is sexually active and know enough information to make it sound believeable. Sometimes these accusations are made in hopes the child/youth can return home or manipulation and revenge against the foster home. Foster parents may want and need to show the child/youth's accusation is false by showing previous sexually activity and knowledge. SEE AFPA POSITION PAPER included in Legislative packet.

Sec. 7, AS12.62.035 is very broad. Regulations to request records of <u>all</u> convictions could include convictions for traffic offenses. "...shall provide a copy of the information to the person who is the subject of the request" is excellent!

Page 4 line 27--what is a "attempted violation"? How would that be found?

Page 7 has several very vague statements including "immediate" and "reasonable efforts". With experience with regulations, we know that

Alaska Foster Parents Association
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most difficulties are the result of vagueness. We would appreciate clearer language.

Page 8, line 12 "verbal statements to a child which express a desire or intent to have sexual contact" needs to have an age definition. Teens talk to each other in this way constantly. In the schools you will hear continuously references to wanting sexual contact.

Sec. 19, AS47.17.050 regarding immunity We feel takes away the constitutional and marital rights between husband and wife. In criminal cases the husband or wife is immune from testimony. Please include a (4) husband-wife privilege.

We understand the reasons for Section 47.35.070. VIOLATIONS, is because the department has no way to deal with licensees who violate statues and regulations except to ignor or revoke the license. This is prcbably true for day care facilities and homes and residential care, but IS NOT TRUE FOR FOSTER HOMES! The licensing agency can withhold or remove placements, revoke or not renew licenses. Violations of regulations can be very minor i.e. fire extinguisher has lost a charge, smoke alarm temporarily out of service (battery), water not checked, not immediately (what is the definition and who's opinion) reporting illness or accident, changes in household not reported soon enough, notifying the wrong division representative, questioned discipline. Foster homes are volunteer--no pay is involved. Foster homes are reimbursed for expenses of the child from $12. - $18. per day. NO SERVICES ARE PAID FOR or any expenses over that amount! If you charge volunteer parents ~~xxxxx~~ $200. per day for each day they are in violation, and until the charges are found to be "guilty", you will not have any foster parents! When you do not pay someone, how can you expect them to pay fines? We can understand not licensing or placing children, but not a fine system for foster parents who are already saving the state over $100. per day per child! It is vital to remove foster parents from this section! And what about the violations of regulations by the agencies?

Thank you for your consideration of these issues in HB 88. If you have questions, comments, or would like more information, please do not hesitate to contact me at the above address, or, after March 24 at 745-7797. THANK YOU.

Sincerely,

Miriam Sumner

Miriam Sumner
AFPA Legislative chairman

Offered: 4/23/85
Referred: Finance

Original sponsor: Phillips

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 67 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the admissibility of hearsay evidence of certain statements by children before grand juries; and amending Rule 6(r), Alaska Rules of Criminal Procedure."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 12.40 is amended by adding a new section to read:

Sec. 12.40.110. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL OFFENSES. (a) In a prosecution for an offense under AS 11.41.410 - 11.41.440 or 11.41.455, hearsay evidence of a statement, not otherwise admissible, made by a child under the age of 10 who is the victim of the offense describing the conduct establishing the offense may be admitted into evidence before the grand jury if

(1) the circumstances of the statement indicate its reliability;

(2) additional evidence is introduced to corroborate the statement; and

(3) the child testifies at the grand jury proceeding or the child will be available to testify at trial.

(b) In this section "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion.

* Sec. 2. AS 12.40.110, added by sec. 1 of this Act, has the effect of amending Rule 6(r), Alaska Rules of Criminal Procedure, by changing the circumstances under which hearsay evidence may be introduced in grand jury

proceedings for certain sexual offenses.

Offered: 4/3/85
Referred: Judiciary and Finance

Original sponsor: Phillips

IN THE HOUSE

BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

CS FOR HOUSE BILL NO. 67 (HESS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the admissibility of hearsay evidence of certain statements by children before grand juries; and amending Rule 6(r), Alaska Rules of Criminal Procedure."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 12.40 is amended by adding a new section to read:

Sec. 12.40.110. ADMISSIBILITY OF CERTAIN STATEMENTS BY CHILDREN BEFORE GRAND JURIES. (a) Hearsay evidence of a statement related to the offense, not otherwise admissible, made by a child under the age of 12 may be admitted into evidence before the grand jury if

(1) the circumstances of the statement indicate its reliability; and

(2) the child

(A) testifies at the grand jury proceeding; or

(B) is unavailable as a witness, the grand jury members are informed of the reason for the child's unavailability, and there is additional evidence introduced to corroborate the statement.

(b) In this section,

(1) "statement" means an oral or written assertion, or nonverbal conduct if the nonverbal conduct is intended as an assertion;

(2) "unavailable" means the child

(A) has a lack of memory of the subject matter of the

statement being offered;

(B) is unable to attend or testify at the hearing because of death or a then existing physical or mental illness or infirmity;

(C) is likely to suffer substantial psychological, emotional, or physical harm if required to testify; or

(D) is absent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of the statement has exercised reasonable diligence in attempting to procure the child's attendance.

(c) A child is not unavailable under this section if the unavailability is due to the procurement or wrongdoing of the proponent of the statement to prevent the child from attending or testifying.

(d) Prior to the admission of hearsay evidence before the grand jury under this section, the superior court shall hold an in camera hearing on the record to determine the admissibility of the evidence. The court shall enter an appropriate order concerning admissibility.

* Sec. 2. AS 12.40.110, added by sec. 1 of this Act, has the effect of amending Rule 6(r), Alaska Rules of Criminal Procedure, by making certain hearsay evidence admissible in grand jury proceedings without requiring compelling justification.

Introduced: 1/16/85
Referred: Health,Education & Social Services,Judiciary and Finance

IN THE HOUSE BY PHILLIPS

HOUSE BILL NO. 67

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL,

For an Act entitled: "An Act relating to hearsay evidence in prosecutions for certain sexual offenses; and amending Rules 803 and 804, Alaska Rules of Evidence, and Rule 6(r), Alaska Rules of Criminal Procedure."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 12.40 is amended by adding a new section to read:

Sec. 12.40.110. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL OFFENSES. (a) In a prosecution for an offense under AS 11.41.410 - 11.41.440 or 11.41.455, hearsay evidence of a statement, not otherwise admissible, made by a child under the age of 10 who is the victim of the offense describing the conduct establishing the offense may be admitted into evidence before the grand jury if

(1) the circumstances of the statement indicate its reliability; and

(2) the child

(A) testifies at the grand jury proceeding; or

(B) is unavailable as a witness and there is additional evidence introduced to corroborate the statement.

(b) In this section,

(1) "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion;

(2) "unavailable" means the child

(A) has a lack of memory of the subject matter of the

statement being offered;

(B) is unable to attend or testify at the hearing because of death or then existing physical or mental illness or infirmity;

(C) is declared incompetent to testify by the judge; or

(D) is absent from the hearing and the proponent of the statement has been unable to procure the child's attendance by reasonable means.

(c) A child is not unavailable under this section if the unavailability is due to the procurement or wrongdoing of the proponent of the statement to prevent the child from attending or testifying.

* Sec. 2. AS 12.45 is amended by adding a new section to read:

Sec. 12.45.049. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL OFFENSES. (a) In a prosecution for an offense under AS 11.41.410 - 11.41.440 or 11.41.455, hearsay evidence of a statement, not otherwise admissible, made by a child under the age of 10 who is the victim of the offense describing the conduct establishing the offense may be admitted into evidence at trial if

(1) the court determines in a hearing outside the presence of the jury that the circumstances of the statement indicate its reliability;

(2) the child

(A) testifies at the trial; or

(B) is unavailable as a witness and there is additional evidence introduced to corroborate the statement; and

(3) the proponent of the statement informs the adverse party of the intention to offer the statement and the contents of the statement sufficiently before the proceedings to give the adverse

party a fair opportunity to respond to the statement.

(b) In this section,

(1) "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion;

(2) "unavailable" means the child

(A) has a lack of memory of the subject matter of the statement being offered;

(B) is unable to attend or testify at the hearing because of death or then existing physical or mental illness or infirmity;

(C) is declared incompetent to testify by the judge; or

(D) is absent from the hearing and the proponent of the statement has been unable to procure the child's attendance by reasonable means.

(c) A child is not unavailable under this section if the unavailability is due to the procurement or wrongdoing of the proponent of the statement to prevent the child from attending or testifying.

* Sec. 3. AS 12.40.110, added by sec. 1 of this Act, has the effect of amending Rule 6(r), Alaska Rules of Criminal Procedure, by making certain hearsay evidence admissible in grand jury proceedings for certain sexual offenses without requiring compelling justification.

* Sec. 4. AS 12.45.049, added by sec. 2 of this Act, has the effect of amending Rules 803 and 804, Alaska Rules of Evidence, by allowing admission at trial of hearsay evidence of certain statements made by certain victims of certain sexual offenses.