SB

3

Senate Health, Education and Social Services Committee

Legislation Checklist

Bill number: SB 3

Sponsor: Kerttula

Date referred to committee:

Synopsis completed: 1/10/85

Fiscal note:

Further referrals:

CONTACTS:

# COMMITTEE REPORT

# SENATE

FURTHER: JUDICIARY
FINANCE

1/14/85

Date 4-4-85

Mr. President

The Committee on HESS considered SB 3

admissibility of certain hearsay evidence in grand jury proceedings for certain sexual offenses and amending Rule 6(r), Alaska Rules of Criminal Procedure

and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass

[ ] do pass with attached amendment(s)

[X] replace with/or adopt CS for SB 3
[ ] new title
[X] same title and recommends Do Pass

[ ] and attached a "LETTER OF INTENT" [ ] NEW FISCAL NOTE

[ ] reports it back without recommendation

[ ] recommends referral to ______________ Committee

| MEMBERS SIGNING DO PASS | MEMBERS HAVING OTHER RECOMMENDATIONS |
|---|---|
| [signature] | |
| [signature] | |
| [signature] | |
| [signature] | |

[signature]
Chairman

Do Pass
Chairman recommendation

Edie FYI put in our bill file

Introduced: 2/8/85
Referred: Health, Education & Social Services, Judiciary and Finance

BY HANLEY, RIEGER, PETTYJOHN, MARTIN, JENKINS, PEARCE, FURNACE, COLLINS AND RINGSTAD

1 IN THE HOUSE

2 HOUSE BILL NO. 179

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the admissibility of hearsay
7 evidence in grand jury proceedings and amending Rule
8 6(r), Alaska Rules of Criminal Procedure."

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

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

11 Sec. 12.40. . . HEARSAY EVIDENCE. In a grand jury proceeding,
12 hearsay evide establishing the offense is admissible whether or not
13 the hearsay evidence would be admissible at trial.

14 * Sec. 2. Section 1 of this Act has the effect of amending Rule 6(r),
15 Alaska Rules of Criminal Procedure, by making hearsay evidence admissible
16 in grand jury proceedings without requiring compelling justification.

TO: Bettye
FM: Edie
RE: SB 3

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SB 3 was introduced with the intention of enhancing prosecution of cases involving sexual assault of young children. Because of inherent problems of communication in the very young; and because of the trauma caused by a sexual assault, the ability of the child to "testify"- communicate clearly details of an assault, is very limited.

The proponents of SB 3 believe that by liberalizing the admissibility of hearsay evidence in Grand Jury proceedings, the young victim will be treated more fairly and information required for prosecution will be more available.

The effect of what is required to accomplish these objectives is an amendment to a section of the Alaska Rules of Court, 6(r) of the Criminal Rules. 6(r) deals strictly with the admissibility of evidence. It says"...Hearsay evidence shall not be presented i. the grand jury absent compelling justification."

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Q1) HEARSAY EVIDENCE IS GENERALLY NOT ACCEPTABLE BECAUSE OF THE QUESTION OF RELIABILITY, TRUTH QUESTIONING, AND CROSS-EXAMINATION. IS THERE A VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION?

A1) Circumstances for cross-examination and witness confrontation are not present during Grand Jury proceedings.

Q2) WHAT IS THE DEFINITION OF HEARSAY?

A2) Hearsay evidence is not defined by statute. It is understood by the court to be either a statement from the adult to whom the child recounted the incident, and/or a videotape of the child interviewed either immediately after the alleged incident or interviewed by an individual professionally trained to encourage children to describe such incidents.

Q3) WHAT ARE THE CURRENT LAWS ON VIDEOTAPING?

AS 12.45.047 allows the videotaping of testimony of a child who has been sexually abused. The testimony is presented by the prosecutor and victim before the trial judge. The defendant has a right to be present and have an attorney present and the right to cross examine the victim. The testimony can then be used at the actual trial.

Q4) THE GOVERNOR HAS SUBMITTED LEGISLATION, HOUSE BILL 88, WHICH ALSO PROPOSES TO ALLOW HEARSAY TO BE SUBMITTED AS EVIDENCE IN GRAND JURY DELIBERATIONS FOR CERTAIN SEXUAL OFFENSES AND BY DOING SO, CAUSE A CHANGE IN RULE 6(r). WHAT IS THE DIFFERENCE BETWEEN THE GOVERNOR"S BILL AND THIS BILL?

A4) In SB 3, hearsay evidence would be admissable in Grand Jury, whether or not it is admissable at trial. In the Governor's bill, hearsay evidence is admissable only if the circumstances of the assertion indicate it's reliability and only if the child also testifies at the grand jury proceeding or, if unavailable, has additional evidence to corroborate the assertion.

Q5) IT IS MY UNDERSTANDING THE USE OF VIDEOTAPE FOR SUBMITTING TESTIMONY IS MINIMAL AT BEST. IS THIS TRUE, AND IF SO, WHY?

Q6) HOW WAS THE AGE 16 FACTOR DETERMINED? IS IT APPROPRIATE?

Q7) WHAT ARE THE SEXUAL OFFENSES IN WHICH HEARSAY EVIDENCE WOULD BE ADMISSABLE?

A3) a. Sexual Assault in the first degree AS 11.41.410
- sexual penetration without consent
- attempt at sexual penetration causing serious physical damage

b. Sexual Assault in the second degree AS11.41.420
- sexual contact without consent
-sexual penetration with a person the offender knows that is suffering from a mental disorder or defect

c. Sexual Abuse of a minor in the first degree AS 11.41.434
-being 16 years of age or older, engaging sexual penetration with someone 13 years or younger
-being 18 years or older and engaging in sexual penetration with someone younger than 18 who is a relation

d. Sexual Abuse of a minor in the second degree AS 11.41.436
-

e. Sexual Abuse of a minor in the third degree AS 11.41.438
-being 16 years of age or older, the offender engages in sexual contact with a person whho is 13, 14, 15 years of age and at least three years younger than the offender.

f. Sexual Abuse of a minor in the fourth degree AS 11.41.440
being under 16 years of age, the offender engages in sexual penetration or sexual contact with a person who is under 13 years of age and at least three years younger than the offender.

g. Unlawful exploitation of a minor AS 11.41.455
knowingly inuces or employs a child under 18 years of age to engage in or photographs films or televises a child under 18 years of age engaged in sexual penetration; lewd touching of another person's genitals, anus, or breast; masturbation; bestiality, etc.

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

1 IN THE HOUSE BY PHILLIPS

2 HOUSE BILL NO. 67

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

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

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

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

12 Sec. 12.40.110. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL
13 OFFENSES. (a) In a prosecution for an offense under AS 11.41.410 -
14 11.41.440 or 11.41.455, hearsay evidence of a statement, not otherwise
15 admissible, made by a child under the age of 10 who is the victim of
16 the offense describing the conduct establishing the offense may be
17 admitted into evidence before the grand jury if

18 (1) the circumstances of the statement indicate its relia-
19 bility; and

20 (2) the child

21 (A) testifies at the grand jury proceeding; or

22 (B) is unavailable as a witness and there is addi-
23 tional evidence introduced to corroborate the statement.

24 (b) In this section,

25 (1) "statement" means an oral or written assertion or
26 nonverbal conduct if the nonverbal conduct is intended as an asser-
27 tion;

28 (2) "unavailable" means the child

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

1 statement being offered;

2 (B) is unable to attend or testify at the hearing

3 because of death or then existing physical or mental illness or

4 infirmity;

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

6 or

7 (D) is absent from the hearing and the proponent of

8 the statement has been unable to procure the child's attendance

9 by reasonable means.

10 (c) A child is not unavailable under this section if the un-

11 availability is due to the procurement or wrongdoing of the proponent

12 of the statement to prevent the child from attending or testifying.

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

14 Sec. 12.45.049. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL

15 OFFENSES. (a) In a prosecution for an offense under AS 11.41.410 -

16 11.41.440 or 11.41.455, hearsay evidence of a statement, not otherwise

17 admissible, made by a child under the age of 10 who is the victim of

18 the offense describing the conduct establishing the offense may be

19 admitted into evidence at trial if

20 (1) the court determines in a hearing outside the presence

21 of the jury that the circumstances of the statement indicate its

22 reliability;

23 (2) the child

24 (A) testifies at the trial; or

25 (B) is unavailable as a witness and there is addi-

26 tional evidence introduced to corroborate the statement; and

27 (3) the proponent of the statement informs the adverse

28 party of the intention to offer the statement and the contents of the

29 statement sufficiently before the proceedings to give the adverse

1 party a fair opportunity to respond to the statement.

2 (b) In this section,

3 (1) "statement" means an oral or written assertion or
4 nonverbal conduct if the nonverbal conduct is intended as an asser-
5 tion;

6 (2) "unavailable" means the child

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

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

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

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

17 (c) A child is not unavailable under this section if the un-
18 availability is due to the procurement or wrongdoing of the proponent
19 of the statement to prevent the child from attending or testifying.

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

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

1 medical attention.

2 (b) Endangering the welfare of a minor in the second degree is a

3 class A misdemeanor.

4 * Sec. 3. AS 11.61.125(a) is amended to read:

5 (a) A person commits the crime of distribution of child pornog-

6 raphy if the person brings or causes to be brought into the state for

7 sale or distribution, or in the state distributes, sells, or exhibits

8 to others for commercial consideration, or possesses, prepares, pub-

9 lishes, or prints with intent to distribute, sell, or exhibit to

10 others for commercial consideration, any material that visually de-

11 picts conduct described under AS 11.41.455(a), knowing that the pro-

12 duction of the material involved the use of a child under 18 years of

13 age who engaged in the conduct.

14 * Sec. 4. AS 12.10.020(c) is amended to read:

15 (c) Even if the general time limitation has expired, a prose-

16 cution under AS 11.41.410 -- 11.41.460, AS 11.66.110 -- 11.66.130,

17 former AS 11.41.430, or former AS 11.51.130(a)(4), for an offense

18 committed against a person under the age of 16 may be commenced within

19 one year after the crime is reported to a peace officer or the person

20 reaches the age of 16, whichever occurs first. This subsection does

21 not extend the period of limitation by more than five years.

22 * Sec. 5. AS 12.40 is amended by adding a new section to read:

23 Sec. 12.40.055. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL

24 OFFENSES. (a) In a prosecution for an offense under AS 11.41.410 --

25 11.41.460, AS 11.66.110 -- 11.66.130, former AS 11.41.430, or former

26 AS 11.51.130(a)(4), hearsay evidence of a statement relating to the

27 offense, not otherwise admissible, made by a child under the age of 16

28 may be admitted into evidence before the grand jury if

29 (1) the circumstances of the statement indicate its

Introduced: 1/18/85
Referred: Health, Education & Social Services, Judiciary and Finance

1 IN THE HOUSE BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

2 HOUSE BILL NO. 88

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the protection of children; and
7 amending Rules 504, 505, and 506, Alaska Rules of
8 Evidence, and Rule 6(r), Alaska Rules of Criminal
9 Procedure."

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

11 * Section 1. AS 11.51.100 is amended to read:

12 Sec. 11.51.100. ENDANGERING THE WELFARE OF A MINOR IN THE FIRST
13 DEGREE. (a) A person commits the crime of endangering the welfare of
14 a minor in the first degree if, being a parent, guardian, or other
15 person legally charged with the care of a child under 18 [10] years of
16 age, the person intentionally deserts the child in any place under
17 circumstances creating a substantial risk of physical injury to the
18 child.

19 (b) Endangering the welfare of a minor in the first degree is a
20 class C felony.

21 * Sec. 2. AS 11.51 is amended by adding a new section to read:

22 Sec. 11.51.110. ENDANGERING THE WELFARE OF A MINOR IN THE SECOND
23 DEGREE. (a) A person commits the crime of endangering the welfare of
24 a minor in the second degree if, being entrusted with the care of a
25 child under 18 years of age, the person with criminal negligence

26 (1) exposes the child to circumstances creating a substan-
27 tial risk of physical injury or sexual abuse; or

28 (2) exposes the child to physical injury by failing to
29 provide the child with necessary food, care, clothing, shelter, or

1 reliability; and

2 (2) the child

3 (A) testifies at the grand jury proceeding; or

4 (B) is unavailable as a witness and there is some

5 additional evidence to corroborate the statement.

6 (b) In this section,

7 (1) "statement" means an oral or written assertion or

8 nonverbal conduct if the nonverbal conduct is intended as an asser-

9 tion;

10 (2) "unavailable" means that the child

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

12 statement being offered;

13 (B) is unable to testify at the proceeding because of

14 death or then existing physical or mental illness or infirmity;

15 (C) is likely to suffer substantial psychological,

16 emotional, or physical harm if required to testify;

17 (D) is declared incompetent to testify by the judge;

18 or

19 (E) is absent from the proceeding and the prosecution

20 has been unable, after reasonable efforts, to procure the child's

21 attendance.

22 * Sec. 6. AS 12.45.045 is amended to read:

23 Sec. 12.45.045. EVIDENCE OF PAST SEXUAL CONDUCT IN TRIALS FOR

24 SEXUAL OFFENSES [OF RAPE AND ASSAULT WITH INTENT TO COMMIT RAPE]. (a)

25 In prosecutions for the crimes [CRIME] of sexual assault in any de-

26 gree, sexual abuse of a minor in any degree, or unlawful exploitation

27 of a minor, or an attempt to commit any of these crimes [SEXUAL AS-

28 SAULT IN ANY DEGREE], evidence of the complaining witness' previous

29 sexual conduct may [SHALL] not be admitted nor reference made to it in

1 the presence of the jury except as provided in this section. When the
2 defendant seeks to admit the evidence for any purpose, the defendant
3 may apply for an order of the court at any time before or during the
4 trial or preliminary hearing. After the application is made, the
5 court shall conduct a hearing in camera to determine the admissibility
6 of the evidence. If the court finds that evidence offered by the
7 defendant regarding the sexual conduct of the complaining witness is
8 relevant, and that the probative value of the evidence offered is not
9 outweighed by the probability that its admission will create undue
10 prejudice, confusion of the issues, or unwarranted invasion of the
11 privacy of the complaining witness, the court shall make an order
12 stating what evidence may be introduced and the nature of the ques-
13 tions which <u>may</u> [SHALL] be permitted. The defendant may then offer
14 evidence under the order of the court.

15 * Sec. 7. AS 12.62.035(a) is amended to read:

16 (a) Notwithstanding any other provision of law, an interested
17 person as defined in (e) of this section may request from the commis-
18 sion records of all convictions <u>for crimes that might pose a risk to a</u>
19 <u>child</u> [INVOLVING CONTRIBUTING TO THE DELINQUENCY OF A MINOR AND ANY
20 SEX CRIMES] of a person who holds or applies for a position in which
21 the person has or would have supervisory or disciplinary power over a
22 minor. The commission shall authorize the disclosure of the informa-
23 tion to the requesting interested person and shall provide a copy of
24 the information to the person who is the subject of the request.

25 * Sec. 8. AS 12.62.035(e)(1) is repealed and reenacted to read:

26 (1) "crime that might pose a risk to a child" includes a
27 violation or attempted violation of present or former Alaska statutes
28 regarding the offenses now designated as murder, manslaughter, negli-
29 gent homicide, assault, reckless endangerment, kidnapping, custodial

# Senator reveals sexual abuse

WASHINGTON (AP) — A national conference on the sexual abuse of children opened yesterday morning with the startling disclosure by Sen. Paula Hawkins that she was sexually abused by a 60-year-old neighborhood man when she was 5.

"It affects you for a lifetime," Hawkins said of the molestation, which occurred when her family lived in California.

Equally traumatic, she said, was her ensuing court appearance before a judge who thought she was lying about the incident.

Hawkins, 57, R-Florida, said her disclosure of the childhood episode was unplanned and very difficult. She never had even told her husband. She said she decided it was important to reveal the incident to show that sexual abuse can happen to anyone.

The freshman senator spoke at the opening session of the Third National Conference on Sexual Victimization of Children, sponsored by the Children's Hospital, National Medical Center.

"I'm lucky, I told my mother," she said, adding that her parents believed her, supported her and helped her avoid lasting problems from the incident.

Hawkins said the elderly neighbor who once reached inside her clothing had attracted children to his home by giving them candy and toys, and offering to baby-sit while their mothers went shopping.

She said the man involved was taken to court after her mother checked with other parents and learned that several neighborhood children had suffered similar abuse.

But when she appeared in court, Hawkins said, "I was embarrassed and humiliated" because the judge treated her as if she were lying.

The elderly man was released and continued to abuse children, she said.

Now, she said, "when children complain, I believe them."

Hawkins said the court memory is "very vivid . . . how tiny I was and how huge the other people were." The lawyers, she said, were terrible.

"It took me a long time to get over it," she said. "If there is a scar in my mind, it's that we didn't win the case."

Hawkins appeared on a panel of the Senate Children's Caucus headed by Sen. Christopher Dodd, D-Conn., who estimated that an incident of child sexual abuse occurs in the United States about once every two minutes. He said one victim in five is

See SENATOR, Page A-4

**Sen. Paula Hawkins** urges parents to be more explicit in telling children how to handle improper sexual advances.

# Senator reveals she was sexually abused as child

From Page A-1

younger than 7.

Most abused children are victims of people they know and trust, such as friends, family members and neighbors, Dodd said. Boys and infants are not exempt.

Kee McFarlane of the Child Sexual Abuse Diagnostic Center in Los Angeles confirmed Dodd's estimates. She said she knows of cases involving infants only 15 months old, in which diapers were removed to abuse the child.

Judge Reggie Walton of the District of Columbia Superior Court agreed with Hawkins' comments about her court appearance as a child.

"It is a traumatic experience for a child to come into a courtroom before a group of strangers and testify about something they probably consider humiliating and dirty," Walton said.

Hawkins urged parents to listen to their children and to warn them in explicit terms about wrong behavior, shunning vague talk about "improper hugs."

"The delicateness of the subject is for a bygone era, the Victorian era," she said. "You have to directly tell a child, 'If a man holds you in his arms and puts his hands in your panties, that's wrong.'

"That's all that happened to me. I told my mother, I didn't understand why this man put his hands in my panties."

McFarlane said that simply warning children to say "no" isn't enough. "I know of hundreds of cases of children who said 'no,' who begged 'no,' and it didn't help," she said.

Court procedures providing a confrontation with the accuser are designed for adults, said McFarlane, and they cause special problems for children who may be facing a teacher or neighbor.

She explained that children must be convinced that parents are aware that sexual abuse can happen and that they can confide in their parents without losing their love.

"If they (children) have never heard about it from us and the first time they hear about these things is someone tricking them, or threatening them," the children don't know how to respond, McFarlane said.

She cautioned, "Do not underestimate the extremes to which people will go to silence children."

Hawkins, one of two woman senators, was born in Salt Lake City, Utah. She and her husband, businessman Walter Hawkins, reside in Winter Park, Fla. They have three children.

Elected in 1980 to the seat formerly held by Sen. Richard Stone, D-Fla., Hawkins is viewed as a conservative on some social and economic issues.

She describes herself as a housewife and has long been interested in legislation to protect and help children. In 1982, she pushed a measure through Congress that set up a nationwide system for locating missing children.

(12)

FROM: ATTORNEY GENERAL'S TASK FORCE ON VIOLENCE SEPT. 1984

ence victims do not first seek help
nt. Rather, they obtain formal pro-
he courts in an effort to temporarily
violence and harassment from the
ny of these orders are issued by civil
ation is a civil offense not subject
nsider the matter to be one in which
ntervene. By their inaction, law en-
re unintentionally eroding the pro-
secured from the court and possibly
scalation of violence.
pal objective of the protection order
harm, law enforcement personnel
enforce the intent of the order.
on of the order is usually a civil of-
olve criminal behavior. The existence
order often gives the officer a basis
o file charges for trespass, disturb-
r appropriate criminal offense. The
rest then in turn becomes the basis
ose a contempt order or other ap-
n the abuser.
ith prosecutors and judges, law en-
should develop special policies for
priate enforcement of all protection
olicies have been articulated, com-
of law enforcement supervisors, of-
rs must be initiated, followed by
ing to ensure that the policies are
Education and Training Recom-

Recommendation 5:
protection orders should be available
and sheriffs' offices.

nmendation 4.

Recommendation 6:
disturbance calls, law enforcement
ment violations of pre-trial release
ort should verify the facts and cir-
ry for the prosecutor to request
lease.

nmendation 8.



# Recommendations for Prosecutors

1. Prosecutors should organize special units to process family violence cases and wherever possible should use vertical prosecution.
   - The units should work closely with victim assistance providers.
   - The units should review all law enforcement reports involving incidents of family violence whenever possible.
2. The victim should not be required to sign a formal complaint against the abuser before the prosecutor files charges, unless mandated by state law.
3. Whenever possible, prosecutors should not require family violence victims to testify at the preliminary hearing.
4. Prosecutors should adopt special policies and procedures for child victims. These should include:
   - Presenting hearsay evidence at preliminary hearings so the child is not required to testify in person;
   - Presenting, with consent of counsel, the child's trial testimony on videotape;
   - Use of anatomically correct dolls and drawings to describe abuse; and
   - Limiting continuances to an absolute minimum.
5. If the defendant does not remain in custody and when it is consistent with the needs of the victim, the prosecutor should request the judge to issue an order restricting the defendant's access to the victim as a condition of setting bail or releasing the assailant on his own recognizance. If the condition is violated, swift and sure enforcement of the order and revocation of release are required.

## Discussion

Prosecutors Recommendation 1:
Prosecutors should organize special units to process family violence cases and wherever possible should use vertical prosecution.

- The units should work closely with victim assistance providers.

**The units should review all law enforcement reports involving incidents of family violence whenever possible.**

*He's a very good liar. He looks very sincere. He promises anything you want to hear. He promises that he will do anything, lots of tears and, 'I'm so sorry, and I love these children, I would never do it again . . .' You want to believe that it's just a mistake, but it's not a mistake.—a victim*

Because family violence involves offenses inflicted not only against the individual but against the state as well, prosecution is a critical element of intervention. Prosecutors can play a key role in holding abusers accountable for their actions and at the same time help to prevent future violence. But without special units successful prosecution of family violence cases is rare. At each successive stage in the justice system, the number of active cases drops dramatically.[19]

The trauma and aftermath of violence within the family has a profound and significant effect upon both the abuser and victim. Too often abusers deny, minimize or excuse their violent behavior. Even after the most violent and destructive episodes, abusers typically go through a period of remorse seeking reconciliation and forgiveness. Unfortunately, repentance is generally shortlived. Without some type of intervention, the violence commonly escalates in frequency and intensity.

In addition to suffering physical injuries inflicted by the abuser, victims of family violence often blame themselves for the abuse. Guilt, shame and embarrassment make them reluctant to seek help and increases their feelings of isolation and hopelessness. Because violence is often learned behavior, many victims may even regard violence as a normal part of a relationship.

*The beatings started gradually and escalated over the fifteen year period we lived together. First [they] were accidents, then something I deserved or provoked.—a victim*

Fear of further violence, particularly fear of reprisals from an abuser who is angered by the steps the victim has taken for protection, often makes the victim hesitant to participate in the criminal justice system. Economic or emotional dependence, promises of change from the abuser, or a fear that the family might separate also contributes to a victim's reluctance to cooperate with criminal proceedings.

Prosecutors must recognize that these special concerns of family violence victims need not make them unwilling or uncooperative complainants and witnesses. Rather, prosecutors must approach cases of family violence from a fresh perspective and be flexible and sensitive in dealing with the emotional complexities of these cases. To most effectively build upon police intervention, prosecutors should organize special units to process family violence cases.[20]

Staffed with both attorneys and victim assistance professionals or volunteers, the unit should review all law enforcement reports involving incidents of family violence whenever possible (See Law Enforcement Recommendation 1). Not all cases will be appropriate for prosecution. However, in all cases, victim assistance personnel can provide important referral information to both the victim and abuser. Sources of treatment and counseling are particularly important for families working to resolve the underlying causes of abuse and break the cycle of violence. Prevention of future violence is definitely the goal. Referrals also can be made for housing, medical services, financial aid and other sources of emergency assistance.

*Vertical prosecution develops trust between the victim and the prosecutor. An individual relationship of trust and concern that both minimizes the negative aspects of the legal process and also strengthens the case.—Prosecuting Attorney Norm Maleng*

In cases that do go forward, the victim assistance professionals and volunteers can provide important advice and support to the victims as well as the prosecutors. In addition to making referrals to service and treatment resources in the community, victim assistance personnel can familiarize the victim with the criminal justice process and ensure victim participation in every stage of the court proceeding. The companionship and reassurance of the victim assistance professionals and volunteers also can help the victim to deal with harassment or intimidation by the abuser and to prevent further victimization. Victim assistance personnel also can help to facilitate convenient court dates, arrange transportation to court proceedings, ensure that the victim has a secure place to wait before testifying, and intercede with employers or creditors of the victim. Working closely to support the victim, victim assistance professionals and volunteers also can aid the prosecutor by increasing victim understanding and cooperation.

The attorneys of the unit develop an expertise in dealing with family violence that results in more accurate case evaluation and more effective prosecution. The creation of a special unit also fosters the development of an individual bond of trust and concern between the victim and a prosecutor sensitive to the complexities of family violence.

**Prosecutors Recommendtion 2:**
**The victim should not be required to sign a formal complaint against the abuser before the prosecutor files charges, unless mandated by state law.**

When there is sufficient evidence of criminal conduct to file charges against the abuser, the prosecutor should not first require the victim to sign a formal complaint.[21] Requiring the victim to do so makes it appear that the victim is responsible for charging the abuser. Given that impression, the defendant will often harass, threaten or otherwise attempt to intimidate the victim into dropping the complaint. The prosecutor must relieve the victim of this pressure by filing charges without requiring the victim to sign the formal complaint. It is the prosecutor, on behalf of the state, and not the victim, who initiates prosecution when the elements of criminal conduct have been determined. The prosecutor and the judge, not the victim, determine whether the case is prosecuted or dismissed.

*The fact is that more cases end up not being prosecuted because the victim. . .decides to fold his tent. This fact of life has to be dealt with and the advocate program is our way of doing that.—District Attorney Sam Millsap*

Anyone who has worked in this area has experienced situations when the victim does not want to go forward. That desire is manifested in several situations.

A witness simply may fail to appear even though subpoenaed. Such a failure may reflect the witness' desire to no longer see the case proceed, but it also may be the result of intimidation or actual injury. It is incumbent on the prosecutor to investigate the case.

Another situation arises when the victim voices a desire to have the matter dropped. As has been discussed, these victims are frequently ambivalent about the entire process and what would best suit their needs.

*As a prosecutor, I have seen relief on a woman's face, relief when I have said, 'I am sorry, I am not waiving'. . .it works, it really does work.—Prosecutor "Sam" Aaron*

Some hesitation may be fear of the unknown. But when victims actually find themselves in court presented with the opportunity to testify, they frequently become confident enough to do so.

If victims absolutely refuse to testify, the prosecutor should still require that they make a statement under oath to the court to that effect.

In appropriate cases, it may be possible to proceed by basing prosecution on prior inconsistent statements of the victim or other witnesses to the crime. Such a decision is not lightly undertaken but the prosecutor might feel a given case is of sufficient seriousness to merit this approach.

**Prosecutors Recommendation 3:**
**Whenever possible, prosecutors should not require family violence victims to testify at the preliminary hearing.**

Testifying in court against another family member or loved one can be a very painful experience. As unpleasant as it may be to discuss the family situation and history of abuse in open court in front of strangers, it is even more disturbing to do so in the presence of the abusive family member. The preliminary hearing is one proceeding at which it should not be necessary for the victim to testify in person. At this initial examination of the evidence to consider whether there is a sufficient basis for prosecution, there is no federal constitutional right to confrontation as there is at trial

*Appropriate consideration of the victim results in better cooperation with law enforcement, helps restore confidence and will, therefore, make the system work more effectively. This really is the bedrock, improving the confidence in our criminal justice system.—Attorney General Kenneth Eikenberry*

The sufficiency of hearsay evidence at a preliminary hearing is firmly established in the federal courts as well as a number of local jurisdictions. For the purposes of the preliminary hearing, the testimony of the law enforcement officer, or investigator or other appropriate witness, that initially interviewed the victim, should be sufficient. The victim of family violence is spared the harassment and intimidation caused by repeated unnecessary appearances, continuances, and confrontations with the abuser.

**Prosecutors Recommendation 4:**
**Prosecutors should adopt special policies and procedures for child victims. These should include:**

- **Presenting hearsay evidence at preliminary hearings so the child is not required to testify in person;**
- **Presenting, with consent of counsel, the child's trial testimony on videotape;**
- **Use of anatomically correct dolls and drawings to describe abuse; and**
- **Limiting continuances to an absolute minimum.**

Children who have been abused or sexually molested have suffered an extreme trauma. Successful case prosecution requires sensitive treatment of these children to ensure that they are not further victimized in the courtroom. Special procedures will also result in the child being a more articulate and effective witness.

The special needs of the child must be considered from the initial investigative interview through case

*These children do not suffer from the trauma, usually of one sudden, frightening attack, but in most cases were subjected to an abusive and secret relationship over a period of months, or years.—Doris Stevens*

development and prosecution, and imposition of sentence. Task Force testimony cited many instances where children were put through numerous and grueling interviews, repeated continuances and painful questioning in the courtroom.[22] Rather than giving the child the respect and compassion needed, these procedures reduce the child to an automaton, caught in the adult drama of the courtroom.

To enable children to more easily and effectively relate the abuse they have suffered, prosecutors should adopt special procedures for child abuse and molestation cases.

At the preliminary hearing the court considers only whether the evidence is sufficient to go forward with prosecution. The prosecutor should not require the child to testify in person. Consistent with state procedures, a videotaped statement, testimony by the child to a law enforcement investigator, or other such presentations should be adequate. If the state rules of procedure do not provide for such presentation, the prosecuting offices should work with concerned citizen groups and lawmakers to modify the rules of procedure to make such a presentation possible (See Judges Recommendation 3).

The child's videotaped testimony also may be sufficient for use at trial with the consent of counsel and appropriate waivers and stipulations from the defendant (See Judges Recommendation 3). While it may appear that the defense may not consent to such a procedure, the defense runs a tremendous risk by insisting on the appearance of the child victim and subjecting a sympathetic victim to cross examination. Thus it may be in the interest of both parties, and certainly in the interest of the child, to allow for the presentation of testimony on videotape.

In interviewing the child, it is particularly important that the prosecutor recognize the profound impact that crimes of abuse and molestation have on a child. Interviews and statements required for trial preparation should be kept to a minimum. The initial interview with the child should be videotaped to avoid repeated sessions of questioning. The prosecutor also should use anatomically correct dolls or drawings to help the child describe the abuse.[23]

*She was asked exact times and dates, which she told them she could not remember. She was then made to feel that because she could not remember, she was lying.—a victim's mother*

Repeated continuances can be extremely damaging to a child. It is important for a child to be able to put the incident behind him and get on with his life. Certainly parents may be reluctant to permit their child to continue in a system fraught with unnecessary delay. Delay also can weaken the prosecution's case as the child's memory of the crime may diminish. Prosecutors should vigorously oppose any attempt to delay cases involving child victims and should absolutely minimize continuances.

*I feel that being a victim of the criminal is terrible enough, but when you're then. . .a victim at the hands of the justice system, it is a travesty.—a victim*

**Prosecutors Recommendation 5:**
**If the defendant does not remain in custody and when it is consistent with the needs of the victim, the prosecutor should request the judge to issue an order restricting the defendant's access to the victim as a condition of setting bail or releasing the assailant on his own recognizance. If the condition is violated, swift and sure enforcement of the order and revocation of release are required.**

See Judges Recommendation 8.

# Recommendations for Judges

**1. A wide range of dispositional alternatives should be considered in cases of family violence. In all cases, prior to sentencing, judges should carefully review and consider the consequences of the crime on the victim.**

**2. Judges should treat incest and molestation as serious criminal offenses.**

**3. Judges should adopt special court rules and procedures for child victims. These should include:**

- **The use of hearsay evidence at preliminary hearings;**
- **Appointment of a special volunteer advocate for children, when appropriate;**
- **A presumption that children are competent to testify;**
- **Allowing the child's trial testimony to be presented on videotape with agreement of counsel;**
- **Flexible courtroom settings and procedures; and**
- **Carefully managed press coverage.**

**4. Protection orders should be available on an emergency basis in family violence cases.**

**5. Judges should establish guidelines for expeditious handling of family violence cases.**

**6. Judges should admit hearsay statements of family violence victims at the preliminary hearing.**

7. Expert witnesses should be allowed to testify in family violence cases to familiarize the judge and jury with the dynamics of violence within the family.

8. In granting bail or releasing the assailant on his own recognizance, the judge should impose conditions that restrict the defendant's access to the victim and strictly enforce the order.

## Discussion

**Judges Recommendation 1:**
**A wide range of dispositional alternatives should be considered in cases of family violence. In all cases, prior to sentencing, judges should carefully review and consider the consequences of the crime on the victim.**

Just as the courtroom is the ultimate focus of the criminal justice system, the imposition of a just sentence is the desired culmination of any criminal judicial proceeding. The sanction rendered is not only punishment for the offender but also an indication of the seriousness of the criminal conduct and a method of providing protection and support to the victim. Too often, in family violence cases, the sentence fails on all three counts.

The criminal justice system has traditionally considered family violence to be a personal matter that should be resolved without resort to the legal process. Placing the family, ideally a source of unity and support, into the adversarial setting of a courtroom seemed unthinkable and inappropriate. However, the testimony of hundreds of family violence victims demonstrates that judges and judicial proceedings are critical components necessary to end the violence and restore the vitality of families caught in the abusive cycle.[24]

*The physical abuse escalated during the marriage in frequency and seriousness over time and so did my feelings of guilt, of shame about it, of dependence on the relationship and a desperate desire to be a better person so he would not beat me.—a victim*

In all cases when the victim has suffered serious injury, the convicted abuser should be sentenced to a term of incarceration. In cases involving a history of repeated abusive behavior or when there is a significant threat of continued harm, incarceration is also the preferred disposition. In serious incidents of violence, incarceration is the punishment necessary to hold the abuser accountable for his crime. It also clearly signals the seriousness with which the offense is viewed by the community and provides secure protection to the victim.

In many instances, the victim simply wants an end to the violence. Particularly when financially dependent on the abuser, the victim, fearing incarceration of the person who is the sole source of economic support, is reluctant to seek the aid of the court. In these and other appropriate cases, judges should use a variety of sentencing and incarceration alternatives.

When some type of confinement is essential, judges may sentence abusers to weekend or evening incarceration. Such sentences punish the abuser yet still allow him to continue to work and provide financial support to his family. Judges also should use other creative types of sentences that include no-contact orders or work furloughs that hold the abuser accountable for his crime and yet permit continued economic support to the family.

*We should attempt to look at the crime they have committed, the length and extent of their abuse of a child, and that should be the determining factor on what happens to them, not lots of extraneous factors.—Jennifer James, Radio and Television Commentator*

When appropriate, other alternatives should be used. With criminal charges and formal courtroom proceedings pending, pre-trial diversion requires an abuser to participate in a treatment or counseling program. Components of court-mandated treatment programs should include instruction in anger management and non-violent conflict resolution. Upon successful completion of the treatment program and any other conditions of diversion, the trial is indefinitely postponed.

Pre-sentence diversion, while allowing conditional release, requires a convicted abuser to participate in the same kind of treatment program. As in pre-trial diversion, sentencing and possible incarceration are indefinitely delayed upon successful completion of treatment and any other diversion condition. In either type of diversion, failure to participate in or successfully complete treatment should result in immediate resumption of prosecution or sentencing.

*I think that. . . when we venture too far away from notions of accountability and punishment and too far into a straight treatment modality with no components of puntive sanctions, that we allow offenders to look at themselves as 'sick' and therefore somehow less accountable for their actions than other people.—Prosecutor Rebecca Roe*

Making the abusers accountable for their conduct includes financial responsibilities. In addition to contributing to the cost of their own treatment, abusers should also, when appropriate, provide restitution to the victim for expenses incurred as a result of the violence. Judges should order the abuser to reimburse the victim for all expenses resulting from the crime. These should include lost wages, medical, counseling and other treatment fees, and replacement value of any property destroyed by the abuser. In the event that a judge does not issue such an order, he should specifically state his reasoning for not doing so in the record. In many cases, members of the family, other than the direct victim, are affected by the abuse. This is particularly applicable to children who have witnessed spouse abuse or the

innocent parent in cases of incest. Their treatment fees also should be paid by the abuser.

As noted by the President's Task Force on Victims of Crime, only the victims can truly convey the consequences of the crime they have suffered. It is especially important in family violence cases that judges consider victim impact statements prior to sentencing. In the calm of the courtroom, weeks or months after the abuse, with obvious physical injuries healed, violence within the family may seem very far removed. But for the victim, the physical and emotional scars, to say nothing of the financial burden, continue. Judges must carefully weigh these very painful and long-lasting effects of abuse in rendering a punishment that is commensurate with the injury.

*The judge represents the law to individual offenders who are brought into court. The judge's attitude, statements and actions can communicate to an abuser that their violence is cruel, it is cruel and criminal behavior which will not be tolerated by our society.—Judge Roy O. Gulley*

Judges and the sentences they impose can strongly reenforce the message that violence is a serious criminal matter for which the abuser will be held accountable. Judges should not underestimate their ability to influence the defendant's behavior. Even a stern admonition from the bench can help to deter the defendant from future violence.[25] In serious cases, incarceration is the only punishment that fits the crime. In other cases judges should carefully consider the impact of the abuse and the punishment on not only the victim and the abuser, but the entire family. Using innovative and creative sentences that include an effective treatment provision for the abuser, judges play a significant role in ending the present abuse and help to break the tragic cycle of violence.

**Judges Recommendation 2:**
**Judges should treat incest and molestation as serious criminal offenses.**

*Believe what kids say. If a child says something. . .I think you need to pay attention to that.—a victim*

Because incest and child molestation are such heinous and reprehensible offenses, many in the community continue to minimize or deny the existence of the problem. The very children and parents whose lives are shattered by these horrible crimes may conceal or deny their unthinkable victimization. Even the criminal justice system, confronted with these crimes, wants to believe they are the result of mistakes or misunderstandings. This disbelief not only compounds the unjust guilt and blame suffered by the child, but also allows the offender to continue to prey on children with impunity.

Judges must take the lead in exploding the myths surrounding the sexual assault of children and treat incest and molestation as serious criminal offenses. Children rarely ever lie about sexual abuse. However, false retractions of true complaints may be common where children are pressured not to testify against a relative or friend. While a child might not suffer obvious physical injury, the deep emotional and psychological scars may never heal. The child's youth and innocence are marred by a crime whose name they do not even know.

*Contrary to lingering myths, the pedophile child molester is neither a strong man nor a dirty old man in a wrinkled raincoat with a bag of candy. He typically knows his victims. . . .He dresses and looks like everyone else.—FBI Special Agent Kenneth Lanning*

Yet the perpetrator is most often someone the child does know, or even loves and trusts. Just as the children who are victims of sexual assault come from every social and economic level, so too, do the offenders. In fact, the incest perpetrator or child molester may well be a respected, prominent member of the community. Although the perpetrators may be dangerously violent or use other means of intimidation or threats of harm to sexually assault children, other molesters never use force. Rather, they seduce children into sexual activity with trickery and deception.

*From my own experience. . .once it is out in the open within the family that the incest is happening. . . the person doing the abusing isn't likely to continue because everybody knows then. You can't get away with it.—a victim*

Task Force testimony suggests that incest offenders may act with motivations far different than other child molesters and may in some instances be amenable to treatment.[26] However, the molester, a stranger or an unrelated, trusted adult, who sexually assaults a child is rarely, if ever, susceptible to treatment.[27] Moreover, the despicable sexual preference for children is a conscious choice that escalates in frequency throughout the pedophile's life. Judges must hold these offenders accountable for their contemptible behavior by imposing sentences commensurate with the devastating harm suffered by the child. Incarceration, whether in hospitals, treatment centers or prisons, is absolutely essential to the protection of the nation's children. The only true protection for children from a pedophile is incapacitation of the offender.

*[The sex offender] needs to be policed for the rest of his life.—a victim*

*There is no known cure for pedophilia. Pedophilia. . .is a way of life.—Det. Lloyd Martin*

**Judges Recommendation 3:**
**Judges should adopt special court rules and procedures for child victims. These should include:**

- **The use of hearsay evidence at preliminary hearings;**
- **Appointment of a special volunteer advocate for children when appropriate;**
- **A presumption that children are competent to testify;**

- Allowing the child's trial testimony to be presented on videotape with agreement of counsel;
- Flexible courtroom settings and procedures; and
- Carefully managed press coverage.

Testifying in court can be an overwhelming and extremely trying experience for any victim of crime. The ordeal can be even more devastating for victims of family violence who must publicly reveal the humiliating and embarrassing details of abuse. Children are especially vulnerable in the courtroom. They typically feel they are somehow to blame for their victimization. Repeating and reliving the abuse through direct testimony and vigorous cross-examination further compounds their guilt and confusion. They become the pivotal players in an unfolding adult drama they cannot understand. The initial trauma inflicted upon the very young must not recur in the courtroom. Judges should adopt special rules and procedures that enable these victims to more comfortably and effectively communicate the harm they have suffered.

*My daughter had been abused not only by her father but by a criminal justice system entangled in it's own ambiguities.—a victim*

The preliminary hearing is not a trial. It is the initial judicial examination of the facts and circumstances of the case where the court determines only whether the evidence is sufficient to continue with further prosecution. Children should not be required to testify in person (See Prosecutors Recommendation 4). Videotaped statements or other hearsay testimony made to an appropriate official should be sufficient.

For all court hearings and proceedings, judges should consider assigning a specially trained, volunteer advocate to represent the interests of the child. In addition, the volunteer may complete an independent investigation of the case, separate and apart from those conducted by the court or protective services. Concentrating on one child's case, the volunteer will have sufficient time to research the facts of the case.[28] The volunteer also can facilitate communication among all elements of the system working on the case, whether it be the court, protective services, foster care, school system or health facilities, to ensure that the child receives the proper care and services.

Young children have traditionally been deemed incompetent to testify in any court proceeding because they are believed to be unable to distinguish right from wrong, fact from fantasy. Because the victim is often the only witness to the crime, a child's testimony may be critical to the prosecution of the case. Children, regardless of their age, should be presumed to be competent to testify in court. A child's testimony should be allowed into evidence with credibility being determined by the jury. The jury should be carefully instructed not to hold the child to adult standards of credibility, but to consider the testimony in light of the child's age, maturity, and level of development.

*. . .the protection of children, as far as I am concerned, is as important a right. And I believe that videotaping children's testimony is extremely important, especially in the tender years.—Jeanine Pirro District Attorney*

To lessen the victim's trauma of testifying in court, innovative methods must be explored. For instance, testimony could be videotaped in a therapeutic atmosphere, for presentation at trial with stipulation by the parties to both procedure and identification (See Prosecutors Recommendation 3). The questioning could be done by an objective therapist in a relaxed setting with one-way mirrors. The defendant could observe the questioning but the child would not be required to actually see the defendant. The person questioning the child could be fitted with an earpiece to allow questions from the prosecutor and the defense attorney to be presented in a nonthreatening manner.[29]

The Task Force recognizes that these are substantial changes in procedure but modification of this nature may be requisite. Situations occur where time and again cases go unprosecuted because children are too frightened to testify before strangers and because parents refuse to subject them to such an ordeal. To reach a point at which these cases can be prosecuted and children can be protected, procedures must be devised which both safeguard the rights of the accused and shield these children from further harm.

When the child does appear at trial, the formal setting and procedures of the courtroom can be terrifying. The intimidation may be mitigated greatly by special care. Prior to testimony, the judge should take the child into chambers, introduce the attorneys and explain how the proceedings will be conducted. When testifying, the child should be allowed to use a smaller version of the adult witness chair or sit at a table with the judge and attorneys. The child also should be allowed to use drawings or anatomically correct dolls to describe the victimization if appropriate. Language that children can understand must be used for all questions. Prior videotaping of testimony must be used whenever possible (See Prosecutors Recommendation 4).

*The inability of young sexual assault victims to testify as effectively as adults and to confront their perpetrators result in failure to provide justice for them in many cases.—Dr. Bruce Woodling*

Court proceedings involving a child victim or witness must not become a media event. When a youngster is a juvenile offender, his name is withheld and the court proceedings are closed to the public. At a minimum, the same considerations should be given to the child victim.

**Judges Recommendation 4:**
**Protection orders should be available on an emergency basis in family violence cases.**

Family violence is not a nine-to-five, Monday through Friday only, occurrence. In fact, family violence most often occurs after regular business hours and on weekends and holidays.[30] To provide effective protection, courts must be readily accessible to family violence victims. Protection orders should be available on an emergency basis, 24-hours a day.

*As we ready ourselves for the holiday celebrations, battered women's shelters throughout the U.S. are readying themselves for their busiest time of the year. More women will seek help during this holiday season than any other time of the year.—Donna Medley, Service Provider*

The protection order, usually a civil order, is granted by a judge based on his independent review of the facts and a finding that the abuser poses a serious threat of intimidation, harassment or physical harm to the victim. For a limited period of time, the order restricts the abuser's access or contact with the victim. Family members who have the misfortune to suffer injury, threats or other abuse from another family member after hours should not have to wait until the start of the next judicial day to obtain a protection order. Neither should the order be costly or require the assistance of an attorney.

Simple forms for obtaining the order and directions for filling them out should be available at the courtroom, all police stations and sheriffs' offices (See Law Enforcement Recommendation 5). Victims could pick up the forms and instructions at the courthouse during business hours and at the police station or sheriff's office at all other times. Victims should then complete the form providing all pertinent and necessary information about the abuser, the danger of further harm or injury and the relief requested. The duty judge or night judge would then review the application and render a decision in much the same way he considers after-hours requests for bail or search warrants.

**Judges Recommendation 5:**
**Judges should establish guidelines for expeditious handling of family violence cases.**

Judges are the ultimate legal authority in the criminal justice system. If they fail to handle family violence cases with the appropriate judicial concern, the crime is trivialized and the victim receives no real protection or justice. Using the yardstick of the court to measure conduct, the attacker will perceive the crime as an insignificant offense. Consequently, he has no incentive to modify his behavior and continues to abuse with impunity. The investment in law enforcement services, shelter support and other victim assistance is wasted if the judiciary is not firm and supportive.

Family violence is a complex criminal offense that has the seriousness of stranger-to-stranger crime but involves a victim and perpetrator who know and care for one another and usually live in the same house. The victim is a reluctant, fearful witness faced with equally undesirable alternatives: testifying against the abuser, which may lead to his incarceration and the loss of the sole source of economic support, or hedging the testimony, which may jeopardize the conviction and allow the abuser to continue the violence.

*My sister asked what the record number of postponements on a case such as this was. The clerk said that he remembered one case was delayed twelve times. . . .She then said 'Well, I guess he will have to kill me before this comes to trial.' We were postponed again that day to July 14, 1983—on that day we buried my sister.—a victim's sister*

Judges must recognize this enormous personal conflict faced by the victims of family violence who so often simply want an end to the abuse. They should develop guidelines to expedite the processing of these cases and provide the protection necessary to the victim. Further, to ensure that family violence cases receive the appropriate judicial consideration, judges should establish special dockets so that these matters do not compete with other criminal cases.[31]

**Judges Recommendation 6:**
**Judges should admit hearsay statements of family violence victims at the preliminary hearing.**

See Prosecutors Recommendations 3 and 4.

**Judges Recommendation 7:**
**Expert witnesses should be allowed to testify in family violence cases to familiarize the judge and jury with the dynamics of violence within the family.**

Of all the crimes that the legal system deals with, family violence is perhaps the most perplexing and

misunderstood. It seems unthinkable that one family member would violently abuse another. Judges and jurors too often assume that the victim could simply leave home if the attacks were truly threatening or dangerous. Further, many believe the courts are an unsuitable forum for family violence cases. That members of the same family should participate on opposite sides of an adversarial proceeding seems disturbingly incongruous.

But intervention by the criminal justice system, particularly the courts, can provide the real and necessary protection for the victim and the appropriate sanctions and deterrents for the abuser. To effectively accomplish both these objectives, the judge and the jury must have a clear understanding of the dynamics and complexities of family violence. Expert testimony from qualified authorities is essential to acquire that insight.

Many judges now permit authorities to testify on the battered child syndrome.[32] A few judges are beginning to allow expert testimony on the battered spouse syndrome.[33] Courts should, when appropriate, admit into evidence testimony on the battered child and spouse syndromes. In addition, courts should allow testimony explaining the characteristics and effects of child sexual assault and elder abuse. Judges and jurors will gain an explicit understanding of the shame, guilt, fear, and embarrassment associated with family violence. Cognizant of the cyclical nature of violence within the family, the emotional, economic, and psychological dependencies between the victim and abuser, and the other fundamental aspects of abuse, they will be better able to understand the victim's actions. Judges can develop effective remedies and render appropriate sanctions.

**Judges Recommendation 8:**
**In granting bail or releasing the assailant on his own recognizance, the judge should impose conditions that restrict the defendant's access to the victim and strictly enforce the order.**

*I feel a person who is the abuser should be taken out of the home, not the one who's being abused.—a victim*

An important reason for intervention and arrest of the perpetrator is to provide safety for the victim. But unconditional release from custody may endanger the victim and allow the defendant to inflict further harm.

At arraignment, the defendant may have reasonable bail set or be released on his own recognizance. In granting pre-trial release, the judge should impose conditions or terms that restrict the offender's access to the victim. The conditions imposed should prohibit the defendant from making any contact, personal or otherwise, with the victim. If the parties were living together, the conditions should require the defendant, not the victim, to stay away from the home. These conditions preserve the defendant's right to release but at the same time consider and provide for the victim's safety. With these restrictions imposed, the victim will not have to initiate a separate proceeding to obtain a civil protection order.

*I also make it very clear that society will not tolerate this sort of behavior and that if he does not follow through with the counseling, if he does not continue the no contact order, whatever, the court will respond quickly, issue a warrant, have him brought immediately forth and off he will go to jail.—Judge Barbara T. Yanick*

In addition to ordering the restrictions, the judge should verbally warn the offender that abuse is a criminal matter for which serious sanctions may be imposed. The judge should caution the abuser that release does not mean he is free to continue to harm or intimidate the victim. The judge should further inform the abuser that violation of the conditions will result in revocation of release. This judicial admonition sends a strong message to the abuser that he is accountable for his actions and that the victim has the support and protection of the criminal justice system. But the judicial admonition is for naught if the judge does not enforce the order.

Harold F. GREENWAY, Appellant,

v.

STATE of Alaska, Appellee.

No. 4754.

Supreme Court of Alaska.

Nov. 7, 1980.

Defendant was convicted in the Superior Court, Fourth Judicial District, Warren W. Taylor, J., of rape, and he appealed. The Supreme Court held that testimony of rape victim's mother and her school counselor concerning victim's complaint of rape was admissible.

Affirmed.

Matthews, J., filed concurring opinion in which Rabinowitz, C. J., concurred.

1. Rape ⟹48(1)

Testimony of rape victim's mother and her school counselor concerning victim's complaint of rape was admissible under special hearsay exception concerning complaints of victims in sex crimes.

2. Rape ⟹48(2)

Testimony from either victim or witnesses pertaining to details of victim's complaint is generally not admissible in criminal prosecution.

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Dick L. Madson, Cowper & Madson, Fairbanks, for appellant.

Natalie K. Finn, Asst. Dist. Atty., Harry L. Davis, Dist. Atty., Fairbanks, Avrum M. Gross, Atty. Gen., Juneau, for appellee.

OPINION

Before RABINOWITZ, C. J., CONNOR, BURKE and MATTHEWS, JJ., and DIMOND, Senior Justice.

PER CURIAM.

Harold Greenway was convicted of raping his thirteen year old stepdaughter. The rape occurred in July, 1978, on the banks of the Yukon River, near Greenway's summer fish camp. According to the victim, Greenway threatened to kill her if she told anyone about the rape and, as a result, she told no one other than her mother [1] until September, when she reported the rape to her school counselor. At trial the State, over Greenway's objections, presented testimony by the victim's mother and her school counselor concerning her complaints of rape. Greenway now contends that the trial court's failure to exclude this testimony as inadmissible hearsay constituted reversible error.[2]

The State contends that the statements in question were admissible under the special hearsay exception concerning complaints of the victim in sex crimes. We find this argument persuasive.

[1, 2] We recognized this exception in *Torres v. State*, 519 P.2d 788, 793 n.9 (Alaska 1974):

> [A]s Wharton points out, statements concerning the crime of rape or sexual assault, shortly after the commission of the act are admissible as a recognized exception to the hearsay rule:
>
> In a prosecution for a sex crime, such as rape or assault with intent to rape, it

1. There is conflicting testimony as to whether or not the victim actually told her mother of the rape. The victim testified that she told her mother of the rape about three days after the incident but the mother interpreted this conversation differently and denied that she knew of the rape until after the victim told her school counselor in September. A social worker also testified that she and the mother had discussed the victim's rape and that the mother had indicated that her daughter had told her of the rape shortly after the incident. The mother admitted to having several conversations with the social worker but again denied admitted knowledge of the rape prior to her daughter's report to the school counselor.

2. Appellant also claims as error the admission of the testimony of the victim that she had told her mother, best friend, social service worker and her school counselor about the rape. However, no objection was made to this testimony and, in fact, the appellant agreed that it should be admissible. Therefore, this claim of error was waived.

tive to fabricate which antedated the rape there was also a specific event which could have supplied a motive to fabricate which occurred after the victim complained of the rape to her mother but before she complained of the rape to the school counselor.

Where there are several events which supply a motive to fabricate, evidence of a statement consistent with the declarant's testimony which was made before the latest event, but after the others, may be admitted:

> Otherwise, it would never be proper to rehabilitate a witness by proof of prior consistent statements in cases where numerous impeaching circumstances were shown to exist at the time of the trial but where there may be found a theoretical possibility that the witness might have been motivated by one of them at the time of making the prior consistent statement.... The principle involved is that where the circumstances are such as to leave it reasonably possible for the jury to say that the prior consistent statements did in fact antedate the motive disclosed on the cross-examination, the court should not exclude them.

*United States v. Grunewald*, 233 F.2d 556, 566 (2nd Cir. 1956), *rev'd on other grounds*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957).

Applying this rule to this case, the victim's complaint to her mother was admissible under the recent fabrication exception.

Walter John DALE, Appellant,

v.

STATE of Alaska, Appellee.

No. 4506.

Supreme Court of Alaska.

Nov. 7, 1980.

Defendant was convicted, on guilty plea, before the Superior Court, Third Judicial District, Anchorage, Victor D. Carlson, J., of five counts of sale of cocaine and was sentenced to five concurrent five-year terms, and he appealed. The Supreme Court, Matthews, J., held that: (1) even if trial court had erred when, in determining sentence, it considered a previously dismissed indictment for possession of narcotics and an alleged uncharged cocaine sale for purpose of testing credibility of defendant's story that he had simply acted as middleman and "good Samaritan" in supplying narcotics, the error would have been harmless, and (2) trial judge was shown to have considered the possibility of defendant British citizen's deportation when sentence was determined, and judge's failure to articulate the role which such factor played in his decision was not error.

Affirmed.

Rabinowitz, C. J., concurred in part and dissented in part and filed opinion.

1. Criminal Law ⇐1177

In proceeding in which defendant pled guilty to five counts of sale of cocaine, even if trial court had erred when, in determining sentence, it considered a previously dismissed indictment for possession of narcotics and an alleged uncharged cocaine sale for purpose of testing credibility of defendant's story that he had simply acted as a middleman and "good Samaritan" in supplying narcotics, the error would have been harmless, in view of the substantial, uncontradicted evidence suggesting that defendant was a "professional" cocaine dealer. AS 17.10.010.

2. Drugs and Narcotics ⇐133

On appeal from proceeding in which defendant British citizen pled guilty to five counts of sale of cocaine and was sentenced to five concurrent five-year terms, trial judge was shown to have considered the possibility of defendant's deportation when sentence was determined; judge's failure to articulate the role which such factor played

> may be shown by testimony of the prosecutrix or by that of some other witness, that the prosecutrix made complaint of the crime shortly after its commission. Such evidence tends obviously to indicate the truth of the charge and is corroborative thereof; conversely, evidence of the failure to make a prompt complaint casts doubt upon the truth of the claim that a crime had been committed.
>
> 2 F. Wharton, Criminal Evidence § 313, at 113–114 (13th ed. Charles E. Torcia 1972) (footnotes omitted).

*See also* 4 J. Wigmore, Evidence §§ 1134–36 (Chadbourn rev. ed. 1972) (discussing at length the justifications behind the exception). It is true that, other than the disputed complaint made to her mother approximately three days after the incident, the victim here did not complain of the rape until September, over a month after its commission. However, her delay is both explained and excused by Greenway's threats against her and her young age. *See, e. g., Hunt v. State*, 213 So.2d 664 (Ala.App.), *cert. denied*, 213 So.2d 666 (Ala. 1968) (delay of nine months does not bar admission of testimony, in light of, *inter alia*, defendant's threats to kill victim); *State v. Twyford*, 85 S.D. 522, 186 N.W.2d 545 (1971) (delay of over two months not reason to exclude testimony, since victim was only twelve years old).[3] We therefore conclude that the trial judge did not err in admitting the testimony of the rape victim's mother and her school counselor concerning her complaint of rape.[4]

The conviction is AFFIRMED.

MATTHEWS, J., with whom RABINOWITZ, C. J., joins, concurs.

MATTHEWS, Justice, joined by RABINOWITZ, Chief Justice, concurring.

I agree with the Per Curiam opinion. Moreover, I believe that the questioned evidence was properly admitted under the recent fabrication exception[1] to the common law rule prohibiting the admission of prior consistent statements, for the following reasons.

Defense counsel in this case elicited testimony that the victim was generally unhappy living with her mother and stepfather before the rape, and that thereafter, in early September, her mother and stepfather were in a violent fight involving a gun during which the victim and her younger sister were forced to flee to a neighbor's house and the police were called. It was just a few days after this incident that the victim complained of the rape to her school counselor, which resulted in her being taken from the home of her mother and stepfather. Thus, while there was a general mo-

3. We realize that the list of hearsay exceptions found in our present Rule 803, Alaska R. Evid., does not include this exception. This omission, however, was more in the nature of an oversight on our part, and not a repudiation of *Torres*; we shall refer the question of whether the rules should be amended to include the exceptions noted in *Torres* to our standing committee on the Evidence Rules. In any event, Evidence Rule 803 was not in effect at the time of Greenway's trial, and so does not govern this appeal.

4. We find no merit to appellant's argument that the victim's testimony went beyond the "fact of the complaint" limitation which is part of the special hearsay exception concerning complaints of the victim in sex crimes. Appellant argues that it was error to allow the victim to testify that she had mentioned the location of the event and, impliedly, the perpetrator, to third persons. Testimony from either the victim or witnesses pertaining to "details" of the victim's complaint is generally not admissible.

*See generally* 4 J. Wigmore, Evidence § 1136, at 306 (Chadbourn rev. ed. 1972). However, in her testimony the victim did not, in fact, state anything about the rape or the name of the perpetrator in her complaints to third persons. The victim's testimony was only to the effect that she had told third persons of the rape. She gave no details pertaining to her complaints and nothing else in the record indicates that either the victim or the witnesses gave such testimony.

1. This exception has been codified in the Alaska Rules of Evidence as Rule 801(d)(1)(B). It provides:

> A statement is not hearsay if
>
> (1) The declarant testifies at the trial or hearing and the statement is ...
>
> (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive ...

should be modified to take into account the Sixth Amendment's fair cross-section requirement, the U.S. District Court for the Eastern District of New York rules. Addressing in particular the discriminatory use of peremptory jury challenges, the court adopts the procedure used by California courts to determine when a prima facie case of discrimination has been established. (McCray v. Abrams, 12/19/83)

Swain essentially held that the use of peremptory challenges in a particular case could not be scrutinized unless a statistical showing of repeated discriminatory use of such challenges was presented. However, the court points out, the fact that most voir dires are not recorded creates insurmountable difficulties for application of the Swain test. The Supreme Court has acknowledged as much, the court says; in denying certiorari when the case at bar was on direct appeal from the state courts, five Justices indicated that the time for reconsideration of Swain might be near. 51 LW 3855 (1983).

Thus, the district court reexamines Swain in light of this black habeas petitioner's claim that a New York state prosecutor improperly used her peremptories to produce an all-white jury. The Supreme Court's decisions in Sixth Amendment cases decided since 1965 have cut away at Swain's integrity, the court asserts. Those cases establish that a state defendant is entitled to a jury selected from a fair cross-section of the community and prohibit racial discrimination in the selection process. Moreover, Swain's warning that an inquiry into the prosecution's motives for employing its challenges "would establish a rule wholly at odds with the peremptory challenge system" has also been eroded by later case law.

The court decides to adopt a procedure used by the California courts. Under this approach the presumption that peremptory challenges are being used in a constitutional manner may be rebutted by a prima facie showing of discrimination. This is done by establishing that the excluded jurors are members of a cognizable group and that a strong likelihood exists that they were dismissed because of their association with that group. At this point the burden shifts to the other party to show that the challenges were exercised for reasons relevant to the trial and not due to any bias. (Page 2369)

## Mishandling Of Benefit Claim Gives Rise To Damages Action Under ERISA

A lawsuit alleging that an employer processed an employee's claim for disability benefits in an arbitrary and untimely manner gives the U.S. Court of Appeals for the Ninth Circuit occasion to issue several rulings interpreting the Employee Retirement Income Security Act. Most importantly, the court holds that while ERISA preempts a claim that the employer's conduct violated state law, such conduct gives rise to a damages action against the employer under ERISA for breach of fiduciary duty. (Russell v. Massachusetts Mutual Life Ins. Co., 12/16/83)

The preemption issue does not detain the court long, as ERISA's broad preemption language was designed to establish national uniformity in regulating ERISA-covered benefit plans. The tougher issue is whether ERISA provides the employee with an action against the employer. The district court thought not. The Ninth Circuit, however, finds that ERISA regulates fiduciary conduct not only in the management of plan assets, but also in the handling and disposition of claims. A fiduciary's failure to act on a benefit claim "promptly" and within the period specified by regulation constitutes a breach of fiduciary duty, the court concludes.

The court next determines, contrary to the district court, that compensatory damages need not be limited to a plan participant's loss of benefits. ERISA empowers a court to award any "equitable or remedial relief as [it] may deem appropriate" for a breach of fiduciary duty. The court says such relief should be calculated to make an injured employee whole and thus should account for all losses proximately caused by the breach. Finally, although courts are divided on the issue, the Ninth Circuit decides that punitive damages are recoverable under ERISA as long as there is a showing that the fiduciary acted with "actual malice" or "wanton indifference." (Page 2375)

## Child Abuse Victim's Statement To Doctor, Naming Abuser, Is Admissible

In an effort to address "the most pernicious social element which afflicts our society," the Wyoming Supreme Court decides that the statements made by a four-year-old child abuse victim who identified her abuser to medical personnel during her medical examination are admissible in evidence under an exception to the hearsay rule for statements "reasonably pertinent to medical diagnosis or treatment." (Goldade v. Wyoming, 12/12/83)

At the child abuse trial of the child's mother, the girl was unable to answer questions and was ruled an incompetent witness. The critical testimony at trial came from the hospital's medical personnel, who asked the girl how she had gotten her injuries.

Although Wyoming's Rule of Evidence 803 provides that statements reasonably pertinent to medical diagnosis or treatment are not excluded by the hearsay rule, statements attributing fault usually are not admissible. The court, however, notes the responsibility, imposed by Wyoming's child abuse statutes upon physicians, to immediately report child abuse to child protection agencies or local law enforcement agencies. Physicians are required to ascertain whether a child victim's injuries were accidental or deliberate, and they are empowered to take the child into temporary protective custody if there is imminent danger to the child's life or safety. Absent information as to the identity of any assailant,


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the court reasons, "this latter decision cannot be made in a rational way."

A liberal interpretation of the medical diagnosis exception to the hearsay rule, when applied to child abuse cases, is only "a logical extension" of the court's minimal standard of proof policy in child homicide cases, the court concludes. Given the physician's duty and his professional responsibility to determine whether child abuse syndrome was present, the statements were pertinent to his diagnosis and treatment, the court says. (Page 2372)

## U.S. May Be Liable For Murder Of Serviceman By Fellow Soldier

The doctrine of Feres v. U.S., 340 U.S. 135 (1950), bars a Federal Tort Claims Act suit against the government for injuries to military personnel arising in the "course of activity incident to service." Despite the continuing viability of this rule, the U.S. Court of Appeals for the Third Circuit allows the mother of a murdered Army private to proceed with her claim against the government. She maintains that her son's death resulted from the negligence of his military superiors in failing to discharge or warn of the dangerous propensities of the murderer, a fellow serviceman who had just served a military prison sentence for a previous murder. (Shearer v. U.. 12/19/83)

The court observes that, generally, an off-duty serviceman not on the military base or engaged in military activity at the time he suffers an injury through the government's negligence can recover under the FTCA. In this case, the decedent was on leave in another state when he was kidnapped at gunpoint and shot by his fellow serviceman. The court says the district court, which dismissed the suit on the basis of Feres, erred by focusing on the status and activity of the fellow serviceman's allegedly negligent superior officers, rather than on the status and activity of the injured party.

The government also sought dismissal of the action under the FTCA's exception for any claim arising out of an assault and battery by a government employee. But the court says the intentional tort exception to FTCA liability does not necessarily bar a negligence action, even though the injury is directly caused by an assault and battery. An FTCA claim may proceed, it says, as long as the plaintiff alleges sufficient facts that, if proven, would demonstrate that the government should have reasonably anticipated that its employee would commit an intentional tort. (Page 2365)

## Consent Decree Doesn't Bar Separate Title VII Suit By Nonparty Employees

An issue that has troubled various courts is the extent to which res judicata and collateral estoppel principles preclude a nonparty from attacking the legality of a consent decree. The U.S. Court of Appeals for the Eleventh Circuit now indicates that a consent decree settling employment discrimination charges and incorporating affirmative action remedies would not preclude a lawsuit by nonparty employees alleging that the decree violates their rights under Title VII of the 1964 Civil Rights Act. (U.S. v. Jefferson County, 12/12/83)

The consent decree at issue contained affirmative hiring and promotion remedies for black employees in certain public service jobs. Just as the district court was about to approve the settlement, white firefighters sought to intervene, claiming that the decree would result in reverse discrimination. The district court denied their motion to intervene as untimely and the white firefighters appealed.

The Eleventh Circuit observes that in deciding whether to deny intervention on timeliness grounds a court must consider the extent to which denial would prejudice the would-be intervenor. That inquiry in turn involves determining the extent to which the final judgment or consent decree might bind the would-be intervenor.

The court decries those decisions indicating that any action having a burden upon a consent decree constitutes an "impermissible collateral attack" on the decree. A consent decree may be attacked, it says, "to the extent that it deprives a nonparty to the decree of his day in court to assert a violation of his civil rights." Assuming that a court hearing any future Title VII suit by the white firefighters would consider their claims carefully, the court says the district court did not abuse its discretion in finding that the white firefighters would not be prejudiced by denial of intervention. (Page 2370)

## CA 7 Determines Proper Filing Time For Equal Access To Justice Act Fees

Under the Equal Access to Justice Act, a prevailing party must apply for attorneys' fees "within 30 days of final judgment in the action." According to the U.S. Court of Appeals for the Seventh Circuit, "final judgment" does not refer to the district court's judgment, but rather to the completion of all appellate proceedings. (McDonald v. Schweiker, 12/12/83)

While requiring a fee application to be filed within 30 days of the district court's judgment would allow the application to be acted on in time for any appeal from the fee award to be consolidated with the appeal from the judgment—thus effecting a judicial economy at the court of appeals level—there is no indication that Congress was worried about the burdens the EAJA might place on the appellate courts. Moreover, the court finds, the EAJA allows a prevailing party in appropriate cases to obtain fees for time spent litigating an appeal as well as for time spent in the district court. Thus, if "final judgment" meant the district court's judgment, an application for fees on appeal would have to be filed before the amount of those fees was known.

Additionally, requiring a claimant to apply for fees

(a) Where the victim did not consent as defined in RCW 9A.44.010(6), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or

(b) Where there is threat of substantial unlawful harm to property rights of the victim.

(2) Rape in the third degree is a class C felony. [1979 ex.s. c 244 § 3; 1975 1st ex.s. c 14 § 6. Formerly RCW 9.79.190.]

9A.44.070 Statutory rape in the first degree. (1) A person over thirteen years of age is guilty of statutory rape in the first degree when the person engages in sexual intercourse with another person who is less than eleven years old.

(2) Statutory rape in the first degree is a class A felony. No person convicted of statutory rape in the first degree shall be granted a deferred or suspended sentence except for the purpose of commitment to an inpatient treatment facility. [1979 ex.s. c 244 § 4; 1975 1st ex.s. c 14 § 7. Formerly RCW 9.79.200.]

9A.44.080 Statutory rape in the second degree. (1) A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old.

(2) Statutory rape in the second degree is a class B felony. [1979 ex.s. c 244 § 5; 1975 1st ex.s. c 14 § 8. Formerly RCW 9.79.210.]

9A.44.090 Statutory rape in the third degree. (1) A person over eighteen years of age is guilty of statutory rape in the third degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is fourteen years of age or older but less than sixteen years old.

(2) Statutory rape in the third degree is a class C felony. [1979 ex.s. c 244 § 6; 1975 1st ex.s. c 14 § 9. Formerly RCW 9.79.220.]

9A.44.100 Indecent liberties. (1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:

(a) By forcible compulsion; or

(b) When the other person is less than fourteen years of age; or

(c) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.

(2) For purposes of this section, "sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.

(3) Indecent liberties is a class B felony. [1975 1st ex.s. c 260 § 9A.88.100. Formerly RCW 9A.88.100.]

9A.44.110 Communication with a minor for immoral purposes. Any person who communicates with a child under the age of seventeen years of age for immoral purposes shall be guilty of a gross misdemeanor, unless such person has previously been convicted of a felony sexual offense or has previously been convicted under this section or *RCW 9.79.130, in which case such person shall be guilty of a class C felony. [1975 1st ex.s. c 260 § 9A.88.020. Formerly RCW 9A.88.020.]

*Reviser's note: "RCW 9.79.130" was repealed by 1975 1st ex.s. c 260 § 9A.92.010, effective July 1, 1976; see RCW 9A.98.010(212).

9A.44.120 Admissibility of child's statement——Conditions. 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.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement. [1982 c 129 § 2.]

Severability——1982 c 129: See note following RCW 9A.04.080.

9A.44.900 Decodification and addition of RCW 9.79.140 through 9.79.220, 9A.88.020, and 9A.88.100 to this chapter. RCW 9.79.140, 9.79.150, 9.79.160, 9.79-.170 as now or hereafter amended, 9.79.180 as now or hereafter amended, 9.79.190 as now or hereafter amended, 9.79.200 as now or hereafter amended, 9.79-.210 as now or hereafter amended, 9.79.220 as now or hereafter amended, 9A.88.020, and 9A.88.100 are each decodified and are each added to Title 9A RCW as a new chapter with the designation chapter 9A.44 RCW. [1979 ex.s. c 244 § 17.]

9A.44.901 Construction——Sections decodified and added to this chapter. The sections decodified by RCW 9A.44.900 and added to Title 9A RCW as a new chapter with the designation chapter 9A.44 RCW shall be construed as part of Title 9A RCW. [1979 ex.s. c 244 § 18.]

9A.44.902 Effective date——1979 ex.s. c 244. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect on July 1, 1979. [1979 ex.s. c 244 § 19.]

duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. If the court determines that the interests of justice so require, the party calling an expert appointed under this rule may cross-examine the witness.

(b) Disclosure of appointment. In the exercise of its discretion, the court may disclose to the jury the fact that the court appointed the expert witness.

(c) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

## ARTICLE VIII

## Hearsay

### RULE 801. DEFINITIONS

The following definitions apply under this article:

(a) Statement. A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A declarant is a person who makes a statement.

(c) Hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(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. Unless the interests of justice otherwise require, the prior statement shall be excluded unless

(i) the witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement or

(ii) the witness has not been excused from giving further testimony in the action; or

(B) Consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive; or

(C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E)

a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

RULE 802. HEARSAY RULE

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Alaska Supreme Court, or by enactment of the Alaska Legislature.

RULE 803. HEARSAY EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. 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.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) offered to prove his present condition or future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptons, pain, or sensations, or the inception or general char-

acter of the cause or external source thereof insofar as reasonably pertinent to disgnosis or treatment.

(5) <u>Recorded recollection</u>. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) <u>Business records</u>. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) <u>Absence of record</u>. Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of subdivision (6), to prove the nonoccurrence or nonexistence of the

matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of truthworthiness.

(8) Public records and reports. (a) To the extent not otherwise provided in (b) of this subdivision, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

If Rule stops here.

(b) The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the state in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness. Any writing admissible under this subdivision shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before the trial, unless the court finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of facts contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings and urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, codes, standards, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied

upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

(22) Judgment as to personal, family, or general history, or boundaries. A judgment as proof of a matter of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(23) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of truthworthiness, if the court deter-

mines 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. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

RULE 804. HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

(a) Definition of unavailability. Unavailability as a witness includes situations in which the declarant

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) establishes a lack of memory of the subject matter of his statement; or

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

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), (4), or (5), of this rule, his attendance or testimony) by reasonable means including process.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, if the party against whom the testimony is now offered, or, in the civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim

by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of truthworthiness, 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. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in

advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

RULE 805. HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in Rule 801(d)(2) (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement or a statement defined in Rule 801(d)(2)(C), (D), or (E) has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Police medical reports

ARTICLE IX

Documentary Evidence

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) General provision. The requirement of authentication or identification as a condition precedent to admissi-

...ntentionally abducts another person under circumstances not amounting to kidnapping in the first degree.

(2) In any prosecution for kidnapping in the second degree, it is a defense if established by the defendant by a preponderance of the evidence that (a) the abduction does not include the use of or intent to use or threat to use deadly force, and (b) the actor is a relative of the person abducted, and (c) the actor's sole intent is to assume custody of that person. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, any other crime.

(3) Kidnapping in the second degree is a class B felony. [1975 1st ex.s. c 260 § 9A.40.030.]

**9A.40.040 Unlawful imprisonment.** (1) A person is guilty of unlawful imprisonment if he knowingly restrains another person.

(2) Unlawful imprisonment is a class C felony. [1975 1st ex.s. c 260 § 9A.40.040.]

**9A.40.050 Custodial interference.** (1) A person is guilty of custodial interference if, knowing that he has no legal right to do so, he takes or entices from lawful custody any incompetent person or other person entrusted by authority of law to the custody of another person or institution.

(2) Custodial interference is a gross misdemeanor. [1975 1st ex.s. c 260 § 9A.40.050.]

## Chapter 9A.44
## SEXUAL OFFENSES

Sections


| | |
|---|---|
| 9A.44.010 | Definitions. |
| 9A.44.020 | Testimony——Evidence——Written motion ——Admissibility. |
| 9A.44.030 | Defenses to prosecution under this chapter. |
| 9A.44.040 | Rape in the first degree. |
| 9A.44.045 | Minimum term for first degree rape——Restrictions on release from confinement——Application to offenses before July 1, 1984. |
| 9A.44.050 | Rape in the second degree. |
| 9A.44.060 | Rape in the third degree. |
| 9A.44.070 | Statutory rape in the first degree. |
| 9A.44.080 | Statutory rape in the second degree. |
| 9A.44.090 | Statutory rape in the third degree. |
| 9A.44.100 | Indecent liberties. |
| 9A.44.110 | Communication with a minor for immoral purposes. |
| 9A.44.120 | Admissibility of child's statement ——Conditions. |
| 9A.44.900 | Decodification and addition of RCW 9.79.140 through 9.79.220, 9A.88.020, and 9A.88.100 to this chapter. |
| 9A.44.901 | Construction——Sections decodified and added to this chapter. |
| 9A.44.902 | Effective date——1979 ex.s. c 244. |


*Council on child abuse and neglect: Chapter 43.121 RCW.*
*Witnesses: Rules of court: ER 601 through 615.*

**9A.44.010 Definitions.** As used in this chapter:

(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(2) "Married" means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for dissolution of his or her marriage.

(3) "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause;

(4) "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act;

(5) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped;

(6) "Consent" means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse. [1981 c 123 § 1; 1975 1st ex.s. c 14 § 1. Formerly RCW 9.79.140.]

**9A.44.020 Testimony——Evidence——Written motion——Admissibility.** (1) In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.

(2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

(3) In any prosecution for the crime of rape or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:

(a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the

defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.

(b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.

(d) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(4) Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection (3) of this section concerning such evidence. [1975 1st ex.s. c 14 § 2. Formerly RCW 9.79.150.]

**9A.44.030 Defenses to prosecution under this chapter.** (1) In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

(2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: *Provided*, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be older based upon declarations as to age by the alleged victim. [1975 1st ex.s. c 14 § 3. Formerly RCW 9.79.160.]

**9A.44.040 Rape in the first degree.** (1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:

(a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or

(b) Kidnaps the victim; or

(c) Inflicts serious physical injury; or

(d) Feloniously enters into the building or vehicle where the victim is situated.

(2) Rape in the first degree is a class A felony. [1983 c 118 § 1; 1983 c 73 § 1; 1982 c 192 § 11; 1982 c 10 § 3. Prior: (1) 1981 c 137 § 36; 1979 ex.s. c 244 § 1; 1975 1st ex.s. c 247 § 1; 1975 1st ex.s. c 14 § 4. (2) 1981 c 136 § 57, repealed by 1982 c 10 § 18. Formerly RCW 9.79.170.]

**Reviser's note:** This section was amended by 1983 c 73 § 1 and 1983 c 118 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section pursuant to RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Severability——1983 c 73:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 73 § 2.]

**Severability——1982 c 10:** See note following RCW 6.12.100.

**Severability——1981 c 137:** See RCW 9.94A.910.

**Effective date——1981 c 136:** See RCW 72.09.900.

**9A.44.045 Minimum term for first degree rape——Restrictions on release from confinement——Application to offenses before July 1, 1984.** No person convicted of rape in the first degree shall be granted a deferred or suspended sentence except for the purpose of commitment to an inpatient treatment facility: *Provided*, That every person convicted of rape in the first degree shall be confined for a minimum of three years: *Provided further*, That the board of prison terms and paroles shall have authority to set a period of confinement greater than three years but shall never reduce the minimum three-year period of confinement; nor shall the board release the convicted person during the first three years of confinement as a result of any type of good time calculation; nor shall the department of corrections permit the convicted person to participate in any work release program or furlough program during the first three years of confinement. This section applies only to offenses committed prior to July 1, 1984. [1982 c 192 § 12.]

**9A.44.050 Rape in the second degree.** (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

(a) By forcible compulsion; or

(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.

(2) Rape in the second degree is a class B felony. [1983 c 118 § 2; 1979 ex.s. c 244 § 2; 1975 1st ex.s. c 14 § 5. Formerly RCW 9.79.180.]

**9A.44.060 Rape in the third degree.** (1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator:

(a) Where the victim did not consent as defined in RCW 9A.44.010(6), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or

(b) Where there is threat of substantial unlawful harm to property rights of the victim.

(2) Rape in the third degree is a class C felony. [1979 ex.s. c 244 § 3; 1975 1st ex.s. c 14 § 6. Formerly RCW 9.79.190.]

**9A.44.070 Statutory rape in the first degree.** (1) A person over thirteen years of age is guilty of statutory rape in the first degree when the person engages in sexual intercourse with another person who is less than eleven years old.

(2) Statutory rape in the first degree is a class A felony. No person convicted of statutory rape in the first degree shall be granted a deferred or suspended sentence except for the purpose of commitment to an inpatient treatment facility. [1979 ex.s. c 244 § 4; 1975 1st ex.s. c 14 § 7. Formerly RCW 9.79.200.]

**9A.44.080 Statutory rape in the second degree.** (1) A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old.

(2) Statutory rape in the second degree is a class B felony. [1979 ex.s. c 244 § 5; 1975 1st ex.s. c 14 § 8. Formerly RCW 9.79.210.]

**9A.44.090 Statutory rape in the third degree.** (1) A person over eighteen years of age is guilty of statutory rape in the third degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is fourteen years of age or older but less than sixteen years old.

(2) Statutory rape in the third degree is a class C felony. [1979 ex.s. c 244 § 6; 1975 1st ex.s. c 14 § 9. Formerly RCW 9.79.220.]

**9A.44.100 Indecent liberties.** (1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:

(a) By forcible compulsion; or

(b) When the other person is less than fourteen years of age; or

(c) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.

(2) For purposes of this section, "sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.

(3) Indecent liberties is a class B felony. [1975 1st ex.s. c 260 § 9A.88.100. Formerly RCW 9A.88.100.]

**9A.44.110 Communication with a minor for immoral purposes.** Any person who communicates with a child under the age of seventeen years of age for immoral purposes shall be guilty of a gross misdemeanor, unless such person has previously been convicted of a felony sexual offense or has previously been convicted under this section or *RCW 9.79.130, in which case such person shall be guilty of a class C felony. [1975 1st ex.s. c 260 § 9A.88.020. Formerly RCW 9A.88.020.]

*Reviser's note: "RCW 9.79.130" was repealed by 1975 1st ex.s. c 260 § 9A.92.010, effective July 1, 1976; see RCW 9A.98.010(212).

**9A.44.120 Admissibility of child's statement——Conditions.** 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.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement. [1982 c 129 § 2.]

Severability——1982 c 129: See note following RCW 9A.04.080.

**9A.44.900 Decodification and addition of RCW 9.79.140 through 9.79.220, 9A.88.020, and 9A.88.100 to this chapter.** RCW 9.79.140, 9.79.150, 9.79.160, 9.79-.170 as now or hereafter amended, 9.79.180 as now or hereafter amended, 9.79.190 as now or hereafter amended, 9.79.200 as now or hereafter amended, 9.79-.210 as now or hereafter amended, 9.79.220 as now or hereafter amended, 9A.88.020, and 9A.88.100 are each decodified and are each added to Title 9A RCW as a new chapter with the designation chapter 9A.44 RCW. [1979 ex.s. c 244 § 17.]

**9A.44.901 Construction——Sections decodified and added to this chapter.** The sections decodified by RCW 9A.44.900 and added to Title 9A RCW as a new chapter with the designation chapter 9A.44 RCW shall be construed as part of Title 9A RCW. [1979 ex.s. c 244 § 18.]

**9A.44.902 Effective date——1979 ex.s. c 244.** This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect on July 1, 1979. [1979 ex.s. c 244 § 19.]

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: SB 3
Title: Admissability of Hearsay Evidence
Sponsor: Sen. Kerttula
Requestor: Sen. HESS
Date of Request: 1-23-85

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)

| OPERATING | FY 85 | FY 86 | FY 87 | FY 88 | FY 89 | FY 90 |
|---|---|---|---|---|---|---|
| 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 | | | | | | |
| REVENUE | | | | | | |

FUNDING: (Thousands of Dollars)

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

POSITIONS:

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | | | | | | |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

ANALYSIS: Attach a separate page if necessary

Prepared By: Paul Conger    Phone: 465-4338
Division: Administrative Services    Date: ~~1-23-85~~
Approved by Commissioner: [signature]    Date: 1/23/85
Agency: Public Safety

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

7/1/84

SB 3
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.

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER

SB 3

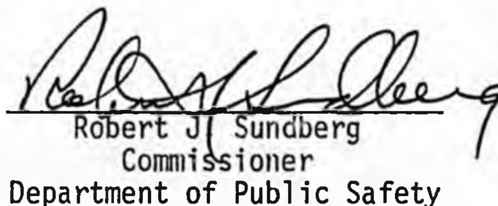
"An Act relating to admissibility of certain hearsay evidence in grand jury proceedings for certain sexual offenses and amending Rule 6(r), Alaska Rules of Criminal Procedure."

The Council on Domestic Violence and Sexual Assault supports the allowance of hearsay evidence in grand jury proceedings for child sexual assault cases. Many victims of child sexual assault are too young to withstand the rigors of the proceedings or to be effective witnesses. Yet their disclosure of sexual assault to police officers and other individuals in less threatening circumstances should be available for consideration. Children often block out their very negative experiences and cannot remember specifics of the experience, particularly under pressure. These children deserve the protection of the criminal justice system as much as older, more articulate individuals.

The U.S. Attorney General's Task Force on Family Violence, which heard testimony in six U.S. cities, reviewed state statutes and researched issues, has recommended that hearsay evidence be allowed in preliminary hearings so the child is not required to testify repeatedly. To quote the Task Force Report:

> "To enable children to more easily and effectively relate the abuse they have suffered, prosecutors should adopt special procedures for child abuse and molestation cases.
>
> At the preliminary hearing the court considers only whether the evidence is sufficient to go forward with prosecution. The prosecutor should not require the child to testify in person. Consistent with state procedures, a videotaped statement, testimony by the child to a law enforcement investigator, or other such presentations should be adequate. If the state rules of procedure do not provide for such presentation, the prosecuting offices should work with concerned citizen groups and lawmakers to modify the rules of procedure to make such a presentation possible."

Three bills (SB 3, HB 88 [Section 5] and HB 67) which allow the admittance of hearsay evidence in grand juries have been introduced this session. The Council does not have the legal expertise to determine the most effective bill. However, the Council is strongly committed to the passage of a bill that provides for the admittance of hearsay evidence in grand jury proceedings to protect the child.



Robert J. Sundberg
Commissioner
Department of Public Safety

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER - SB 3

SUPPORT

January 23, 1985

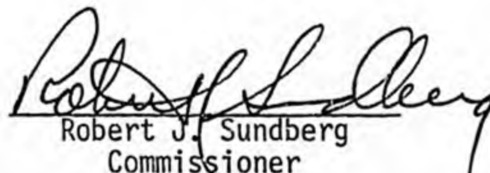
Alaska State Troopers

SB3 - "An Act relating to the admissibility of certain hearsay evidence in grand jury proceedings for certain sexual offenses 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.

Senate Bill 3 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

# Children and the Courts

"He touched me with his peanut," the 12-year-old girl told a St. Paul, Minn., jury. "What's a peanut?" asked prosecuting attorney Kathleen Gearin. Then she handed the frightened child, who is retarded, two anatomically correct dolls and gently asked her to explain. Weeping, the child used the dolls to graphically demonstrate a sexual act. The shock in the courtroom was audible. "I thought the jury was going to jump over the rail and attack the defendant," Gearin said. Instead, the jurors convicted the child's stepfather on two felony counts—and the judge sentenced him to 42 months in jail.

**Children are being seen, heard and believed in cases that previously were consigned to the closet. And jurists are trying to make the experience less traumatic.**

There was a time when a sexually abused child who complained to the police had only one thing to look forward to: another rape in the courtroom. But for many youngsters, in many courts, that is no longer true. Children are being seen, heard and believed in cases that previously were consigned to the closet. "The trend," says University of Nebraska Prof. Gary Melton, "is to let the testimony of children in and to be fairly liberal in the procedure."

Children have been permitted to testify under Anglo-American law at least since 1779, provided that they satisfied a judge that they both knew the difference between the truth and lies and could express what they had seen. What's different about the current situation is that judges are not only permitting more kids to get their day in court, but their claims are being taken seriously. Judges have learned that often there is no correlation between age and honesty, and, with the zeal of all converts, have tried to make their courtrooms more inviting places for children. Properly handled, some experts believe that the experience can be helpful for the child. Says San Francisco counselor Julie Robbins, who has tracked 400 cases, "I see court as a necessary step for abused kids—it's cathartic."

**Show and Tell:** In Massachusetts, judges bring in pint-size witness chairs so youngsters' feet won't dangle. In Maryland, children who have trouble speaking may draw what happened. In Minnesota, a child frozen with fear was permitted to testify from under the prosecutor's table. And from Manhattan Beach, Calif., to Brooklyn, N.Y., children in court use dolls to describe crimes whose names they don't know. "We have to quit pretending that kids have to testify like adults," says Kathleen Morris, a prosecutor in Minnesota. "If all they can do is show, that should be enough."

Can children be believed? "We have a very long intellectual tradition that discredits the testimony of women and children when they complain of sexual assault," says Harvard Medical School psychiatrist Judith Herman. False charges are rare, she insists. "More commonly there are false retractions of true complaints" after a child gives in to family pressure not to testify against an abusive relative. Child advocates won't deny that children invent tales sometimes. But attorney David Lloyd of Washington's Children's Hospital has a simple test: listen for details the child would not know if he or she had not witnessed sexual conduct. As Minneapolis psychologist Michael O'Brien says, "Children just don't fantasize about Daddy going pee-pee in their mouth."

**Evidence:** Technically, in most states, the victim's testimony alone is enough to win a conviction, but in practice prosecutors prefer to have more evidence. Only Nebraska and the District of Columbia still require independent corroboration to prove sexual abuse. Two weeks ago, New York finally repealed that requirement—and none too soon, prosecutors say. "It was heartbreaking," recalls New York County sex-crimes chief Linda Fairstein. "The kids would come in, tell their stories, and there was nothing we could do."

Judges and juries tend to be most suspicious of abuse charges that are part of a divorce or custody fight. "It's not that children are vicious," says New York lawyer Norman Reimer, "but they're used as pawns." Judges and juries recognize that possibility, and as a result may overlook serious abuses, says Washington, D.C., psychologist-lawyer Donald Bersoff—especially given the mix-and-match nature of the modern family. Bersoff urges judges to look for "specific physical and psychological reactions" that abused children show.

Defending an alleged abuser is not child's play. A defense attorney who rips into a young witness may irreparably hurt his client. "That approach doesn't have much jury appeal," says San Francisco Judge Robert Dossee. Most defenders assert that the assault never happened and confine their cross-examination to just enough questions to point out inconsistencies or lapses in a child's memory—a tactic that is particularly effective if the child has been testifying for a long time. And there is good reason to give the defense considerable latitude. "Nobody wants to victimize the victim again," says Houston Judge Ted Poe. "But we can't allow emotion to take over, either. Just the stigma of being charged is so great that the defense must have a real chance."

**Frustration:** In fact, the odds still favor the molester. Most cases still go unreported. Most complaints never lead to charges. Most charges are reduced in plea bargains. Those that survive can drag on for years. Ft. Lauderdale prosecutor Carl Weinberg quit his job after 18 months because he couldn't stand the frustrations any longer. "I can think back on maybe two or three cases in which I really helped the child," he recalls. "It's a futile battle that tears your heart out."

Several states are now trying out reforms to ease a few of the problems. In Texas, victims' statements are videotaped early in investigations and can even be introduced at trial—so long as the child is available for cross-examination. In Colorado, courts are experimenting with funneling lawyers' questions through a friendly therapist. In Washington and Colorado, state laws permit a counselor to tell the jury what a young child told him, even though it's hearsay that can't be cross-examined. Each of these new ideas may run afoul of a defendant's constitutional right to "confront" his accuser. And they all may be tied up in appeals courts for years. In the meantime, parents and teachers would do well to tell their children when to scream for help—so they never have to learn what the view is from the witness stand.

ARIC PRESS with PATRICIA KING in Minneapolis,
ANN McDANIEL in Washington,
RICHARD SANDZA in San Francisco,
SHAWN DOHERTY in New York and bureau reports

**Sec. 12.45.047. Videotaping of testimony by young victims of sexual offenses.** (a) Upon application by the prosecuting attorney and notice to the defendant, the court shall permit the state to videotape the testimony of a child who is the alleged victim of a violation of AS 11.41.410 — 11.41.455 and who is 16 years of age or younger at the time the court issues the order permitting the videotaping.

(b) The trial judge shall preside at the videotaping proceeding and shall rule on all questions as if at trial. The defendant shall be afforded all rights applicable to defendants during trial, including the right to an attorney and the right to confront and cross-examine the witness. The trial judge shall determine those persons other than the prosecuting attorney, the defendant, and the defendant's attorney who may attend the videotaping proceeding.

(c) Videotaped evidence taken in accordance with this section is admissible in evidence in the criminal trial of a defendant charged with a violation of AS 11.41.410 — 11.41.455. (§ 2 ch 67 SLA 1982)

**Editor's notes.** — For provisions setting forth the policy of the state, the purposes of the enacting legislation, and legislative findings, see § 1, ch. 67, SLA 1982 in the 1982 Temporary and Special Acts and Resolves.

Section 3, ch. 67, SLA 1982, provides: "AS 12.45.047 added by sec. 2 of this Act has the effect of changing Rule 804, Rules of Evidence, by adding the videotaped evidence of a young victim of a violation of AS 11.41.410 — 11.41.455 to the list of exceptions to the hearsay rule."

**Sec. 12.45.048. Exclusion of public from trial during testimony by young victim of sexual offense.** (a) After notice to the defendant, the state may apply to the court for an order excluding the public from the courtroom during the testimony of a child who is the alleged victim of a violation of AS 11.41.410 — 11.41.455. The order shall be granted if the court finds that the child is 16 years of age or younger at the time of the trial.

(b) If the public is excluded from the trial under (a) of this section, the testimony given during the time the public is excluded shall be available to the public upon request within a reasonable time sufficient to allow preparation of a tape recording or transcript of the testimony.

(c) In this section "public" means all persons except

(1) the judge presiding over the trial;

(2) the members of the jury;

(3) the defendant and the attorney and an investigator for the defendant;

(4) the prosecuting attorney and an investigating officer for the state;

(5) the parents or legal guardians of the child;

developed a significant emotional attachment who can provide emotional support for the child while the child testifies;

(8) court personnel, including those essential for taking the testimony. (§ 2 ch 67 SLA 1982)

**Editor's notes.** — For provisions setting forth the policy of the state, the purposes of the enacting legislation, and legislative findings, see § 1, ch. 67, SLA 1982 in the 1982 temporary and special acts and resolves.

## Sec. 12.45.060. Discovery after direct examination of witness.

### NOTES TO DECISIONS

**Based on Jencks Act.** — This statute was modeled after the federal Jencks Act, 18 U.S.C. § 3500, et seq. Therefore, when faced with questions requiring the interpretation of the statute the court has turned to federal case law for instruction. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

**Criminal R. 16 and Jencks Act not inconsistent.** — Criminal R. 16 governs pretrial discovery while the Jencks Act governs discovery during trial. Although the same evidence may be discoverable under both the rule and the statute, they are not so overlapping as to be inconsistent. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

**Duty of state to preserve evidence.** — The duty of preservation is the state's duty to preserve any evidence which is discoverable by the defendant. This duty attaches once any arm of the state has first gathered and taken possession of the evidence in question. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

**When sanctions appropriate.** — In cases where the defendant cannot reasonably be said to have been prejudiced by the state's good faith failure to preserve the evidence, sanctions will generally not be appropriate. Where, however, the defendant has suffered prejudice, sanctions will generally be warranted. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

Where it appears that the evidence was lost or destroyed in good faith, the imposition of sanctions will depend upon the degree to which the defendant has been prejudiced. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

Where the evidence in question was destroyed in bad faith or as part of a deliberate attempt to avoid production, sanctions will normally follow. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

**Discretion of trial court.** — What sanction is appropriate in a given case is best left to the sound discretion of the trial court. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

**Good faith alone does not excuse breach.** — That evidence was deliberately not preserved in good faith as a result of ignorance or as part of a department policy, established practice, or anything of this nature will not automatically excuse the state's breach of its duty. The mere fact of good faith does not make the state's breach any less a violation of Cr. R. 16 or the Jencks Act. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

**Burden of proof.** — The heavy burdens of establishing that the failure to preserve the evidence occurred in good faith and not out of a desire to suppress evidence and of demonstrating that the defendant has suffered no resulting prejudice rest squarely on the shoulders of the state.

(3) LOOK AT PAGE 901 RE: TRAUMA



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ings applying aggravating and mitigating factors, as well as his overall assessment of the exceptional severity of Lee's offense. Given the unusually aggravated nature of this offense, the fact that Lee's prior felony may still be considered by the sentencing court on remand, and the fact that, in originally imposing Lee's sentence, the court discounted the significance of his prior felony because it was of a lesser class than the current offense, we recognize that this case may well be one in which little if any change will be necessary on remand.[6] The need for a remand, however, is clear. Under these circumstances, determination of the actual sentence that Lee should receive upon remand must be left to the sentencing court.

The sentence is VACATED, and this case is REMANDED for imposition of a non-presumptive sentence.

Ernest MORGAN, Appellant,

v.

STATE of Alaska, Appellee.

No. 6991.

Court of Appeals of Alaska.

Dec. 23, 1983.

After the Supreme Court, 635 P.2d 472, reversed defendant's conviction, the Superior Court, Fourth Judicial District, Charles R. Tunley, J., convicted defendant of rape, assault with a dangerous weapon, assault with intent to commit rape, and assault and battery, and he appealed. The Court of Appeals, Bryner, C.J., held that: (1) evidence relative to reinstatement of original rape charge following defendant's successful appeal did not support even a prima facie finding of prosecutorial vindictiveness; (2) trial court did not abuse its discretion in permitting dismissed rape charge to be reinstated without indictment; (3) time from entry of defendant's guilty pleas to reversal of his conviction on appeal was properly excluded from computation under 120-day speedy trial rule, and (4) sentencing judge was not barred from imposing sentence higher than eight-year term originally imposed for his conviction of assault with a deadly weapon and assault with intent to commit rape.

Affirmed.

1. Constitutional Law ⇐257.5

Requirements of due process protect accused from both actual and apparent prosecutorial vindictiveness. U.S.C.A. Const.Amends. 5, 14; Const. Art. 1 § 7.

2. Criminal Law ⇐31, 330

When totality of circumstances in case, objectively viewed, indicates realistic likelihood of prosecutorial vindictiveness, a prima facie showing of vindictiveness must be found; burden is then on prosecution to rebut showing of vindictiveness by negating appearance of vindictiveness as well as possibility of actual vindictiveness. U.S.C.A. Const.Amends. 5, 14; Const. Art. 1 § 7.

3. Criminal Law ⇐31

Record unequivocally established that only reason for State's dismissal of defendant's rape charge was his willingness to waive his right to trial by pleading guilty to three other offenses with which he was charged; therefore, record failed to support even a prima facie finding of prosecutorial vindictiveness where, after defendant succeeded on appeal and an order was entered that he be permitted to withdraw his guilty pleas, State informed defendant that it in-

6. We note that the unsuspended fifteen-year period of incarceration originally ordered by Judge Buckalew is equal to the presumptive term for a person convicted of a class A felony who has two prior felony convictions. We have previously approved sentences in this range in exceptionally severe cases involving first felony offenders. *See Maal v. State*, 670 P.2d 708, 712 (1983).

tended to reinstate previously dismissed rape charge if he elected to withdraw his guilty pleas to the three other charges for which he had already been convicted.

4. Criminal Law ⇔31

Normally, a prima facie case of vindictiveness will be established by proof of a prosecutorial threat to reinstate a previously dismissed charge following a successful appeal by accused; however, where record shows that State originally dismissed charge against accused in reliance on his willingness to relinquish his right to trial and to accept punishment for related charges, no inference of vindictiveness can fairly be said to arise if accused subsequently elects to reassert his right to trial and the State, in response, simply restores the case to its original posture.

5. Indictment and Information ⇔144.2

Trial court, after dismissal of rape charge and waived by defendant of his right to trial by pleading guilty to three other offenses with which he was charged, and after defendant obtained order on appeal allowing him to withdraw his guilty pleas, did not abuse its discretion in permitting dismissed rape charge to be reinstated, without reindictment, pursuant to criminal rule providing, inter alia, that criminal rules may be relaxed or dispensed with in any case where it is manifest to court that strict adherence to them will work injustice. Fed.Rules Cr.Proc.Rule 48(a), 18 U.S.C.A.; Rules Crim.Proc., Rules 7(a), 43(a); Const. Art. 1 § 8.

6. Criminal Law ⇔577.8

Where no trial on rape charge was anticipated after State dismissed that charge on basis of defendant's willingness to waive his right to trial by pleading guilty to three other offenses with which he was charged, time from entry of defendant's guilty pleas to reversal of his conviction on appeal by Supreme Court, which concluded that defendant should be permitted to withdraw his guilty pleas, was properly excluded from computation under 120–day speedy trial rule, and therefore prosecution for rape was not barred thereunder. Rules Crim.Proc., Rule 45.

7. Criminal Law ⇔189

Rule that courts sentencing offenders convicted upon retrial after successful appeal may not impose higher sentences than were originally imposed on same charges did not apply where State, after defendant waived his right to trial by pleading guilty to three other offenses with which he was charged, dismissed rape charge, but reinstated it after defendant succeeded on appeal and was permitted to withdraw his guilty pleas; therefore, sentencing judge was not barred from imposing, on retrial, sentence higher than eight-year term originally imposed for assault with a deadly weapon and assault with intent to commit rape, as defendant was not given a higher sentence for those crimes, but rather was sentenced to a ten-year term for rape, a crime for which he had not been previously sentenced.

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Mary E. Greene, Asst. Public Defender, Fairbanks, and Dana Fabe, Public Defender, Anchorage, for appellant.

Richard W. Maki, Asst. Atty. Gen., Anchorage, and Norman C. Gorsuch, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

BRYNER, Chief Judge.

Ernest Morgan was convicted by a jury of rape (former AS 11.15.120), assault with a dangerous weapon (former AS 11.15.220), assault with intent to commit rape (former AS 11.15.160), and assault and battery (former AS 11.15.230). Superior Court Judge Charles R. Tunley sentenced Morgan to concurrent terms of ten years for rape, eight years for assault with a dangerous weapon (ADW), six years for assault with intent to commit rape, and six months for assault and battery (A & B). On appeal, Morgan challenges only his conviction and sentence for rape. Morgan argues that Judge Tun-

ley erred in permitting the rape charge to be reinstated after it had previously been dismissed. He further contends that prosecution of the rape charge was barred by Alaska's speedy trial rule. Alaska R.Crim.P. 45. Finally, he maintains that Judge Tunley was barred from imposing a sentence in excess of eight years for the rape conviction. We affirm.

## FACTS

A brief discussion of the procedural background of this case is necessary to place Morgan's arguments in context. On April 20, 1978, Morgan, his wife, and another individual attacked a Bethel woman and subjected her to repeated acts of rape, torture and violent assault. Morgan was arrested shortly after the incident and was subsequently indicted for rape, ADW, assault with intent to commit rape, and A & B. At the arraignment following his indictment, Morgan attempted to peremptorily disqualify Superior Court Judge Christopher Cooke pursuant to Alaska Criminal Rule 25(d). Judge Cooke ruled that Morgan's peremptory challenge was untimely.

On August 7, 1978, the date set for trial, Morgan withdrew his original pleas of innocence and pled guilty to three charges: ADW, assault with intent to commit rape, and A & B. Although there was no formal plea agreement, Morgan was aware that the state would not try the rape charge alone if he pled guilty to the three other charges against him. After Morgan entered his guilty pleas, the state did in fact dismiss the rape charge. The decision to dismiss was based primarily on the state's conclusion that the interest of justice would not be served by subjecting Morgan's victim to the trauma of a jury trial in light of Morgan's guilty pleas to three of the four charges against him.

Prior to sentencing, however, Morgan obtained a new attorney and moved to withdraw his guilty pleas. One of the grounds for his motion was that Judge Cooke had improperly denied Morgan's peremptory challenge. Judge Cooke denied Morgan's motion and sentenced him to concurrent eight-year terms for ADW and assault with intent to commit rape; Judge Cooke imposed an additional six-month term, also concurrent, for A & B. Morgan appealed, again claiming that Judge Cooke improperly denied his peremptory challenge. The Alaska Supreme Court reversed Morgan's conviction. The court concluded that Morgan's peremptory challenge had been timely, that Judge Cooke improperly refused to disqualify himself, and that Morgan should therefore be permitted to withdraw his guilty pleas. *Morgan v. State*, 635 P.2d 472 (Alaska 1981).

Upon reversal of Morgan's conviction, the state informed Morgan that it intended to reinstate the previously dismissed rape charge if he elected to withdraw his guilty pleas to the three charges for which he had already been convicted. Morgan nevertheless withdrew his guilty pleas. Subsequently, over Morgan's objection, Judge Tunley permitted the prosecution to reinstate the original rape charge. Morgan was eventually tried and convicted of the four charges contained in the original indictment.

Before sentencing, Morgan argued that Judge Tunley was barred from imposing a sentence exceeding the aggregate eight-year term Morgan received from Judge Cooke after pleading guilty to ADW, assault with intent to commit rape, and A & B. Judge Tunley rejected this argument and imposed a ten-year sentence for Morgan's conviction of rape.

## PROSECUTORIAL VINDICTIVENESS

[1, 2] Morgan first claims that reinstatement of the original rape charge following his successful appeal created an impermissible appearance of prosecutorial vindictiveness, thereby violating his constitutional right to due process. Morgan relies on our decision in *Atchak v. State*, 640 P.2d 135 (Alaska App.1981). In *Atchak*, we observed that fundamental fairness precludes the state from "upping the ante" by increasing or threatening to increase charges in retaliation for an assertion by the accused of his constitutional or statutory rights. *Atchak*, 640 P.2d at 149. We emphasized that the

requirements of due process[1] protect the accused from both actual and apparent prosecutorial vindictiveness. Accordingly, we held that when the totality of the circumstances in a case, objectively viewed, indicates a realistic likelihood of prosecutorial vindictiveness, a *prima facie* showing of vindictiveness must be found. The burden is then on the prosecution to rebut the showing of vindictiveness by negating the appearance of vindictiveness as well as the possibility of actual vindictiveness. *Atchak v. State*, 640 P.2d at 144–45.[2]

[3] We believe that the record in this case fails to support even a *prima facie* finding of prosecutorial vindictiveness. As we have already indicated, in determining whether a *prima facie* case of vindictiveness has been made, we must consider all relevant circumstances in the record. The record unequivocally establishes that the only reason for the state's dismissal of Morgan's rape charge in 1978 was his willingness to waive his right to a trial by pleading guilty to the three other offenses with which he was charged.

[4] Normally, a *prima facie* case of vindictiveness will be established by proof of a prosecutorial threat to reinstate a previously dismissed charge following a successful appeal by the accused. However, where the record shows that the state originally dismissed a charge against the accused in reliance on his willingness to relinquish his right to trial and to accept punishment for related charges, no inference of vindictiveness can fairly be said to arise if the accused subsequently elects to reassert his right to trial and the state, in response, simply restores the case to its original posture. Under these circumstances, the state's conduct is not retaliatory or vindictive in nature. Rather, the state, like the accused, seeks only to reassert its initial position. Hence, no realistic likelihood of vindictiveness is indicated by the state's conduct.

Morgan attempts to bolster his claim by pointing out that, in the absence of a formal plea bargain, the state's decision to dismiss the rape charge must be deemed binding, since the dismissal was not required. We believe this position is unrealistic. When an accused decides to enter guilty pleas to a number of charges and apparently acquiesces to conviction and sentencing, we think the state is reasonably entitled to rely on the accused's decision in determining how to dispose of any remaining charges. If the accused subsequently seeks to reassert his innocence, there seems to be little reason to characterize a corresponding effort by the state to reinstate the original charges as being retaliatory or vindictive, regardless of whether dismissal of the charges was originally based on a formal plea bargain. In this case, the evidence is uncontroverted that Morgan's rape charge was dismissed in reliance on his guilty pleas to the related charges of ADW, assault with intent to commit rape, and A & B. Given this evidence, the prosecution's decision to reinstate the rape charge after Morgan elected to withdraw his guilty pleas does not amount to an impermissibly vindictive act, even if no formal plea agreement

1. Alaska Const. art. 1, § 7; U.S.Const. amends. V and XIV.

2. Our holding in *Atchak* was based in part on the United States Supreme Court's holdings in *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), and *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). We also relied on the Alaska Supreme Court's extension of these decisions in *Shagloak v. State*, 597 P.2d 142 (Alaska 1979). We acknowledged in Atchak that the United States Supreme Court had created a specific exception to the prosecutorial vindictiveness doctrine in cases involving plea bargaining. *Bordenkircher v. Hayes*, 494 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). Since no plea bargain was involved in *Atchak*, however, we did not address the applicability of *Bordenkircher* under Alaska law. *Atchak*, 640 P.2d at 145 n. 21. Since our decision in *Atchak*, the United States Supreme Court has further restricted the scope of the prosecutorial vindictiveness doctrine, holding that it applies only to post-conviction situations. *United States v. Goodwin*, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982). Because this case involves a post-conviction threat to increase charges and there was no plea bargaining, we need not address the applicability of either *Bordenkircher* or *Goodwin* under Alaska law.

compelled the earlier dismissal of the rape charge.

## FAILURE TO REINDICT

Morgan next argues that Judge Tunley erred in permitting reinstatement of the dismissed rape charge without reindictment. Morgan relies on the language of Criminal Rule 43(a), which states, in relevant part, that when the state files notice of dismissal, "the prosecution shall thereupon terminate." Whether a previously dismissed case may be reinstated by court order following a dismissal entered pursuant to Criminal Rule 43(a) is a question of first impression in Alaska. Under the comparable federal rule, Fed.R.Crim.P. 48(a), reindictment seems to be accepted as the appropriate means of reinstituting dismissed charges. *See, e.g., United States v. Senak*, 477 F.2d 304 (7th Cir.1973), *cert. denied*, 414 U.S. 856, 94 S.Ct. 157, 38 L.Ed.2d 105 (1973). In the present case, however, Judge Tunley ruled that even if Criminal Rule 43(a) technically required reindictment, good cause existed to relax the rule and permit reinstatement of the original charge. Judge Tunley stated:

> If Criminal Rule 43(a) can in any way be read to require a reindictment (which I do not believe it can), said Rule is hereby dispensed with by this court in this case, for I believe it is manifest to this court that a strict adherence to Rule 43(a) would work an injustice. *See: Criminal Rule 53.* I just cannot see any reason for a reindictment, which would undoubtedly require putting a young girl through the embarrassment and trauma of testifying yet again, to yet another grand jury.

[5] We do not believe that Judge Tunley abused his discretion in permitting the dismissed charge to be reinstated pursuant to Criminal Rule 53.[3] Moreover, given the lack of any significant change in the factual basis supporting the reinstated charge, we do not think Judge Tunley's ruling deprived Morgan of his right to be prosecuted only upon indictment. Morgan has presented no reason, and we can think of none, why the reinstated charge of rape, which was included as a part of the original indictment returned against him, should be deemed insufficient to protect his right to indictment as provided for by Alaska Criminal Rule 7(a) and by the Alaska Constitution, article 1, section 8.

## SPEEDY TRIAL VIOLATION

[6] Morgan further contends that his prosecution for rape was barred by Alaska Criminal Rule 45, which generally requires criminal trials to be held within 120 days of arrest.[4] However, we conclude that the time from entry of Morgan's guilty pleas to reversal of his conviction on appeal by the supreme court must be excluded from computation under the 120-day rule. Exclusion of this time period is warranted for good cause.[5]

An analogous case is *State v. Fevos*, 617 P.2d 490 (Alaska 1980). After being indicted for assault charges, Fevos entered a no contest plea; a date for sentencing was scheduled. Prior to sentencing, Fevos successfully moved to withdraw his no contest plea and reinstated his original plea of not

3. Alaska R.Crim.P. 53 provides:

> These rules are designed to facilitate business and advance justice. They may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work injustice.

4. Alaska R.Crim.P. 45 provides, in relevant part:

> (b) *Speedy Trial Time Limits.* A defendant charged with a felony, a misdemeanor, or a violation shall be tried within 120 days from the time set forth in paragraph (c) of this rule.
>
> (c) *When Time Commences to Run.* The time for trial shall begin running, without demand by the defendant, as follows:
>
> (1) from the date the defendant is arrested, initially arraigned, or from the date the charge ... is served upon the defendant, whichever is first....

5. Alaska R.Crim.P. 45(d) provides, in relevant part:

> (d) *Excluded Periods.* The following periods shall be excluded in computing the time for trial: ....
>
> (7) other periods of delay for good cause.

guilty. He later moved to dismiss his case for violation of the 120-day rule. On appeal, the supreme court held that the period between entry of Fevos's plea of no contest and his sentencing date was excluded from the 120-day rule for good cause:

> Since Fevos entered a plea of no contest on March 8, and sentencing was set for April 12, this time span is also excludable for good cause under Rule 45 because no trial was anticipated.

*Fevos,* 617 P.2d at 492 (footnote omitted); *see also id.* at 492 n. 5.

Here, as in *Fevos,* no trial was anticipated after entry of guilty pleas. The prosecution relied on Morgan's pleas to three of the four charges against him and concluded that prosecution of the remaining count was not justified. We believe the prosecution's reliance on Morgan's guilty pleas was reasonable, and we find no good reason why the reinstated charge of rape should be treated differently from Morgan's other charges for purposes of applying the 120-day restriction of Criminal Rule 45.[6]

## INCREASE IN SENTENCE AFTER APPEAL

[7] Morgan's last argument is that Judge Tunley was barred from imposing a sentence higher than the eight-year term originally imposed for his conviction of ADW and assault with intent to commit rape. Morgan relies on *Shagloak v. State,* 597 P.2d 142 (Alaska 1979). However, we think *Shagloak* is largely inapposite. *Shagloak* holds that courts sentencing offenders convicted upon retrial after a successful appeal may not impose higher sentences than were originally imposed on the same charges. Thus, *Shagloak* would have directly prohibited Judge Tunley from exceeding Judge Cooke's original sentences for Morgan's convictions of ADW, assault with intent to commit rape, and A & B. However, Morgan was not given a higher sentence for any of these crimes. Rather, he was sentenced to a ten-year term for rape, a crime for which he had not been previously sentenced. The supreme court's holding in *Shagloak* thus does not directly control this case. Nor do we believe that the policies underlying the decision in *Shagloak* warrant extension of its holding to the present case.

In *Shagloak,* the court explained its ruling in the following terms:

> We believe if a more severe sentence may be imposed after retrial for any reason, there will always be a definite apprehension on the part of the accused that a heavier sentence may be imposed. Such apprehension or fear would place the defendant in an "incredible dilemma" in considering whether to appeal the conviction. A "desperate" choice exists, and may very well deter a defendant from exercising the right to assert his innocence and request a retrial. Such deterrence violates the due process clause of the Alaska Constitution. The fundamental standard of procedural fairness, which is the basic due process right claimed in this case, forbids placing a limitation on the defendant's right to a fair trial by requiring the defendant to barter with freedom for the opportunity of exercising it.

6. It might be argued that the state was placed on notice of the potential need for a trial on the rape charge by Morgan's motion to withdraw his guilty pleas. However, we think it would be unreasonable to hold that good cause for exclusion of time under Rule 45(d)(7) terminated when Morgan moved to withdraw his guilty pleas. If Morgan ultimately failed in his efforts to withdraw his plea, the prosecution's position with respect to the dismissed rape charge would not have been altered. Accordingly, the prosecution had good reason to await a final ruling on the merits of Morgan's motion to withdraw his pleas prior to reinstating the rape charge. Similarly, if Morgan ultimately prevailed in his efforts to withdraw his guilty pleas, the three charges to which he had pled guilty would have to be tried. It would seem purposeless to construe Criminal Rule 45 as requiring the state to proceed with trial of the originally dismissed rape charge while the other changes were on appeal, since essentially the same trial would have to be repeated if Morgan ultimately succeeded in withdrawing his guilty pleas. Thus, we hold that Morgan's efforts to withdraw his guilty pleas do not affect good cause for delaying prosecution of the rape charge.

*Shagloak*, 597 P.2d at 145 (footnote omitted).

Here, the possibility that Morgan might be prosecuted and separately sentenced for the additional crime of rape after a successful appeal simply did not, in and of itself, place Morgan in an "incredible dilemma" or force him to make a "desperate choice" within the meaning of *Shagloak*. The dilemma and choice faced by Morgan following his successful appeal was precisely the same as that which he had faced at the inception of his case.

Prior to trial, when Morgan was charged with four separate offenses, including rape, he was aware that the prosecution would dismiss the rape charge if he pled guilty to the three remaining charges. Morgan certainly must have been aware that, if convicted of all four offenses, he faced a potentially higher sentence than that which he would receive if he pled guilty to three offenses and obtained a dismissal of the rape charge. Faced with this choice, Morgan elected to plead guilty to three charges and to allow the charge of rape to be dismissed. Prior to sentencing, Morgan changed his mind and sought to withdraw his guilty pleas. At that time, the same basic choice confronted him: to accept conviction and sentencing for three offenses or to assert his right to trial on the original indictment at the risk of being convicted and sentenced for all four charges.[7] By changing his mind and moving to withdraw his pleas, Morgan chose to take the risk of conviction and punishment on the original charges; he was prevented from doing so by Judge Cooke, whose ruling was subsequently reversed. The prosecutorial threat to reinstate Morgan's rape charge after he successfully appealed presented Morgan with precisely the same choice that he had previously faced: to accept conviction and sentencing for three offenses or to assert his right to trial at the risk of being convicted and sentenced for an additional offense. Thus, in no meaningful sense did the threat of an increased charge and sentence following appeal force Morgan to make a choice more desperate than that which he originally made and that with which he was faced throughout his prosecution.

In summary, our decision that reinstatement of the dismissed rape charge was not vindictive is largely dispositive of Morgan's claim that his maximum sentence could not exceed the eight-year term originally imposed. Just as the threat of reinstatement did not give rise to an inference of prosecutorial vindictiveness, imposition of the separate and higher sentence for the crime of rape does not create an appearance of judicial vindictiveness. Essentially, Morgan's argument is that, by pleading guilty to three of the original charges against him and procuring dismissal of the fourth, and then later deciding to reassert his innocence, he somehow gained a constitutionally protected right against prosecution and punishment for the charge dismissed in reliance on his guilty pleas. We find this argument to be unpersuasive and do not believe the supreme court's holding in *Shagloak* compels a contrary conclusion.[8]

7. When Morgan moved to withdraw his pleas of guilty, his counsel did not assert that the state would in any way be foreclosed from reinstating the original charge of rape. Nor has Morgan's current counsel argued that reinstatement of the rape charge would have been impermissible at any time prior to Morgan's successful appeal. We think it apparent that, if Morgan had been permitted to withdraw his guilty pleas prior to the original sentencing, reinstatement of the rape charge would have been permissible, and any assertion of prosecutorial vindictiveness would have been without merit.

8. Morgan separately maintains that a sentence in excess of eight years was not justified because Judge Cooke took Morgan's rape into account in sentencing Morgan on his pleas of guilty to the charges of ADW, assault with intent to rape, and A & B. This argument is unpersuasive. In sentencing Morgan for those three charges, Judge Cooke did indicate that he would take into account all relevant circumstances, including the injuries suffered by M.P. However, Judge Cooke made it clear that he did not intend to make any finding as to whether Morgan actually committed the offense of rape and that he did not intend to sentence Morgan for any crimes other than those to which he had pled guilty.

The conviction and sentence are AFFIRMED.

William M. CULLOM, Appellant,

v.

STATE of Alaska, Appellee.

No. 7505.

Court of Appeals of Alaska.

Dec. 30, 1983.

Defendant was convicted in the Superior Court, Fourth Judicial District, Fairbanks, Jay Hodges, J., of possession of cocaine, and defendant appealed. The Court of Appeals, Coats, J., held that search of defendant by store security guards after security guard saw defendant conceal cologne set on his person was not state action and therefore not subject to exclusionary rule.

Affirmed.

Searches and Seizures ⟹7(4)

Where store security guard was not hired or paid by police and was not acting in any way in concert with police, search by security guard of individual that security guards saw conceal cologne set on his person was not state action and therefore not subject to exclusionary rule.

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Charles R. Pengilly, Asst. Public Defender, Fairbanks, and Dana Fabe, Public Defender, Anchorage, for appellant.

Kristen Young, Asst. Atty. Gen., Office of Special Prosecutions and Appeals, Anchorage, and Norman C. Gorsuch, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

## OPINION

COATS, Judge.

An unarmed security guard for Fred Meyer, Larry Garcia, saw William Cullom conceal a cologne set on his person. The guard followed Cullom to the store exit, and showed Cullom his security identification. The guard took Cullom to the store's security office, recovered the cologne set, read Cullom his *Miranda* rights, and then frisked Cullom for weapons. The weapons search is apparently a routine procedure.

During the weapons search, Garcia found a glass vial, a syringe and a spoon in Cullom's sock. He also found a concealed shoe polish kit belonging to Fred Meyer. Garcia made out a citizen's arrest report, and then called the police. Residue on the spoon was found to be cocaine. Cullom was charged with possession of cocaine, AS 17.10.010. He moved to suppress the evidence on the basis that it was illegally seized.

Judge Hodges denied the motion, finding that the search was not state action, and therefore not subject to fourth amendment limitations. Even if there were state action, ruled the court, the search was constitutional and reasonable under the circumstances.

Cullom pled guilty and brought this *Cooksey-Oveson* appeal.[1] We conclude that the weapons search which resulted in the seizure of the cocaine was not state action and therefore the actions of the security guard were not subject to the fourth amendment of the United States Constitution or Article I § 14 and Article I § 22 of the Alaska Constitution.

It is clear that private searches are not generally subject to the fourth amendment. *Walter v. United States,* 447 U.S. 649, 656,

1. *Oveson v. Anchorage,* 574 P.2d 801 (Alaska 1978); *Cooksey v. State,* 524 P.2d 1251 (Alaska 1974).

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date: ____

REQUEST
Bill/Resolution No.: SB 3
Title: An Act relating............
hearsay evidence in grand jury...
Sponsor: Sen Kerttula
Requestor:
Date of Request: 1/18/85

FISCAL DETAIL
Agency Affected: Health and Social Services
Program Category Affected:

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

| | FY 85 | FY 86 | FY 87 | FY 88 | FY 89 | FY 90 |
|---|---|---|---|---|---|---|
| GENERAL FUND | | | | | | |
| FEDERAL FUNDS | | | | | | |
| OTHER | | | | | | |
| TOTAL | -0- | -0- | | | | |

POSITIONS:

| | FY 85 | FY 86 | FY 87 | FY 88 | FY 89 | FY 90 |
|---|---|---|---|---|---|---|
| FULL-TIME | -0- | -0- | | | | |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

ANALYSIS: Attach a separate page if necessary

N/A

Prepared By: Michael L. Price [signature]
Division: Family and Youth Services
Phone: 465-3170
Date: 1/18/85

Approved by Commissioner: [signature]
Agency: Health & Social Services
Date: 1/22/85 [initials]

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

POSITION PAPER/Department of Health & Social Services

(2)

POSITION PAPER

SENATE BILL NO. 3

For an act entitled "An Act relating to the admissibility of certain hearsay evidence in grand jury proceedings for certain sexual offenses and amending Rule 6(r), Alaska Rules of Criminal Procedure".

This bill would allow admission at grand jury proceedings of hearsay statements of children under 16 years of age relating to sexual offenses. The bill would provide a means for admitting evidence from children at grand jury proceedings while protecting those children from additional emotional trauma. The bill may also increase the likelihood of successful prosecution of sexual offenses committed against children.

The department is extremely pleased that the legislators have addressed the problem and offered a solution to reduce child sexual abuse in Alaska. The department supports admitting certain hearsay evidence by children under 16 years old but believes that SB 3 should adopt the language in the Governor's Child Protection packet (HB 88). Section 5 of HB 88 defines under what conditions the hearsay evidence can be admitted. Section 5 states that there must be some indication of reliability of the hearsay statement and that either the child testifies at the grand jury proceeding or is unavailable (Sec. 12.40.055(a)(1)(2)). The bill then defines unavailability (Sec. 12.40.055(b)(2)). The Governor's bill also defines the child's "statement" to include non-verbal conduct. (Sec. 12.40.055(b)(1)). SB 3 does not define statement nor does the bill address availability or reliability of the witness.

HB 88 addresses potential legal issues and may better withstand a constitutional challenge than would SB 3.

The department supports the concept in SB 3 but prefers the language in HB 88.

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

DATE: 1/21/85

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

DATE: 1/22/85

# ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

<u>POSITION PAPER</u>

SB 3

The Alaska Network on Domestic Violence and Sexual Assault, a non-profit corporation representing 20 domestic violence and sexual assault programs statewide, support SB3, allowing for the admission of certain hearsay evidence in grand jury proceedings for certain sexual offenses.

The state of Alaska is to be credited for enacting many measures over the past several years which serve to protect children from sexual and physical abuse. Domestic violence and sexual assault programs across the state have devoted much time and energy to educating both professionals and members of the public about issues involving child sexual assault. These combined efforts have resulted in a dramatic increase in the number of self-reports made by child victims, and a greater understanding on the part of the general public as to the extent of the problem.

We now know that child victims will often disclose incidences of sexual assault to the non-offending parent, a teacher, a day care provider, and other trusted adults. Such statements by the child victim to an adult are often viewed as the most reliable sources of evidence concerning the assault. However, since such evidence is legally considered to be "hearsay" and is not admissable even in grand jury proceedings, some cases of child sexual assault are not being fully investigated or prosecuted.

Because of the unique nature of cases of child sexual assault, cases in which the primary witness is a child, certain limited allowances must be permitted in order to adequately provide protection. For this reason, the Network supports the passage of SB3.

10 SEWARD #13 JUNEAU ALASKA 99801 (907) 586-3650

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.

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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:

> [S]ome jurisdictions ... take the highly technical view of finding an inconsistency only when this is apparent on the face of

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. L..max,* 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 defenda[illegible]volvement in the crime.

521 F.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, 631-32 (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 longstanding 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 788, 789 (Alaska App.1982).

testimony of Miklik's medical expert, who said that "work aggravation of the hypertensive arteriosclerotic heart disease caused plaintiff's disability". The board later found that Miklik was the victim of heart damage, concluding that "the stressful employment aggravated the pre-existing arteriosclerotic heart condition". Such a bald assertion completely ignores *Kostamo.*

The main issue in two of the five cases which comprised *Kostamo* was whether there had been heart damage. The Court stated that the occurrence or non-occurrence of a heart attack is a purely medical dispute; faced with conflicting expert testimony, the WCAB was compelled to decide the issue. The board concluded that in neither case had a heart attack occurred; thus, there was no heart damage. This Court affirmed and emphasized that absent such "proof" of heart damage, the presence of arteriosclerosis alone would not support an award of benefits.

"Although there is a causal relationship between the underlying disability, arteriosclerosis, and [claimants'] inability to continue working, that disability was not caused and could not have been aggravated by their employment." *Kostamo,* 405 Mich. p. 118, 274 N.W.2d 411.

III

[7] Even if the WCAB had had adequate support for its finding of heart damage in *Miklik,* the board further failed to show a sufficient link between the damage and the workplace. There must be a relationship proved between the damage and *specific* incidents or events at work. General conclusions of stress, anxiety, and exertion over a period of time do not satisfy this second requirement. There must be enough detail about that which precipitated the heart damage to enable the factfinder to establish the legal connection by a preponderance of the evidence.

[8] The link between the work and the heart damage need only be one of reasonable relationship of cause and effect. Other possible or probable causes need not be excluded beyond doubt. Further, the work need not be the *sole* cause of the damage; it is sufficient if the employment is a cause. The factfinder must identify and evaluate the discrete factors of employment which are connected to the damage. The *Kostamo* Court noted several examples which have been regarded as significant by courts and commentators: temporal proximity of the cardiac episodes to the work experience, hot and dusty conditions, repeated return to work after a cardiac episode, and mental stress.

The WCAB's conclusion in *Miklik* that general stress existed without a link between a *specific* incident of employment and a *specific* cardiac episode does not suffice. Accordingly, we reverse the decision of the WCAB.

The present Court, while unanimously concurring in this opinion, is equally divided on the question of whether, in light of the reversal of the WCAB, this case should be remanded for further proceedings. Not wishing to affirm the WCAB by such division, a majority of the Court directs that this case be remanded to the WCAB for further proceedings not inconsistent with this opinion.

LEVIN, KAVANAGH, WILLIAMS, COLEMAN and RYAN, JJ., concur.

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

John L. KREINER, Defendant-Appellant.

Docket No. 68114.

Supreme Court of Michigan.

Dec. 22, 1982.

Rehearing Denied Feb. 22, 1983.

Defendant was convicted in the Circuit Court, Wayne County, Joseph B. Sullivan,

I

The defendant was charged with second-degree criminal sexual conduct[3] as a result of what was alleged to have occurred between him and a six-year-old girl during the morning of July 3, 1979.

The child could not relate at trial the details of what had occurred on July 3. She would only say that the defendant had come into her bedroom and had done something "bad". Her mother explained that the defendant was a friend who had come to visit the preceding evening and had slept on the couch that night. The mother testified that she got up around 10:30 or 11 a.m. She dressed and took her daughter to eat. On the way home from the restaurant, she had a conversation with her daughter. Defense counsel interrupted with an objection that the contents of the conversation would be hearsay. The trial judge relied on the tender years exception to the hearsay rule to allow the testimony and noted also that there had been little delay in the communication to the mother:

> "Here, in this instance, the child being seven [at the time of trial], apparently alleges to her mother the following morning that a certain act occurred. The passage of time is minor, comparatively speaking, as it was the first opportunity, a visit with the mother in the morning, the child had to talk to the mother, who took her out in the car to breakfast and on the way back the child related this incident. Therefore, I'm going to overrule the objection and permit the testimony. Thank you.
>
> "I should comment further that I feel that is adequate explanation for what little delay there was. There really was very little delay."

The mother then testified as follows:

> "*Q.* * * * What did she tell you?
>
> "*A.* She said that he had fondled her female genitals and, well, that he had—was playing with her too-too.
>
> "*Q.* She said that he was playing with her too-too?
>
> "*A.* Yes. She said that he had done something that hurt and then he stopped.
>
> "*Q.* What is a too-too, if you know?
>
> "*A.* That is what me and her refer to as her female genitals.
>
> "*Q.* I see.
>
> "*A.* And she had said that he had laid on top of her and that he had touched her with his penis.
>
> "*Q.* Did she tell you where he touched her with his penis?
>
> "*A.* On her legs."

Again, over objection on hearsay grounds, a police officer was permitted to testify as to his conversation with the child later that day:

> "*A.* * * * She said that he took out his thing and asked her to touch it. And she told him no that she wouldn't. And then he pulled down her pants and began touching her.
>
> "I asked her where he touched you, 'where you pee?' And she said yes. And I said, 'Did it hurt?' And she said 'No, just a little bit', and I said, 'Did he put it inside where you pee a little bit?' and she said yes.
>
> "And I said, 'Did you want him to do that?' And she said no. 'I told him to stop.'
>
> "I said, 'Did he stop?' and she said no.
>
> "I said, 'How long did he do that?'
>
> "She said he kept doing it until he started rubbing his thing.
>
> "*Q.* I see.
>
> "*A.* I said, 'Then how long did he rub his thing, for just a couple of seconds, or what?' And she told me he rubbed it for a long time, and at that point I didn't know how to exactly ask her if he had ejaculated and I asked her, 'Did it spit?' And she said no, that it hadn't and that was the extent of the interview at that time."

The defendant testified that nothing occurred that morning between him and the child. He had showered about 9 a.m. and left. The trial judge concluded that the defendant did have sexual contact with the

3. M.C.L. § 750.520c; M.S.A. § 28.788(3).

child, and he found the defendant guilty as charged. The Court of Appeals affirmed the defendant's conviction.

II

A

[1, 2] Before addressing the precise issue whether the tender years exception survived the adoption of the Michigan Rules of Evidence, we believe the treatment of this case by the courts below [4] suggests a need to examine the common-law definition of that exception and how it was misapplied here. The exception does not permit the introduction of *any* conversation with the infant victim regarding the details of the crime; it permits hearsay only to corroborate the testimony of the complainant:

> "The rule in this State is that where the victim is of tender years the testimony of the details of her complaint may be introduced *in corroboration* of her evidence, if her statement is shown to have been spontaneous and without indication of manufacture; and delay in making the complaint is excusable so far as it is caused by fear or other equally effective circumstance." *People v. Baker*, 251 Mich. 322, 326, 232 N.W. 381 (1930). (Emphasis added.)

The rule came into Michigan jurisprudence in *People v. Gage*, 62 Mich. 271, 28 N.W. 835 (1886), as one allowing hearsay in corroboration of the testimony of a complainant. In this case, the hearsay was not used for corroboration, but to supply the very elements of the crime. Consequently, the tender years exception was not available to justify admission of either witness's testimony.

[3] In *Baker*, the Court also limited the tender years exception to the first complaint made:

> "*The statement by Dorothy to Mrs. Alarie was not an original complaint and was not admissible.* But, because of admissions by defendant of Dorothy's charge of indecent liberties, substantially as she made it to Mrs. Schmidt and Mrs. Alarie, the testimony of her statement to the latter was not prejudicial or reversible error." 251 Mich. 326, 232 N.W. 381. (Emphasis added.)

The child's "statement" to the police officer, in this case, came after the original complaint to the mother, and therefore it was also inadmissible for that reason.

B

The tender years exception, as restated in *Baker*, did not survive adoption of the Michigan Rules of Evidence. MRE 101 provides that "[t]hese rules govern proceedings in the courts of this state to the extent and with the exceptions stated in rule 1101". None of the rule 1101 exceptions are applicable here. MRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted". MRE 802 provides that "[h]earsay is not admissible except as provided by these rules". MRE 803 provides 23 exceptions to the hearsay rule, none of which encompass the tender years exception as *Baker* defines it.

[4] The Michigan Rules of Evidence were based on the Federal Rules of Evidence. The comparable FRE 803 contains 24 exceptions. The twenty-fourth would permit hearsay not otherwise qualifying "but having equivalent circumstantial guarantees of trustworthiness". The committee which assisted in creating the Michigan rules recommended to the Court the

4. The Court of Appeals did find the police officer's hearsay testimony inadmissible, but for a different reason:

> "The hearsay account related by Officer Hayes presents another situation, however. By his own testimony, during his interrogation of [the child], the girl merely replied 'yes' or 'no' to his questions. Officer Hayes' questioning, then, actually constituted the hearsay account related at trial. Additionally, the record fails to support a finding that [the child] was still under the effects of the startling event at the time of the officer's interrogation."

The Court nevertheless found the error harmless because the testimony duplicated that of the mother which had already been admitted.

adoption of a comparable MRE 803(24),[5] even though the committee recognized it had "no counterpart in prior Michigan law".[6] We did not, however, adopt an MRE 803(24).[7] Finding no applicable exception in the Michigan Rules of Evidence, we conclude that the tender years exception did not survive the adoption of those rules.

C

Our inquiry is not at an end, however. MRE 803(2) allows the out-of-court statement of a declarant available as a witness to be admitted if it is:

"A statement relating to a startling event or condition made while the declarant was under stress of excitement caused by the event or condition."

We addressed the excited utterance exception to the hearsay rule in *People v. Gee*, 406 Mich. 279, 282, 278 N.W.2d 304 (1979):

"Otherwise objectionable hearsay testimony may be admissible if it amounts to an excited utterance. * * *

"To come within the excited utterance exception to the hearsay rule, a statement must meet three criteria: (1) it must arise out of a startling occasion;[4] (2) it must be made before there has been time to contrive and misrepresent; and (3) it must relate to the circumstances of the startling occasion.

"4 Startling enough to produce nervous excitement and to render the utterance spontaneous and unreflecting."

[5] This rule would support the admission of a hearsay statement by a child of tender years in a sexual assault case, *if* the foundation criteria of the rule are met.[8]

[6] The record in this case has not been developed sufficiently for us to determine if the criteria were met so as to allow the mother's testimony to be admitted. For example, it is unclear how much time expired between the alleged assault and the point at which the child related to her mother what had occurred. It is clear that the child did not tell her mother at "the first opportunity", as the trial judge said, because the mother and child were alone during a car trip to a restaurant, during the meal at the restaurant, and during part of the trip home before the conversation in question occurred. A new trial is required, at which the prosecutor may attempt to establish a foundation for admitting the testimony under MRE 803(2).

In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the judgments of the Court of Appeals and the circuit court and remand the case to the circuit court for a new trial.

FITZGERALD, C.J., and LEVIN, KAVANAGH and RYAN, JJ., concur.

WILLIAMS, Justice, concurring.

I concur except I believe the mother's testimony was admissible.

COLEMAN, Justice, dissenting.

I dissent in part. I would affirm the trial judge on the bases of the totality of the record before him and in light of the fact that defendant was a friend of the hapless child's mother, thus placing said child in a position totally unlike that of an assault by a stranger. Here, withdrawal till she might sort out her fears and explore her mother's temper was understandable—as opposed to crying out spontaneously against the assault of a stranger. I cannot fault the trial judge for his sensitivity to this distinction.

5. 399 Mich. 1009.

6. 399 Mich. 1015.

7. 402 Mich. cxix. See also Robinson, *Current Issues in Michigan Evidence Law*, 61 Mich. Bar.J. 330, 332–333 (May, 1982).

8. "If the utterance of a child of 'tender years' relates to a 'startling event or condition' and was made while the child was 'under the stress of excitement caused by the event or condition,' the statement may be admitted as an excited utterance under MRE 803(2). See *People v Cobb*, 108 Mich App 573 [310 NW2d 798] (1981). On the other hand, if these requirements are not met, the mere fact that the declarant is of 'tender years' and makes a statement in a sex-related case does not provide a basis for admitting the statement under the so-called 'res gestae' exception. 61 Mich Bar J 332."

Rules of Court



(r) **Admissibility of Evidence.** Evidence which would be legally admissible at trial shall be admissible before the grand jury. In appropriate cases, however, witnesses may be presented to summarize admissible evidence if the admissible evidence will be available at trial. Hearsay evidence shall not be presented to the grand jury absent compelling justification for its introduction. If hearsay evidence is presented to the grand jury, the reasons for its use shall be stated on the record.

(s) **Discharge and Excuse.** A grand jury shall serve until discharged by the presiding superior court judge of the judicial district but no grand jury may serve more than 5 months, unless for good cause such period is extended. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the presiding judge may excuse a juror either temporarily or permanently, and in the latter event said judge may impanel another person in place of the juror excused.

(t) **Delegation of Duties.** Whenever a superior court is sitting other than where the presiding judge is sitting, the presiding judge may delegate his duties under this rule to another superior court judge. (Amended by Supreme Court Order 136 dated August 27, 1971; by Supreme Court Order 136A dated September 13, 1971; by Amendment No. 1 to Supreme Court Order 136 dated October 17, 1972; by Supreme Court Order 146 effective October 31, 1971; by Amendment No. 1 to Supreme Court Order 146 effective October 31, 1971; by Supreme Court Order 157 effective February 15, 1973; by Supreme Court Order 216 effective October 1, 1975; by Supreme Court Order 261 effective December 30, 1976; and by Supreme Court Order 539 effective October 1, 1982)

(c) CROSS REFERENCE: Crim. Form 12

(d) CROSS REFERENCES: Crim. Forms 11, 12

(h) CROSS REFERENCES: AS 12.40.030; AS 12.40.040; AS 12.40.050; AS 12.40.060

(i) CROSS REFERENCE: AS 12.40.070

(l) CROSS REFERENCE: AS 12.40.090

(o) CROSS REFERENCE: Crim. Form 13

SB 427 HISTORY

The bill was amended in Senate HESS. Wording changed from "preliminary examination" to "grand jury" because preliminary examinations are rarely used in Alaska. The change in Rule 6(r) was added.

The fiscal note is zero.

Senate HESS: 4 DP (Halford, V. Fischer, P. Moss, Josephson)
Senate JUD: 3 DP (Ray, Pettijohn, Eliason)
1 NR (Ziegler)

Passed Senate 5/8/84 16-0-4

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Council on Domestic Violence and Sexual Assault; Jana Varrati

---

CSSB 472 was read across on May 10th and referred to Judiciary. It was not priority legislation to them and apparently they felt it was too late in the session.

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# New War on Child Abuse

## Reforms Are Making Prosecutions Easier

By Mary Ann Galante
National Law Journal Staff Reporter

THE WITNESS BOX was empty. Instead, the packed Los Angeles courtroom audience watched a 5-year-old girl testify on a large TV screen placed before a podium from which lawyers asked her questions.

The tiny witness could have been at home, or even in another state. She was in the next room.

Washed in the glare of floodlights, the child was demure until questioning turned to details of her alleged molestation by an elementary school principal, Hugh Greenup, 57, of Northridge, Calif., charged with sexually assaulting seven students. The little girl, seated beside her mother, stared into space, then froze. "Your honor, we'll need a little time," came the voice of the bailiff as the sound of sobbing rose.

The testimony by two-way, closed-circuit TV was used in California for the first time last month. *People v. Greenup*, A752-34. It is one of several innovations being tried across the country to spare children who allegedly have been molested yet another assault by the legal system.

Sexual abuse of children brings out strong emotions. Dramatic reforms are being adopted nationwide to change courtroom procedures, sentencing laws and rules of evidence to facilitate prosecution of accused child molesters. But some question whether the trend is an overreaction at the expense of constitutional rights.

State laws vary widely, but the more common reforms include:

- Abolishing statutorily set ages below which children are presumed to be incompetent as witnesses.
- Abandoning corroboration requirements. Only two jurisdictions — Nebraska and the District of Columbia — still retain blanket prohibitions against finding someone guilty of sexual abuse solely on the word of a child.
- Changing hearsay rules to allow into evidence both out-of-court statements from children and videotaped interviews. A related technique — used in the

*Continued on page 26*

*Growing Disillusion*

# Is Partnership Worth It All?

By David A. Kaplan
National Law Journal Staff Reporter

*"Probably every new and eagerly expected garment ever put on since clothes came in, fell a trifle short of the wearer's expectation."*
— Charles Dickens in "Great Expectations"

FOR JUNIOR partners in the nation's major law firms, was the catch worth the chase?

The chance at partnership — what essentially amounts to lifetime job tenure, financial security and social status — is the brass ring that spurs those fresh out of law school to toil as overworked associates for as long as 10 years in hundreds of firms across the country.

*Continued on page 22*

HIGHLIGHTS

# Child-Abuse Prosecutions Are Increasing

Continued from page 1

Greenup case — allows live testimony via closed-circuit television to shield very young witnesses from exposure to grand juries, spectators the press or even defendants.

Growing Awareness

The trend toward innovation can be traced to growing public awareness about a previously hidden issue that suddenly has burst out of the deepest corner of the American closet. In California alone, more than 40 bills aimed at easing young victims' trauma have been introduced in the Legislature.

Because prosecutors' offices tally cases differently, there are no reliable statistics to gauge the success of these efforts. But there's little doubt that more cases are being filed," notes Josephine A. Bulkley of Washington, D.C., former project director of the American Bar Association's two-year national study on how legal systems cope with child sex abuse.

Change has been slow. For years, prosecuting cases involving preschoolers was the exception rather than the rule because such cases, relying heavily on the testimony of the young witnesses, are difficult to prove.

Today, however, prosecutors and child therapists alike bristle at the widespread view that sexually abused youngsters cannot separate fact from fantasy. They counter that toddlers as young as 2 or 3 are incapable of describing sex acts unless they have actually experienced them.

Special Units

Although they are still rare, special prosecuting units have been set up in a few major cities. Two years ago, Jean Matusinka, who heads the Los Angeles District Attorney's Child Sex Abuse Unit, won funding from the Los Angeles County Board of Supervisors for her section. Her pitch was easy: The county had 750 incest cases, and half were being ignored for lack of lawyers.

Last year, her team of five trial lawyers and two investigators filed about 130 cases involving sexual abuse. They won convictions in all but two.

A major plus of the special units is that they usually allow for vertical prosecution — in which one lawyer follows a case through all phases, rather than the assembly-line approach used in most felonies.

> The younger the victim, the more likely he'll 'babble, wander, twirl in the chair, then look at you and freeze.'

That approach, which minimizes a child's contact with the legal system, was started in the mid-1970s by what became the King County Special Assault Unit in Seattle, long a leader in innovative prosecution of child sex-abuse cases. Lawyers there prosecute 275 to 300 cases involving child molestation a year — an unusually high figure even in larger cities.

Another way prosecutors minimize the trauma of eliciting testimony from young victims is by using anatomically accurate dolls. They are helpful "for kids who can only verbalize with names like 'peanut' and 'koochie' to show what happened [to them]," explains Laurie Boerma, chief of Philadelphia's Child Abuse Unit.

Seattle offenders who are found to be suitable candidates for treatment often receive light jail time of perhaps 90 days, and then are allowed into a therapy program — provided they admit the crime.

The approach results in guilty pleas in 80 percent of the filed cases. Its success has led to plans in Florida's Dade County to launch soon a similar program to treat entire families of pedophiles who admit intrafamily abuse.

It's when cases go to trial, lawyers on both sides agree, that child sexual-abuse cases are the toughest.

Prosecutor often have no more than the story of a terrified toddler. And the younger the victim, the more likely he or she is "to babble, wander, twirl in the chair, then look at you and freeze," notes Robert H. Lynn, assistant county attorney in Minneapolis.

Moreover, the cases' sensitive nature results in an exhausting emotional drain for both sides, observes Seattle defense lawyer Michael A. Frost. "After three days of trial, everybody feels like it's lasted two weeks. You don't want to get up and go to court."

The defense burden is doubly difficult because jurors resent a lawyer who bullies children. "With adults, you can be tough to get at the truth. But how do you deal with a 4-year-old" who may be lying? asks Deputy District Defender Susan Alkema of Albuquerque, N.M.

Nonetheless, the odds still favor the attacker because most cases continue to go unreported and untried. But as many states amend their rules of evidence, prosecutors are gaining an edge.

Competency Rules

A major trend has been toward dropping competency criteria. At one time, legal scholars note, children were in the same class as felons and athiests — jurors were told their testimony was suspect. The shift started in 1974, when the Federal Rules of Evidence were enacted, eliminating the competency requirement for children.

Nonetheless, about half the states today still presume witnesses younger than 10 are incompetent. A substantial number of states have no presumption, leaving it up to the judge to decide whether children in specific cases meet competency standards.

> The cases are exhausting, says one defense lawyer. 'After three days of trial, everybody feels like it's lasted two weeks.'

The competency hurdles have been "the No. 1 legal rule preventing successful prosecution of child-molestation cases," says Irving Prager, a professor at California's University of La Verne College of Law.

But competency standards clearly are being eroded. Several states — including Colorado and Utah — have gone at least as far as the federal rules, and similar reforms have been proposed in California and Ohio.

An even greater barrier to prosecution has fallen with the elimination of requirements that all cases of sexual abuse be corroborated independently.

'Substantial Impact'

In New York, which just amended its law to drop the corroboration requirement in sex abuse cases, the Brooklyn

Continued on following page

Some prosecutors use anatomically correct dolls to elicit testimony from victims. Those help kids who can only verbalize with names like 'peanut' and 'koochie,' says one prosecutor.

*Continued from preceding page*

district attorney's office alone in the past two years dropped 56 cases involving child sexual abuse for lack of corrobation, claims District Attorney Elizabeth Holtzman. The prosecutor said she expects the state's newly amended law will have "a substantial impact on our ability to prosecute child-molestation cases."

That seems to be proven in those states that no longer require more than a child's word to convict sexual offenders. The Sacramento, Calif., district attorney's office, for example, won a conviction in a case within the past year using the uncorroborated testimony of a 4-year-old. The tiny victim, notes Deputy DA Robin Shakely, "testified beautifully . . . She was a really sharp little girl."

But defense lawyers are concerned that removing corroboration requirements will wipe out needed constitutional safeguards. "Juries tend to believe victims," notes Linda Jacobson, an attorney with Washington, D.C.'s Public Defender Service, which opposes changing the district's rule. "A lot of times there are unsubstantiated allegations, and not a tremendous amount of proof."

Even more controversial are those reforms that create exceptions to the hearsay rule. Throughout the country, these have taken two forms: exceptions that allow admission of youngsters' out-of-court statements, and those that involve videotaped interviews with child victims.

Washington state took the lead by adopting a hearsay exception in 1982 to admit children's statements when the victims are under 10 and allege sexual abuse. To be admissible, the court must find the time, content and circumstances of the child's statement provide enough "indicia of reliability." Corroboration is needed if the ch[illegible] is unavailable. Wash. Rev. Cod[illegible] 9A.44.120.

Similar exceptions have since be[illegible] adopted in Colorado, Kansas, Minn[illegible]ta and Utah. Legislators in four o[illegible] states — California, Ohio, Virginia and Wisconsin — are looking at adopting hearsay bills.

Hearsay exceptions allow mothers, teachers, counselors and others having the child's trust to tell a court what a child too young to testify for himself privately confides about sexual abuse. A vivid example occurred recently in Colorado, when prosecutor Yvette Kane used hearsay testimony against a man who eventually admitted fondling his 2½-year-old grandchild.

Such cases show that the exceptions clearly are a prosecutor's tool. But

*Continued on page 28*

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# Reforms Aim to Minimize Child's Trauma

# Reforms Aim to Minimize Child's Trauma

*Continued from page 27*

there are pragmatic limits. Because live testimony of child victims has a far greater impact on juries, prosecutors say they only resort to hearsay evidence when cases can be prosecuted no other way.

In the two years since the Washington law was enacted, for instance, prosecutors in King County have used it in only 15 cases. "Frankly, if a victim *can* testify and is competent, I want the jury to see and hear the child," says Rebecca Roe, supervising attorney of the Special Assault Unit in Seattle. "It's usually much more convincing."

Washington's law already has been appealed to the state Supreme Court in a case from Okanogan County. *State v. Ryan*, 50216-1. And legal experts predict that more appeals on laws that create new hearsay exceptions are certain. Colorado lawyers, for instance, point to the fact that that state's law has no definition for what constitutes witness "unavailability," or what kind of corrobation is needed if a witness does not testify.

### Controversy Over Tapes

Defense lawyers have raised equally strong arguments about videotaping of victims' interviews and depositions, the second method of admitting abused children's out-of-court statements.

In the past several years, a number of states have enacted provisions allowing videotaping in child sex abuse cases. The list includes Arizona, Colorado, Florida, Minnesota, Montana, New Mexico and Texas.

Depending on the jurisdiction, the videotaping can be of a formal deposition with full cross-examination and a judge in attendance, as in New Mexico. Or it can be as informal as a playroom interview between the child and a social worker, videotaped only to preserve testimony.

Either way, videotaping is intended to prevent trauma to a child who is spared having to retell his or her ordeal before a grand jury or, in some states, at trial. New Mexico's law, for instance, has allowed prosecutors for the past several years to record depositions of witnesses under 13 who have been proven unable to testify in court without physical or mental harm.

Some experts — including prosecutors — dispute the value of videotaping children's testimony in sexual-abuse cases at all. Instead, they argue, young victims benefit from being able to tell their stories.

"It's important for kids to realize they're going to be listened to and believed," insists Ms. Shakely. She feels the procedure often is suggested by "people who don't know what they're doing. Having the power back and the ability to control their own lives makes kids feel good."

### Two-Way Solution?

Some of the objections to videotape — constitutional as well as practical — may be resolved by allowing children to testify via closed-circuit television. When the transmission is two-way, as in the Greenup preliminary hearing in Los Angeles last month, constitutional problems are avoided, advocates suggest. Meanwhile, child victims can testify in person, while still being insulated from the courtroom, spectators and the alleged attacker.

Because closed-circuit testimony is live and allows witnesses to respond to questions from both the prosecution and defense, the issue becomes whether the accused has the right to "eyeball-to-eyeball" confrontation.

In a leading related case, *U.S. v. Benfield*, 593 F.2d 815, the 8th U.S. Circuit Court of Appeals in 1979 found videotaping was unconstitutional when a woman with a "psychiatric infirmity" was deposed while her alleged kidnapper sat in another room and viewed her testimony. But because the victim was unaware of the defendant's presence, the court found the right to face-to-face confrontation was not met.

A California appellate court used a similar rationale in a 1981 ruling, *Herbert v. Superior Court*, 117 Cal.App.3d 661. Confrontation rights were denied in that child sex-abuse case, the court said, when the victim was allowed to testify with her back to the defendant.

But attorneys in *Greenup* believe the confrontation issue is resolved because the video monitors are two-way. The seven alleged victims viewed the accused molester, as well as the questioning attorney at the same time those in the courtroom watch the children testify.

### A 'Real' Confrontation?

Los Angeles Municipal Court Judge Candace Cooper, who presided over the preliminary hearing of the case, believes the simultaneous nature of the two-way closed-circuit transmission meets constitutional muster. "The issue is: Is this 'real' confrontation or not? I believe there's no constitutional problem because all parties are aware and viewing everyone at the same time," the judge said.

Potential challenges aside, both lawyers and the judge found the closed-circuit technique seemed to result in the child-witnesses being more relaxed in a comparatively isolated setting.

Part of that ease may be due to the pains taken by prosecutors beforehand. Los Angeles Deputy District Attorney Kenneth R. Freeman walked each of the children through in the courtroom in dry runs before they actually testified, showing them monitors and explaining procedures.

He said the 5-year-old who broke down did so because a bright light was shining in her eyes. "Once we found out what was bothering her and removed the light, she did fine," Mr. Freeman noted. In fact, he continued, for that terrified youngster, the closed-circuit cameras "made the difference in getting and not getting testimony."

Despite initial reservations, defense lawyer Edward Masry of Los Angeles says he, too, is pleased with the results of the two-way video-camera experiment. He agreed to the experiment, he says, because *Greenup* "involves an innocent man in a high-profile case." The closed-circuit testimony, he explains, eliminated the highly charged emotional state that a small child will display to a jury.

So Mr. Greenup, the defendant, agreed to the procedure at the preliminary hearing with the understanding it will be used again at trial, his lawyer claims. The ultimate decision will be left with the superior court judge who hears the case, based upon a showing that further testimony will cause emotional trauma to the victims.

Even if the judge agrees, there may be other hurdles to the procedure in Los Angeles, as well as elsewhere. The closed-circuit camera in *Greenup* cost roughly $1,000 per day — a figure that could place the technique well out of smaller counties' economic range.

Financial considerations aside, the closed-circuit procedure — as well as other innovations — are not likely to be readily embraced, at least by the defense bar. The current public outcry is seen by many as bordering on hysteria. "It's gotten so that I'm afraid to get into an elevator with a little girl," observes defense lawyer Masry wryly.

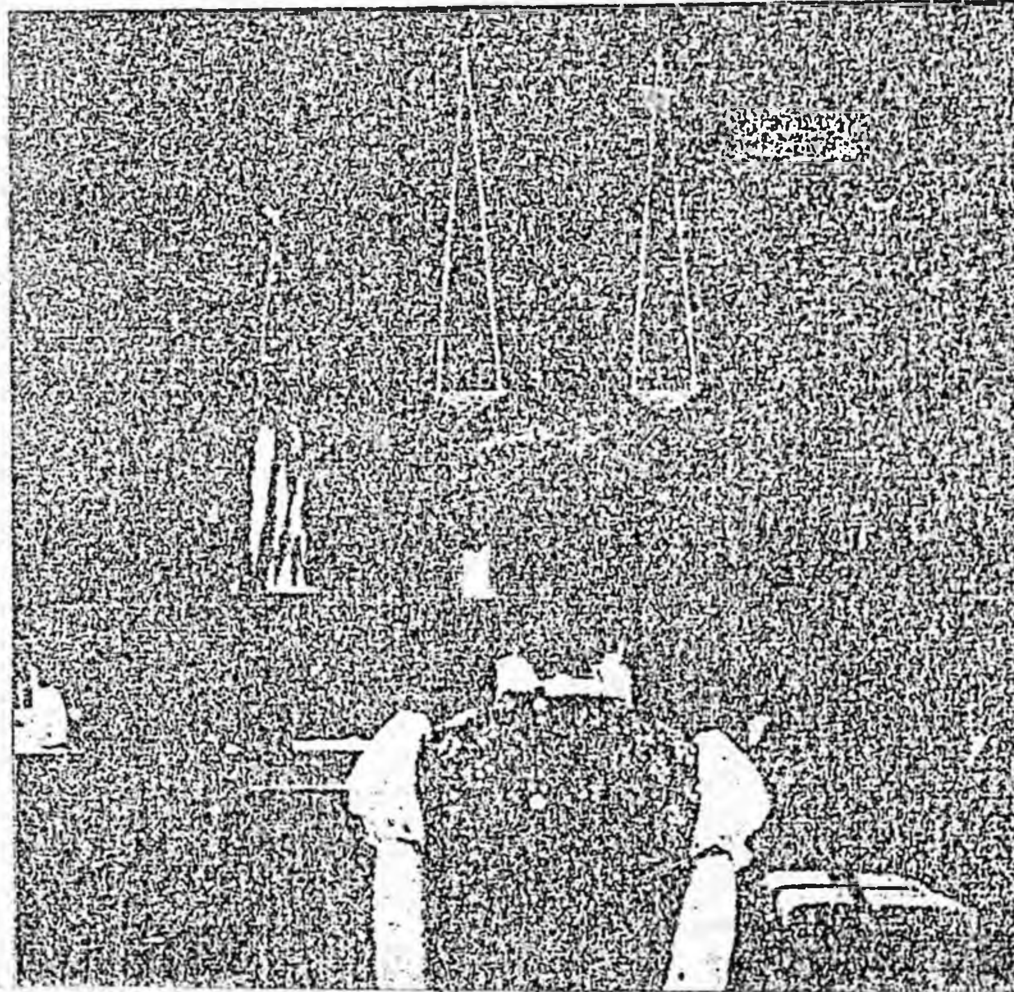
While readily acknowledging a sexual abuse epidemic, some see the potential for reforms going too far.

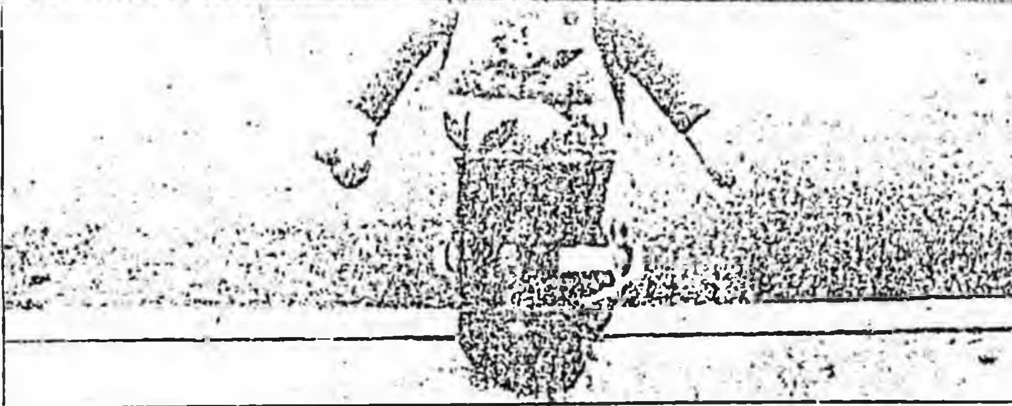
In Los Angeles, where the McMartin Pre-School case, *People v. Buckey*, A 750900, has public sentiment at a fever-pitch, the ACLU already has come down against such suggested reforms as allowing hearsay exceptions in child sexual-abuse cases. "*Any* court proceeding is traumatic" for every victim, notes Marjorie Swartz, an ACLU legislative advocate. "We're going to be convicting innocent people if we don't preserve cross-examination and confrontation to the greatest degree."

A similar view was echoed by Mr. Lynn in Minneapolis, who is prosecuting a sexual-abuse case against the artistic director of the famed Children's Theatre Co. and School in Minneapolis.

Reflecting on recent changes in Minnesota — notably to that state's hearsay rules — Mr. Lynn talked about his "gut reaction, even as a prosecutor. . . The more afield we get, the more nervous I am that some poor innocent guy will go down the tubes" he notes.

"I've got to sleep at night and look at myself as I shave in the morning," he adds. "Constitutional rules serve a purpose — making sure that we convict only the guilty. Schmaltzy as it sounds, it's true."





AP/Wide World Photos

# Molestation Cases Spur Suits, Novel Theories

AS THE STIGMA once connected with molestation has eased, more children and their parents are using civil lawsuits to strike back.

Angry plaintiffs across the nation are testing out novel legal theories in sex-abuse cases that range from failure to protect and warn to asking courts to recognize a new tort of incest.

At the same time, the list of potential defendants has swelled, as plaintiffs look for new sources of funds. The result has been more third parties being hauled into court in sex-abuse cases — including doctors, lawyers, police officers and insurers.

There's little doubt that civil suits over child abuse — all but unheard of five years ago — "have just taken off like crazy," says Judith Musick, a psychologist with San Francisco's Institute for the Study of Sexual Assault.

One new source of some of the suits are the criminal reporting laws in most states that require public officials and health professionals to report suspected child abuse. The theory is that doctors, hospitals and police should be held accountable civilly if they are called in to help molested children but don't inform authorities.

## Lawyer Named In Suit

A Los Angeles Superior Court case now in litigation goes one step further by naming a mother's former divorce lawyer as a defendant, in addition to physicians, a detective and the city of Inglewood, Calif., which employs the officer. *Henderson v. City of Inglewood*, C 468673.

The $20 million negligence suit was brought after a 3-year-old girl twice was found to have serious vaginal injuries after weekend visits with her father. Faye Henderson, the child's mother, claims she repeatedly warned the defendants that her ex-husband was raping the toddler.

Detectives allegedly did not pursue the matter, and her lawyer allegedly did not tell the mother she would have to share custody with her ex-husband, according to filings in the case. Los Angeles lawyer Linda Pate, who now represents the plaintiff, claims the mother's divorce attorney breached a duty to the child by agreeing to the father's joint custody.

The cases also have not been limited to the alleged victim. In Los Angeles, for example, at least 20 cases stemming from the McMartin Pre-School prosecution — a widely publicized case in which seven former teachers in a Manhattan Beach, Calif., preschool have been charged with 207 child-molestation counts — have alleged injury to the children's parents. *People v. Buckey*, A 750900.

According to the complaints, the parents' emotional distress was a foreseeable result of their children's alleged sexual abuse. So far, trial courts

> One new source of suits are the criminal reporting laws requiring officials and health professionals to report suspected child abuse.

have not been receptive to the parents' emotional-distress claims. They have had more success in alleging the nursery school's breach of contract and fraud.

## 'Adult Survivor' Suits

In addition to cases brought on behalf of minors, a flurry of so-called "adult survivor" suits are being filed.

The adult actions typically are by women who allege they did not realize they were traumatized by childhood sexual abuse until years later. As a result, the suits can have a major hurdle: often the statute of limitations has lapsed by the time the plaintiff discovers she wants to sue.

In a case now before the Third Appellate District of the California Court of Appeal, American Civil Liberties Union attorney Susan McGrelvy is urging the creation of a new tort of incest. *Newlander v. Newlander*, C-319815. Plaintiffs' lawyers believe a special tort is needed to sidestep barriers that could crop up in battery suits — such as statutes of limitations and intrafamilial immunity.

## 'Manifestation-of-Injury Theory'

The argument could be a strong one. Robert L. Rabin, a Stanford law professor, believes courts might eliminate statute-of-limitations problems by "a manifestation-of-injury theory . . . that an injury occurs when the plaintiff becomes conscious of it," comparing the cases with toxic torts suits. He cautions, however, that while it is "possible to draw an administratively feasible line," such a policy also could allow plaintiffs to delay filing a suit, perhaps, until a defendant dies.

Once civil molestation cases resist attacks on the pleadings, many apparently have a good chance of success. The Institute for the Study of Sexual Assault — which tries to keep score of the filings — has tallied at least four cases that ended in judgments or settlements ranging from $30,00[illegible] to $908,000 within the past few years.

That arguably is so because, from a defens[illegible] standpoint, the cases are far from child's play. Most involve a sympathetic plaintiff — typically a young, blameless child. Along the way, plaintiff can get what amounts to a legal free ride if th[illegible] defendant is found guilty in a related crimin[illegible] case.

And if the alleged sexual abuse occurred in th[illegible] defendant's home, plaintiffs' lawyers say, there's good chance that insurance companies will offe[illegible] settlements under homeowner policies.

"They're potentially dangerous cases becaus[illegible] juries get angry, which might lead to runawa[illegible] verdicts," says one Los Angeles insurance defens[illegible] lawyer who asked not to be named.

— *Mary Ann Galan[illegible]*

# Anchorage Chamber of Commerce
# Crime Commission

## CRIME COMMISSION SURVEY

## 100 SURVEYS

WE NEED YOUR INPUT AS TO THE SUBJECTS WE ARE INVESTIGATING/ STUDYING. PLEASE MARK THE ITEMS THAT YOU ARE CONCERNED ABOUT AND RETURN TO US AT THE ADDRESS LISTED. THE FOLLOWING ITEMS ARE FINDINGS OF THE 1984 CRIME COMMISSION.

1. STATE NEEDS A CONSPIRACY LAW AGREE 83 DISAGREE 8
   AT PRESENT, FEDERAL LAW HAS TO BE USED TO CHARGE MANY PERSONS INVOLVED WITH SOPHISTICATED CRIMES INVOLVING DRUGS, ETC. NO OPINION - 9

2. HEARSAY EVIDENCE RULE NEEDED. AGREE 86 DISAGREE 11
   GRAND JURIES WOULD BE ALLOWED TO HEAR EVIDENCE FROM EXPERT WITNESSES AND WOULD REDUCE THE PUBLIC COST WITHOUT ADVERSELY AFFECTING AN ACCUSED'S RIGHTS.
   NO OPINION - 3

3. JUVENILE WAIVER AGREE 97 DISAGREE 2
   16 AND 17 YEAR OLDS CHARGED WITH SERIOUS CRIMES; I.E., MURDER, SHOULD BE TRIED AS ADULTS.
   NO OPINION - 1

4. RECRIMINALIZATION OF MARIJUANA AGREE 70 DISAGREE 26
   POSSESSION IS ILLEGAL ACCORDING TO U.S. LAW BUT ALLOWED IN ALASKA EVEN THOUGH ALASKA LAW STATES YOU CANNOT PURCHASE NOR SELL MARIJUANA.
   NO OPINION - 4

* OVER *

A Committee of the Anchorage Chamber of Commerce

George N. Nelson Chairman

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Wash State upheld hearsay



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

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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.

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[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

> basic elements which distinguish excited utterances from other hearsay statements. This is necessary in order to preserve the real purpose of the exception and prevent its application where the factors guaranteeing trustworthiness are not present.

*Dixon*, at 873.

The principal elements of the excited utterance exception are a startling event and a spontaneous declaration caused by that event.[1] In other words, the event must speak through the declarant.

> The crucial question in all cases is whether the statement was made while the declarant was still under the influence of the event to the extent that his statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.

*Johnston*, at 406.

Statements are not inadmissible solely due to the passage of time between the event and the declaration, *State v. Fleming*, 27 Wn. App. 952, 956, 621 P.2d 779 (1980); *State v. Downey*, 27 Wn. App. 857, 861, 620 P.2d 539 (1980), nor solely due to the fact that the declaration was made in response to a parent's questions. *Robbins v. Greene*, 43 Wn.2d 315, 321, 261 P.2d 83 (1953); *State v. Bouchard*, 31 Wn. App. 381, 384, 639 P.2d 761 (1982). Here, however, the aggregate effect of the passage of time and the leading nature of the mother's questions attenuated the degree of

[1] *Beck v. Dye*, 200 Wash. 1, 9-10, 92 P.2d 1113, 127 A.L.R. 1022 (1939) set forth the oft-quoted elements of the common law res gestae hearsay exception:

> (1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact, and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation, and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.



reliability of Trina's statements beyond that countenanced under the strict limits of the excited utterance exception. Hence, the trial court improperly admitted the hearsay declaration under ER 803(a)(2).

Such a conclusion, however, does not preclude the admission of the evidence under the broader statutory child sexual abuse exception. RCW 9A.44.120 provides:

> Admissibility of child's statement—Conditions. 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.
>
> A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

Slider contends that admitting the hearsay under this statute was improper because (1) Trina was not "unavailable" as a witness; (2) it amounted to an ex post facto application of the law; (3) the enactment of the statutory exception amounted to an unconstitutional usurpation of a judicial function; and (4) it denied him an opportunity to confront the witness in contravention of the state and federal constitutions.

### A. Unavailability

[2] ER 804(a) defines "Unavailability as a witness" to include situations where the declarant "(3) Testifies to a

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

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[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.

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[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.

*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 unconstitutiona.. 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.

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[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. 33[illegible], 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. & Washing-



ton 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

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



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.

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[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.

(a) Where the victim did not consent as defined in RCW 9A.44.010(6), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or

(b) Where there is threat of substantial unlawful harm to property rights of the victim.

(2) Rape in the third degree is a class C felony. [1979 ex.s. c 244 § 3; 1975 1st ex.s. c 14 § 6. Formerly RCW 9.79.190.]

9A.44.070 Statutory rape in the first degree. (1) A person over thirteen years of age is guilty of statutory rape in the first degree when the person engages in sexual intercourse with another person who is less than eleven years old.

(2) Statutory rape in the first degree is a class A felony. No person convicted of statutory rape in the first degree shall be granted a deferred or suspended sentence except for the purpose of commitment to an inpatient treatment facility. [1979 ex.s. c 244 § 4; 1975 1st ex.s. c 14 § 7. Formerly RCW 9.79.200.]

9A.44.080 Statutory rape in the second degree. (1) A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old.

(2) Statutory rape in the second degree is a class B felony. [1979 ex.s. c 244 § 5; 1975 1st ex.s. c 14 § 8. Formerly RCW 9.79.210.]

9A.44.090 Statutory rape in the third degree. (1) A person over eighteen years of age is guilty of statutory rape in the third degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is fourteen years of age or older but less than sixteen years old.

(2) Statutory rape in the third degree is a class C felony. [1979 ex.s. c 244 § 6; 1975 1st ex.s. c 14 § 9. Formerly RCW 9.79.220.]

9A.44.100 Indecent liberties. (1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:

(a) By forcible compulsion; or

(b) When the other person is less than fourteen years of age; or

(c) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.

(2) For purposes of this section, "sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.

(3) Indecent liberties is a class B felony. [1975 1st ex.s. c 260 § 9A.88.100. Formerly RCW 9A.88.100.]

9A.44.110 Communication with a minor for immoral purposes. Any person who communicates with a child under the age of seventeen years of age for immoral purposes shall be guilty of a gross misdemeanor, unless such person has previously been convicted of a felony sexual offense or has previously been convicted under this section or *RCW 9.79.130, in which case such person shall be guilty of a class C felony. [1975 1st ex.s. c 260 § 9A.88.020. Formerly RCW 9A.88.020.]

*Reviser's note: "RCW 9.79.130" was repealed by 1975 1st ex.s. c 260 § 9A.92.010, effective July 1, 1976; see RCW 9A.92.010(212).

9A.44.120 Admissibility of child's statement——Conditions. 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.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement. [1982 c 129 § 2.]

Severability——1982 c 129: See note following RCW 9A.04.080.

9A.44.900 Decodification and addition of RCW 9.79.140 through 9.79.220, 9A.88.020, and 9A.88.100 to this chapter. RCW 9.79.140, 9.79.150, 9.79.160, 9.79-.170 as now or hereafter amended, 9.79.180 as now or hereafter amended, 9.79.190 as now or hereafter amended, 9.79.200 as now or hereafter amended, 9.79-.210 as now or hereafter amended, 9.79.220 as now or hereafter amended, 9A.88.020, and 9A.88.100 are each decodified and are each added to Title 9A RCW as a new chapter with the designation chapter 9A.44 RCW. [1979 ex.s. c 244 § 17.]

9A.44.901 Construction——Sections decodified and added to this chapter. The sections decodified by RCW 9A.44.900 and added to Title 9A RCW as a new chapter with the designation chapter 9A.44 RCW shall be construed as part of Title 9A RCW. [1979 ex.s. c 244 § 18.]

9A.44.902 Effective date——1979 ex.s. c 244. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect on July 1, 1979. [1979 ex.s. c 244 § 19.]

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# ARTICLES

# NEW HEARSAY EXCEPTIONS FOR A CHILD'S STATEMENT OF SEXUAL ABUSE

GLEN SKOLER*

## INTRODUCTION

Within the last two decades the American consciousness has gradually faced the grim reality that each year approximately 400,000 children are sexually abused.[1] This realization has led to increasing criticism of the legal profession for its failure to effectively respond to this pervasive social problem.[2] Some commentators have even suggested that legal intervention in response to child sexual abuse often constitutes a second

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1. CHILD SEXUAL ABUSE: INCEST ASSAULT AND SEXUAL EXPLOITATION, NAT'L CENTER ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVICES (1981) (reporting authorities offering a range of possible incidence figures). Most studies, based on statistical projections estimate between 200,000-500,000 cases a year. Estimates vary due to such factors as the age range covered, the definition of sexual abuse utilized, whether or not boys were included in the estimate and whether statistical projections were generated from reported incidents or retrospective interviews. The U.S. Government's National Center on Child Abuse and Neglect describes its own estimate of over 100,000 cases per year as conservative. *See generally Id.* at 1-3. Reported cases probably represent only the "tip of the iceberg." In studies of college students, over 25% of respondents of both sexes reported that they had been subjected to some form of sexual abuse as children. *Id.* at 2-3.

2. CHILD SEXUAL ABUSE AND THE LAW, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, AMERICAN BAR ASSOCIATION (J. Bulkley 4th ed. 1983) [hereinafter cited as CHILD SEXUAL ABUSE AND THE LAW]; RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, AMERICAN BAR ASSOCIATION (J. Bulkley 1982) [hereinafter cited as ABA RECOMMENDATIONS]; Parker, *The Rights of Child Witnesses: Is The Court A Protector or Perpetrator?*, 17 NEW ENGL. L. REV. 643 (1982) [hereinafter cited as Parker, *Child Witnesses*].

victimization of the child.[3] Such critical commentary has inspired several reform proposals designed to mitigate both the incidence and consequence of child sexual abuse.[4] This article will assess one of these reform proposals: a new hearsay exception for a child's out-of-court statements of sexual abuse.

To this point, this new hearsay proposal has taken two quite different forms. The first variant would simply create a new hearsay exception for a child's statements of sexual abuse.[5] Washington[6] and Kansas[7] have adopted this alternative and their inspiration has stimulated interest and advocacy in other jurisdictions. The second variant involves the use of videotaped interviews and depositions which insulate the child victim from the trauma of open courtroom testimony. The taped proceedings allow for substantial cross-examination but not direct confrontation.[8] This approach, to a varying degree, has been adopted in a few states.[9]

The proposed hearsay reform will be analyzed from a psycho-legal perspective. The issue will be critically evaluated both on the basis of current legal theory and case law, and on the basis of our current understanding of child psychology and the complex dynamics of sexual abuse. Part I briefly outlines

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3. SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS (A. Burgess, A. Groth, L. Holmstrom, & S. Sgroi eds. 1978); Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391, 398-99 (1975); Melton, *Child Witnesses and the First Amendment: A Psycholegal Dilemma*, —— J. SOC. ISSUES —— (1984) [hereinafter cited as Melton, *A Psycholegal Dilemma*]; Melton, *Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings*, in CHILD SEXUAL ABUSE AND THE LAW, *supra* note 2, at 184; Parker, *Child Witnesses*, *supra* note 2 at 643. *See also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608 (1982) (Burger, J., dissenting) (exclusion order in trial of defendant charged with rape of three minor girls upheld).

4. ABA RECOMMENDATIONS, *supra* note 2.

5. Some commentators advocate a new additional exception to the hearsay rule. Others suggest expansion of the *res gestae* category to include the dynamics of child sexual abuse. *See, e.g.*, Parker, *Child Witnesses*, *supra* note 2, at 674. Still others recommend increased reliance on modern residual exceptions. *See, e.g.*, Bulkley, *Evidentiary Theories for Admitting a Child's Out-of Court Statement of Sexual Abuse at Trials*, in CHILD SEXUAL ABUSES AND THE LAW, *supra* note 2, at 153.

6. WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1982).

7. KAN. STAT. ANN. § 60-460(dd) (Supp. 1982).

8. Libai, *The Protection of a Child Victim of a Sexual Offense in The Criminal Justice System*, 15 WAYNE L. REV. 977 (1969); *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 J. L. REFORM 131 (1981) [hereinafter cited as *Proving Parent-Child Incest*]; Parker, *Child Witnesses*, *supra* note 2.

9. Generally, however, state deposition procedures preserve the defendant's full rights to confrontation and cross-examination. *See, e.g.*, FLA. STAT. ANN. § 918.17 (West Supp. 1981); MONT. CODE ANN. § 46-15-401 (1981); N.M.R. CRIM. P. (Dist. Ct.) rule 29.1 (1980) *implementing* N.M. STAT. ANN. § 12-2312 (1982).

the modern approach to dealing with the problem of child sexual abuse, emphasizing developments and rationales which have led to the proposed hearsay reform. Part II details the two variants of the proposed hearsay reform. Part III explores the constitutionality of the new proposals, primarily by considering the relationship between the Confrontation Clause and the hearsay doctrine. Part IV suggests two important theoretical issues raised by the new hearsay exceptions: 1) whether the traditional rationales which underlie the hearsay rule and the Confrontation Clause retain their validity when the out-of-court declarant is a child victim of sexual abuse; and 2) whether the balancing of competing individual rights and societal interests is adequately resolved by the essentially evidentiary approach which the Supreme Court has used to reconcile the hearsay rule with the Confrontation Clause. Part V uses the legal criteria of the hearsay rule-Confrontation Clause aggregate, necessity and indicia of reliability, to organize a brief review of the psychological evidence which may speak to the merits of the hearsay proposals. Part VI summarizes the results of this psycho-legal analysis and favors further implementation of the proposed hearsay reform.

## I. THE NEED FOR REFORM

In recent years members of both the legal and mental health professions have carefully documented the general problem of child sexual abuse which includes society's long refusal to reconginze this problem, the power of the incest taboo, and the dynamics which typify sexual abuse and incestuous families.[10] The initial efforts to confront the public with the issue were well justified in a society which denied the reality of widespread sexual abuse. Historically, Wigmore appears to have been the most influential legal authority to formally discount such reports. In his treatise on evidence he supported his highly personal and prejudiced beliefs with questionable, inaccurate and sometimes purposely distorted "scientific evidence."[11] Due, partly, to Wigmore's influence, some states still require that a child's report of

10. S. BUTLER, CONSPIRACY OF SILENCE (1978); DeFrancis, *Protecting Child Victims of Sex Crimes Committed by Adults*, American Humane Association (1969); J. HERMAN, FATHER-DAUGHTER INCEST (1981); SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS, *supra* note 3; *The Sexual Victimology of Youth* (Shultz ed. 1980); Katz, *Incestuous Families*, 1 DET. C. L. REV. 79 (1983).

11. *See* Beinen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence*, 19 CAL. W.L. REV. 235 (1983).

sexual abuse be independently corroborated.[12] From the psychology perspective, Freud was the most influential figure to deny patient reports of child sexual abuse.[13] He initially believed the reports, but then attributed them to universal incestuous fantasy.[14] Freud's theory of the Oedipal complex would become one of the central tenets of psychoanalytic theory.

Our society unquestionably lives under the authority of the incest taboo and has developed strictures to proscribe and punish child sexual abuse.[15] The power of the taboo, however, accounts for the paradox that society not only outlaws child sexual abuse, but also denies its threatening reality. In prior years, the issue of child sexual abuse was brought before the public only by professional commentators. Recently, however, the mass media has recognized the enormous societal interest in the ancient taboo. Today, it is cultural commonplace to see both the victims and perpetrators of incest, along with their therapists, appearing on national talk shows.[16] In many American cities, school children are informed of the dangers of sexual abuse and are urged to report such incidents.[17] While these progressive changes do not typify the general societal response to child sexual abuse, they do represent a marked reversal of the long process of societal denial.

One of the major consequences of our changing attitudes is that the problem is slowly being shifted from the legal profession to the mental health and social welfare systems. Traditional legal intervention, emphasizes punishment of the offender over protection of the child.[18] Several experts believe that this type of intervention constitutes a second or double victimization of the child.[19] The victim may feel punished when removed from the home, guilty for reporting the offender, and

12. Lloyd, *The Corroboration of Sexual Victimization of Children*, CHILD SEXUAL ABUSE AND THE LAW, *supra* note 2, at 103.

13. *See infra* notes 168 to 202 and accompanying text.

14. S. FREUD, AN AUTOBIOGRAPHY STUDY (1925); S. FREUD, THE HISTORY OF THE PSYCHOANALYTIC MOVEMENT (1914).

15. S. FREUD, TOTEM AND TABOO (1913).

16. Within the last year child sexual abuse has also been the subject of special news features, a T.V. movie and even a popular situation comedy featuring a child star.

17. For young children, sexual abuse is phrased in terms of "touching that feels uncomfortable" or "good touching" and "bad touching." Private parts of the body are sometimes called "red light" areas where the touching should stop.

18. Katz, *supra* note 10, at 94; INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, AMERICAN BAR ASSOCIATION (J. Bulkley 3d ed. 1983).

19. *See, e.g.*, J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 64 (1979); Melton, *A Psycholegal Dilemma*, *supra* note 3; Parker, *Child Witnesses*, *supra* note 2.

responsible for destroying the family.[20] Progressive programs now try to remove the offender from the home rather than the victim.[21] Subsequent intervention often involves family and individual therapy, with the objectives of returning the offender to the home, improving the spousal relationship, and reversing the "incest dynamics" within the family.[22]

The foregoing is offered as a preface to emphasize that any need for hearsay reform to facilitate the prosecution of child sexual abuse does not imply that prosecution is always recommended. Usually individual and family treatment will be the preferred intervention depending on the particular strengths of the offender and the family for positive change. Legal coercion, however, such as the threat of prosecution or imprisonment, often serves as an effective catalyst to initiate treatment. Therefore, the ability and willingness of the state to move forward with an effective prosecution has suddenly become a shared concern of both the legal and mental health professions.

### *Rationales for a New Hearsay Exception*

Child sexual abuse cases are generally considered difficult to prosecute.[23] Often the only witnesses to the incident are the adult perpetrator and the child victim. Depending on the type of

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20. GOLDSTEIN, FREUD & SOLNIT, *supra* note 19, at 64; SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS, *supra* note 3; THE SEXUAL VICTIMOLOGY OF YOUTH, *supra* note 10; Katz, *supra* note 10. These reactions are in part related to certain incest dynamics which inappropriately place a great deal of responsibility and blame on the incest victim.

21. INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES, *supra* note 18; Katz, *supra* note 10; MacFarlane & Bulkley, *Treating Child Abuse: An Overview of Current Program Models*, in *Social Work and Child Sexual Abuse*, I, J. HUM. SEXUALITY & SOC. WORK (1982).

22. Giaretto, *Humanistic Treatment of Father-Daughter Incest*, 1 CHILD ABUSE & NEGLECT 411 (1977); Giaretto and Sgroi, *Coordinated Community Treatment of Incest*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 231 (1978); Katz, *supra* note 10; MacFarlane & Bulkley, *supra* note 21. Offenders, however, are not as amenable to treatment as one might expect. They tend to use a strong system of denial and rationalization to account for their inappropriate contacts with children. Denial and rationalization are common defenses. Typical excuses include claims that the perpetrator was performing a medical or hygienic examination, was conducting sex education and checking for signs of sexual activity. It is also common to accuse the victim of lying, being sexually provocative or taking revenge for parental discipline. Although treatment can be effective, some level of coercion is often initially required. A pre-trial diversion program which offers treatment in lieu of prosecution is one alternative which has been successfully used to insure the offenders initial investment in the treatment process. Post conviction alternatives offer other means of requiring treatment for the offender. ABA RECOMMENDATIONS, *supra* note 2, at 24-26. *See also* INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES, *supra* note 18.

23. *See* CHILD SEXUAL ABUSE AND THE LAW, *supra* note 2; ABA RECOMMENDATIONS, *supra* note 2.

sexual contact, corroborating physical evidence may be absent or inconclusive.[24] It is not unusual for a child to retract a true report of sexual abuse due to guilt, fear of reprisal or anxiety that the offender will be sent to prison.[25] When a child retracts his report and refuses to testify, that child becomes unavailable as a witness.[26] The child victim may also be rendered unavailable as a witness due to his "extremely tender years."[27] Under such circumstances, the child's prior out-of-court statements are often the only probative evidence available. These factors make it difficult to prosecute a child sexual abuse case. The use of a child victim's out-of-court statements would enhance the prosecution of an alleged child abuser without violating the defendant's constitutional rights.

Even if the child is legally available to testify as a witness, there are many factors which suggest that the child's out-of-court statements may be inherently reliable. Indeed several commentators question the reliability of the child victim's testimony in an open courtroom.[28] In addition, there are cognitive and developmental limitations which constrain the child's ability to relate events under the pressures of cross-examination.[29] Because of these emotional and cognitive factors, a child's out-of-court statements of sexual abuse may be more reliable than a child's actual in-court testimony, regardless of the child's availability as a witness.[30]

Another rationale for creating a new hearsay exception for child reports of sexual abuse is to avoid the trauma of trial preparation and testimony.[31] Conceivably the trauma could be so severe as to render the child's testimony unreliable or render him unavailable. Many child advocates feel that the victims should be spared the trauma of testifying regardless of the issues of availability or reliability. Chief Justice Burger expressed the common held belief that, the experience of testifying in an open

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24. Lloyd, *supra* note 12.

25. *See infra* notes 67 to 167 and accompanying text.

26. *See*, *e.g.*, FED. R. EVID. 804(a)(2) (witness "unavailable" when he "persists in refusing to testify"). *See also* State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983).

27. United States v. Nick, 604 F.2d 1199, 1202 (9th Cir. 1979).

28. Melton, *Procedural Reforms*, *supra* note 3, at 184.

29. Melton, *Children's Competency to Testify*, 5 L. & HUM. BEHAV. 73 (1981) [hereinafter cited as Melton, *Children's Competency*].

30. Melton, *Procedural Reforms*, *supra* note 3, at 189.

31. Melton, *A Psycholegal Dilemma*, *supra* note 3 (discussing the controversy over the presumed trauma of testimony for child victim/witnesses).

courtroom "can be devastating and leave permanent scars."[32]

There are three rationales which are generally offered in support of a new hearsay exception for child reports of sexual abuse. The first rationale is necessity. The second rationale recognizes the inherent reliability of the child's hearsay testimony. The third rationale acknowledges the need to protect child victims from the trauma of courtroom testimony. These rationales support the argument that a new hearsay exception for child reports of sexual abuse is necessary, inherently reliable and serves a sound societal interest in protecting children from "devastating" and "permanent scars."

### *Is A New Hearsay Exception Really Necessary?*

Even if the reasons for admitting a child's out-of-court statements of sexual abuse into evidence are persuasive, there still remains the question of whether a new exception to the hearsay rule is necessary to accomplish that purpose.[33] In the past, hearsay has been admitted under the traditional exceptions to the hearsay rule and more recently under modern residual or "catch-all" exceptions.[34] Reliance on the traditional hearsay exceptions to admit child statements of abuse often results in "tortured" interpretations of the traditional exceptions.[35] The use of the excited utterance or *res gestae* exception demonstrates the judicial system's frustrated attempts to stretch a traditional hearsay exception to cover the pervasive and unique problem of child sexual abuse. In the course of expanding the allowable time intervals for excited utterances, some courts have demonstrated a good understanding of the dynamics of sexual abuse, noting that children may not immediately complain because of threats, fear, guilt and other pressures to keep the incident "a secret."[36] Other courts have observed that "children of tender years are generally not adept at reasoned reflection and the con-

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32. Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 608 (1982) (Burger, J., dissenting).

33. Bulkley, *supra* note 2, at 153; ABA RECOMMENDATIONS, *supra* note 2, at 34-36.

34. Bulkley, *supra* note 2, at 153. For example, depending on the circumstances of each case, child statements of sexual abuse could be admitted into evidence under the following exceptions of the federal hearsay rule: FED. R. EVID. 803(1) (present sense impression); FED. R. EVID. 803(2) (excited utterances); FED. R. EVID. 803(3) (then existing mental emotional or physical condition); FED. R. EVID. 803(4) (statements for purposes of medical diagnosis or treatment); FED. R. EVID. 803(24) & 804(b)(5) (other exceptions, i.e., the "catch-all"); FED. R. EVID. 801(d)(1) (prior statement by witness as non-hearsay); FED. R. EVID. 804(b)(1) (former testimony).

35. Bulkley, *supra* note 2, at 153.

36. *Id.* at 156, 163 n.29.

coction of false stories under such circumstances."[37] Despite such an enlightened approach to the problem, courts are still placed in a difficult situation when the traditional exception is the only means of admitting a child's statements of sexual abuse. Either the court is bound by the inherent limitations of the excited utterance exception, which does not and cannot fit even the typical report of abuse, or the court is forced to liberalize the exception until it has lost its original meaning. Thus, courts have admitted "excited utterances" which have been the subject of much reflection and which have been uttered days, weeks and even months after the "startling event."[38]

After considering the limitations of the traditional hearsay exceptions some commentators have urged liberal use of the modern residual or catch-all exception to admit child reports of abuse into evidence.[39] Most residual exceptions, however, are still "exceptions in search of a rule."[40] Courts vary in their interpretation. While the interests of justice may be served by admitting reliable hearsay on a case by case basis, there appears to be no clear understanding of how a new hearsay exception could be established under the residual exceptions—if in fact that was ever the drafters' intent. Another drawback to reliance on the residual exceptions is that they are too strict. In certain instances they are stricter than Confrontation Clause requirements. Specifically, it is unreasonable to require that a child's statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts."[41] Moreover, residual exceptions will often face Confrontation Clause challenges, and still courts seem confused about the relationship between the two.[42] There is some language in *Ohio v. Roberts*[43] which suggests that "indicia of reliability" may be established differentially, depending on whether the hearsay falls within a firmly rooted exception.

Given the present confusion, to assume that the residual exceptions are adequate to comprise child reports of sexual abuse,

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37. Soto v. Territory, 12 Ariz. 36, 94 P. 1104 (1908) (utterance of minor child need not be contemporaneous with event in order to be admissible as it is unlikely to be premeditated); Lancaster v. People, 200 Colo. 448, 450, 615 P.2d 720, 723 (1980).

38. Bulkley, *supra* note 2, at 156, 163 n.28.

39. ABA RECOMMENDATIONS, *supra* note 2, at 35; CHILD SEXUAL ABUSE AND THE LAW, *supra* note 2 at 158-61.

40. Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions In Search of a Rule*, 57 N.Y.U. L. REV. 867 (1982).

41. United States v. Perez, 658 F.2d 654, 661 n.6 (9th Cir. 1981) (*citing* the residual exceptions in FED. R. EVID. 803(24)(b)) and 804(b)(5)(B).

42. Sonenshein, *supra* note 40, at 895-98.

43. 448 U.S. 56, 67 (1980).

is merely to say that judges, without guidance and with varying appreciation of the problem of child sexual abuse, will decide these issues on a case by case basis. The theoretical issue of whether the residual exceptions will finally put an end to the common law tradition of individualized exceptions to the hearsay rule is an important issue.[44] The need, however, under the present law, is for a new exception.

## II. The Hearsay Proposals: Two Variants

Washington and Kansas were the first two states to recognize the need for a new hearsay exception.[45] The Washington exception requires that the child victim be under ten years of age and applies only to incidents of sexual contact.[46] The court must find that the time, content and circumstances of the child's statement provide sufficient "indicia of reliability." If the child is unavailable as a witness, then corroborative evidence of the act must be established.[47]

The Kansas statute,[48] on the other hand, is not limited to sexual abuse but includes criminal proceedings, as well as child deprivation and need of care proceedings. The court must find that the child victim is unavailable as a witness, that the statement is "apparently reliable," and that the child was not induced to make the statement.

Both statutes were drafted with the knowledge that this new type of admissible hearsay would be subject to Confrontation Clause challenges. Both statutes adopt the standards set forth in *Ohio v. Roberts* for resolving Confrontation Clause challenges to the hearsay rule.[49] Conceptually, the statutes are quite similar but there are differences. The Kansas law requires a finding of reliability, while the Washington statute requires not only indicia of reliability but corroborative evidence of the act when the witness is unavailable. This additional requirement for corroborative evidence not only acts as an added guarantee of trustworthiness, but also addresses the due process problem of convicting a defendant solely on the basis of hearsay

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44. ABA Recommendations, *supra* note 2, at 35; Child Sexual Abuse and the Law, *supra* note 2, at 158-59.

45. Wash. Rev. Code Ann. § 9A.44.120 (West Supp. 1984). Kan. Stat. Ann. § 60-460(dd) (1983). There is also a notification clause similar to that found in the federal residual exception. Fed. Rule Evid. 803(24) & 804(b)(5).

46. Wash. Rev. Code Ann. § 9A.44.120 (West Supp. 1984).

47. *Id.*

48. Kan. Stat. Ann. § 60-460(dd) (1983).

49. Ohio v. Roberts, 448 U.S. 56, 67-68 (1980).

declarations.[50] Interestingly, the Kansas law requires unavailability, while the Washington law does not. The Supreme Court has held that subsequent cross-examination of the declarant at trial satisfies the Confrontation Clause.[51] Nevertheless, the state or federal jurisdiction must establish some provision for admitting the evidence under the hearsay rule. It is difficult to discern from the Kansas statute whether the drafters of the provision erroneously considered only *Ohio v. Roberts*,[52] an unavailability case, or whether they intended to exclude the hearsay declarations of available child witnesses. The statutes also differ in that the Washington law is limited to only incidents of sexual abuse and establishes an age limit of nine, a time which precedes significant developmental gains in cognitive, social, and sexual maturity.[53]

Aside from these differences, however, the Washington and Kansas laws are basically the same. Both laws recognize the need for and establish a new hearsay exception for a child's out-of-court statements of abuse. Both clearly rely on the necessity and reliability standards of *Ohio v. Roberts* as a means of withstanding Confrontation Clause challenges. Whether these laws will ultimately be upheld as constitutional is still a matter of speculation.

### *Child Courtrooms and Videotaped Depositions*

There is a second type of proposal for admitting a child's statements of sexual abuse into evidence. Although this proposal involves admitting hearsay testimony, it is conceptually different from the approach adopted by Washington and Kansas. This second proposal has many variants, but generally involves the use of closed circuit or videotaped interviews and depositions which are offered into evidence at the criminal trial. Such procedures usually permit cross-examination of the child victim, but prohibit direct confrontation.[54] The child victim is thereby insulated from the trauma of repetititous courtroom testimony.[55]

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50. This "corroboration" requirement should not be confused with the controversial laws requiring additional evidence to "corroborate" the child complainant's account.

51. Nelson v. O'Neill, 402 U.S. 622 (1971); California v. Green, 399 U.S. 149 (1970), *on remand sub. nom.* People v. Green, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971), *cert. granted* Green v. California 404 U.S. 801 (1972).

52. 448 U.S. 56 (1980).

53. *See infra* notes 168 to 202 and accompanying text.

54. Libai, *supra* note 8; Parker, *Child Witnesses*, *supra* note 2; *Proving Parent-Child Incest*, *supra* note 8.

55. *See supra* note 31.

This second proposal takes many different forms, ranging on a continuum from a formal deposition with full cross-examination in the physical presence of the defendant, to a videotaped interview in a playroom between the child victim and a trained social worker.[56] Modern commentators who favor such alternatives often credit David Libai[57] for underscoring the plight of the child victim-witness and initiating legal reforms. After documenting the problem of child sexual abuse and noting the often deleterious effects of classical legal intervention, Libai offered several proposals to protect the child victim in the course of legal proceedings. He urged that the initial interview with the child victim be conducted by a specially trained police officer and that the interview be taped and later admitted into evidence.[58] He also suggested that under certain circumstances the child victim should be declared unavailable to testify. Another Libai proposal involved a special child courtroom which would ensure a less intimidating environment.[59]

Inspired by Libai, Dustin Ordway advocated that the child victim's only contact with the legal system be through a social worker.[60] All intervie[illegible]ould be taped. If legal proceedings progressed, all inquiri[illegible] would be submitted by attorneys to the social worker who would then question the child. After viewing videotaped responses, attorneys could again submit questions through the social worker until the social worker felt that the limit of reasonable inquiry had been reached. Ordway's is one of the most liberal and non-traditional proposals and, according to Ordway, should apply only to incest cases.[61]

One of the most recent, comprehensive and scholarly proposals has come from Jacqueline Parker.[62] Her model act refines and augments several of Libai's proposals. She advocates that the child be protected and interviewed by a child hearing officer (CHO) who is an attorney, specially trained in child psychology, social work, clinical interviewing, and nursing. Parker's is a far ranging proposal which allows the court to make various modifications to standard procedures at which the child would normally be required to testify and submit to cross-examination. One such procedure would be a special deposition taken in a child hearing courtroom (CHC) which would include only the

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56. *Proving Parent-Child Incest*, *supra* note 8.
57. *See* Libai, *supra* note 8, at 1000.
58. *Id.* at 1002.
59. *Id.* at 1014-25. The defendant would be required to be seated outside the physical presence of the child, behind a one way mirror.
60. *Proving Parent-Child Incest*, *supra* note 8.
61. *Id.*
62. Parker, *Child Witnesses*, *supra* note 2.

judge, child victim, CHO, and perhaps a trusted adult.[63] The defendant and members of the public would sit behind a one-way mirror. Actual questioning both on direct and cross-examination would be conducted by the CHO or by the parties' attorneys, with the CHO reserving the right to disallow or rephrase questions which are too harsh or upsetting for the child. This special deposition would be admissible in lieu of live testimony under the rationale that, by participating in the deposition procedure, the defense has waived the right to any furter cross-examination, and that the judge, by granting the request for a deposition, has deemed the child "psychologically unavailable" to testify at a subsequent trial.[64] Under the hearsay doctrine, the deposition would be admitted as prior testimony based on the unavailability of the witness. In addition to this deposition procedure, Parker would also allow for testimony at trial, but only in the special child hearing courtroom. Even during this phase of testimony, Parker suggests that portions of taped interviews between the CHO and the child victim could be introduced in lieu of live testimony when questions during cross-examination have previously been posed by the CHO in other taped proceedings or interviews.[65] Parker also advocates expansion of the spontaneous utterances or *res gestae* exception to the hearsay rule to include child reports of abuse.[66] This additional proposal is similar to the Washington and Kansas state laws; the difference is that Parker would simply expand the *res gestae* exception rather than trying to establish a new hearsay exception.[67]

The public policy interest in protecting child victims of sexual assault is not limited to the United States. In fact the United States would be rather embarrassed to compare its treatment of child victims to that of its European allies.[68] However, foreign

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63. *Id.*

64. *Id.* at 668-69.

65. *Id.* at 670.

66. *Id.* at 674-77.

67. To date, at least 4 states have some type of provision which allows for the videotaped deposition of a child victim of sexual abuse. *See supra* note 9. New Mexico, for example, provides that such a deposition is admissible into evidence as an exception to the hearsay rule if the child is unable to testify without suffering unreasonable and unnecessary mental or emotional harm. N.M.R. CRIM. P. (Dist. Ct.) Rule 29.1(a) (1980). However, unlike Parker's Model Act, the New Mexico statute stipulates that the defendant be present, represented by counsel and given an adequate opportunity to cross-examine at the deposition. Even in the course of drafting this provision, serious questions were raised about the constitutionality of not requiring an available witness to confront the accused at trial. *See infra* text accompanying notes 67 to 167.

68. Scandinavian countries, which have preserved the right to confrontation, use specially trained police women to investigate child reports of

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judicial systems are not constrained by the Confrontation Clause of the sixth amendment of the United States Constitution. To institute similar systems in this country, one must address the complex and confusing relationship between the hearsay doctrine and the Confrontation Clause. Although Libai's original proposals have stimulated much interest in this country, Parker [69] accurately notes that his legal analysis is outdated and weak, particularly in his attempts to analogize between the sixth and first amendments. Subsequent commentators, like Ordway and Parker who admire Libai more as a child advocate than a legal scholar, have adopted Libai's reform proposals while developing more updated and convincing rationales. Their arguments for admitting into evidence taped interviews and special depositions are, on the surface, very seductive, and are as follows:

> In *Ohio v. Roberts* the Supreme Court approached the problem of reconciling the Confrontation Clause with the hearsay rule by establishing the criteria of unavailability and indicia of reliability. Proposals for admitting into evidence taped interviews and special depositions meet both of these tests. The unavailability test is met because the nature of the crime and the trauma of subsequent testimony renders the child victim "psychologically unavailable." Even if the child is literally available to testify at trial, surely the societal costs of traumatizing child victims are just as severe as the undue delay or cost of obtaining out-of-state witnesses. The reliability test is also fulfilled because specially structured taped interviews and depositions which provide for the substantial equivalent of cross-examination, imbue this type of hearsay testimony with a very high degree of reliability. This degree of reliability, provided by substantial cross-examination, even exceeds the reliability of other hearsay exceptions, which have been admitted in the past over Confrontation Clause challenges.[70]

child sexual abuse. In Stockholm these special police officers are actually nurses. The child's statements are tape recorded with the goal of reducing the need for the child to repeat his story. Melton, *Procedural Reforms*, *supra* note 3, at 185, 195 n. 8. England provides that the deposition of a child may be admitted into evidence in lieu of live testimony when the court finds evidence that the process of testifying would endanger the child's life or health. Parker, *Child Witnesses*, *supra* note 2, at 680. The most progressive system for protecting child victims of sexual abuse was instituted by Israel in 1955. Melton, *Procedural Reforms*, *supra* note 3, at 185, 195 nn. 4-7. In any sex offense case involving a child under 14, a specially trained youth examiner interviews the child. No interrogation of the child or testimony by him may occur without the approval of the youth examiner. Children testify in only 14% of the cases. Usually only the youth examiner appears in court. D. Reifen, *Court Procedures in Israel to Protect Child-Victims of Sexual Assault* in 3 VICTIMOLOGY: A NEW FOCUS 106 (I. Drapkin & E. Viano eds. 1975).

69. Parker, *Child Witnesses*, *supra* note 2, at 646-47.

70. This argument is a summary of the reasoning offered in Parker, *Child Witnesses*, *supra* note 2 and *Proving Parent-Child Incest*, *supra* note 8. Oddly, Parker only briefly references *Roberts*. She does cite, however, the line of cases leading to *Roberts*. Relying on earlier commentary, she pri-

There are several problems with this reasoning. These problems will be analyzed in the next part which discusses *Roberts* and the Supreme Court's attempt to reconcile the hearsay rule with the Confrontation Clause. The two hearsay proposals for child victims of sexual abuse, one establishing a new hearsay exception and the other advocating the use of special depositions, rely on *Roberts* for their justification. An understanding of the Court's approach in *Roberts* therefore is essential to assess the constitutionality of these two new hearsay proposals.

## III. Hearsay, the Confrontation Clause and Cross-examination

Reconciling the Confrontation Clause with the hearsay rule is a complex and confusing problem.[71] In fact, there have been only nine major decisions rendered by the Supreme Court on this subject since 1965.[72] The Court itself has acknowledged the slow formulation of a clear policy:

> True to the common-law tradition, the process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions. The Court has not sought to "map out a theory of the Confrontation Clause that would determine the validity of all hearsay 'exceptions.' "[73]

The common-law doctrine against hearsay is riddled with exceptions.[74] The Confrontation Clause of the sixth amendment states: "In all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him."[75] Taken literally, the Clause would render all hearsay exceptions inadmissible. This approach has long been rejected by the Court, which instead interprets the Clause as reflecting a "preference for face-to-face confrontation at trial, and that 'a primary interest secured by (the provision) is the right of cross-examina-

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marily views unavailability as the touchstone of the Confrontation Clause while minimizing the reliability issue.

71. Few tasks in criminal evidence are more perplexing than to describe the effect of the Confrontation Clause of the Sixth Amendment upon the hearsay doctrine. Signals from the Supreme Court point in different directions, the views of commentators differ, and while the subject is as potentially vast as the hearsay doctrine itself, benchmarks in the form of authoritative decisions are few and far between.

4 D. Louisell & C. Mueller, Federal Evidence § 418 at 123 (1980).

72. *Id.* at 133.

73. Ohio v. Roberts, 448 U.S. 56, 64-65 (1980) (quoting California v. Green, 399 U.S. 149, 162 (1970)).

74. Fed. R. Evid. art. VIII, Advisory Committee's Note, Introductory Note, at 89 (West 1975).

75. U.S. Const. amend. VI.

tion.' "[76] The right of confrontation is not absolute and may give way to competing public policy interests.[77] In those nine cases since 1965, the Court has tried to reconcile the Confrontation Clause with the hearsay doctrine and considerations of public policy.[78]

*Ohio v. Roberts*[79] represents the Court's most recent attempt to accomplish this difficult task. *Roberts*, although the leading case, is not original in its analysis or interpretation of the Confrontation Clause. Rather it represents an articulation and clarification of themes developed in prior cases. In *Roberts*, the Court noted the divergence of scholarly commentary and forcefully stated that it does not intend to "start anew" its Confrontation Clause analysis.[80] Therefore, *Roberts* may be considered "highly significant as an expositor of the Confrontation Clause."[81]

The facts in *Roberts* are notable in that they differ markedly from the fact situation which will usually be presented under the two new hearsay proposals for child reports of sexual abuse. *Roberts* involved prior (preliminary hearing) testimony of a witness who was physically unavailable to testify at trial. This form of hearsay is different than the type of "excited utterance" which would be admitted under the Washington and Kansas state laws. It is also different from formalized child depositions intended for use at trial.[82]

The Supreme Court held that the prosecution made a good faith effort to locate the witness and that the preliminary hearing testimony, although not formal cross-examination, bore the substantial equivalence of cross-examination to establish its reliability. The Court used the criteria of unavailability and reliability to set forth a general approach for reconciling the hearsay doctrine with 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

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76. Ohio v. Roberts, 448 U.S. 56, 63 (quoting Douglas v. Alabama, 380 U.S. 415, 418(1965)).
77. *Id.*
78. *See supra* note 71, at 133.
79. 448 U.S. 56 (1980).
80. *Id.* at 67 n.9.
81. LOUISELL & MUELLER, *supra* note 71, § 418 at 150 (1980).
82. Ohio v. Roberts, 448 U.S. 56 (1980).

of trustworthiness.[83]

### *Roberts and the Child Victim Declarant*

How well do the two new hearsay proposals for child reports of sexual abuse conform to the holding in *Ohio v. Roberts*? The first proposal, established by Washington[84] and Kansas,[85] read literally, conforms quite well to the *Roberts* standards. This is not surprising since both statutes were carefully drafted with *Roberts* in mind. The Washington state law, for example, admits sufficiently reliable hearsay whether the declarant is available or not. *Roberts* seems to require unavailability because, under the facts of that case, there were no means to confront the hearsay declarant through the process of cross-examination. However, in the line of cases leading to *Roberts*,[86] the Court had indicated that subsequent cross-examination of the hearsay declarant at trial would satisfy the Confrontation Clause, because, under such circumstances, the defendant does have the opportunity to confront the witness against him. If the witness is unavailable, then both statutes require a finding of particularized reliability while the Washington state law also requires corroborating evidence of the act to protect both confrontation and due processs interests. Thus, in the case of a hearsay declarant who does not testify at the proceeding, both laws appear to meet the necessity and reliability standards of *Roberts*.

The fact that the Washington and Kansas hearsay exceptions adopted the Language of *Roberts*, however, does not guarantee the constitutionality of the new exceptions. *Roberts* left many questions unanswered. For example, what constitutes unavailability? In *Roberts*, that issue was clear. The witness could not be located and the only related question was whether the prosecution made a reasonable and good faith effort to locate her. Nevertheless, there are many different ways to view a child victim as unavailable to testify. The case of a child victim who is too traumatized to testify or who refuses to testify appears to constitute unavailability and is consistent with evidentiary definitions of unavailability.[87] What about the child victim of incest who retracts her or his story prior to trial?[88] This situation is a typical one and raises the odd constitutional possibility of declaring a victim-witness unavailable due to a formal recantation

83. *Id.* at 67.
84. WASH. REV. CODE ANN. § 9A.44.120 (West Supp. 1984).
85. KAN. STAT. ANN. § 60-640(dd) (1983).
86. *See supra* note 58.
87. FED. R. EVID. 804(a)(2); FED. R. EVID. 804(a)(4).
88. *See infra* text accompanying notes 67 to 167.

as a means of admitting the hearsay version of the original charge. One state supreme court has recently allowed expert testimony as to whether a child's recantation of a rape accusation against her father was congruent with a pattern of intrafamilial sexual abuse.[89]

Another question pertains to the good faith effort to make a child witness available to testify. In the case of an out-of-state witness, like *Roberts*, it might involve sending subpoenas and trying to locate the witness. In a case of child abuse, could it involve having to refer the child to a special incest counselor to help the child feel more comfortable about testifying in court? And then there is the concept of "psychological unavailability." Can an available witness be rendered unavailable to testify because there is a probability that he or she will suffer psychological damage during the process of testifying? There is some language in *Roberts* which suggests that unavailability, in the sense of physical absence, is not always required. This dictum referes to *Dutton v. Evans*,[90] one of the major cases prior to *Roberts*, in which "the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness."[91] It would be difficult to apply this dictum to cases of child sexual abuse in which the child victim is usually the key and often the only witness against the defendant. Naturally, many child right's advocates and mental health professionals would like all of these questions regarding unavailability to be resolved in favor of the child victim. *Roberts*, however, left most of these questions unanswered.

There are just as many unanswered questions regarding "indicia of reliability" in cases of child sexual abuse. *Roberts* suggests that reliability can be inferred when the evidence falls within a firmly rooted hearsay exception; otherwise a showing of particularized guarantees of trustworthiness is required.[92] *Roberts*, however, may not really be on point with the Washington and Kansas statutes. How courts will assess the reliability of children too frightened to testify or who retract their stories is unknown. Will expert testimony on typical incest dynamics be admissible to help assess the reliability of both the hearsay declaration and the retraction? Often the same expert who first hears the child's report will later assess its reliability. What role will this expert play in establishing reliability?

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89. State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983).
90. 400 U.S. 74 (1970).
91. *Roberts*, 448 U.S. at 65 n.7.
92. *Id.* at 67.

In summary, although it may be easy to see that the new Washington and Kansas hearsay exceptions conform to the wording of *Roberts*, *Roberts* is not a child abuse case, nor did it struggle with the difficult issues which arise under the Washington and Kansas hearsay exceptions. In fact, *Roberts* establishes phrases which are rather vague and subjective, as are many newly pronounced principles of constitutional interpretation. Unavailability must be established by good faith and reasonable efforts. Reliability must be established by certain "indicia of reliability" and "guarantees of trustworthiness." What *Roberts* really means, and how it will be applied in cases of child sexual abuse, if at all, remains unanswered.

*Videotaped Depositions and* Roberts*: "Is it Hearsay?"*

Proposals for admitting into evidence taped interviews and special depositions in cases of child sexual abuse also rely heavily on *Roberts* for their justification.[93] The basic argument is that a child victim is rendered "psychologically unavailable" to testify, and that taped interviews and deposition procedures, which have a substantial equivalence of cross-examination, guarantee a very high degree of reliability.[94] This reliance on *Roberts* appears straightforward, but there are several problems with this type of reasoning. First, it expands the notion of unavailability far beyond the holding in *Roberts*. Second, to argue that the prior testimony exception is reliable is unconvincing. Depositions have always been acknowledged as highly reliable but are relegated to the judicial preference for live testimony. Third, it confuses and ignores the public policy interests and considerations which distinguish depositions from other forms of hearsay. Finally, it ignores the real issue in advocating the use of taped interviews and depositions which is the balancing of interests between protecting the child victim and the judicial preference of available witnesses. Sole reliance on *Roberts*, in an attempt to conform to *Roberts*, may not be necessary and may confuse the examination of important competing public interests.

The notion of psychological unavailability is radically different from the kind of physical unavailability which the *Roberts* court considered. Many evidence codes, such as the Federal Rules of Evidence, recognize that a witness may be unavailable due to a then existing mental illness or infirmity.[95] But the concept of psychological unavailability is meant to be broader in

93. *Proving Parent-Child Incest*, *supra* note 8.
94. *See supra* note 70 and accompanying text.
95. FED. R. EVID. 804(a)(4).

scope and would be invoked for many children solely because the experience of testifying might produce further psychological harm.[96] At this point, "psychological unavailability" becomes merely a way of using the language in *Roberts* to assert that the unavailability requirement of *Roberts* should be balanced against the competing state interest in protecting child victims of sexual abuse.[97]

The *Roberts* criterion of unavailability is thus supposedly overcome by the notion of "psychological unavailability." Once this hurdle is cleared, the *Roberts* criterion of "indicia of reliability" seems easily satisfied because the proposed taped child interviews and depositions allow for the "substantial equivalence of cross-examination"[98] in the form of questions submitted to the child. The basic problem with hearsay is that it usually lacks the protections of live testimony which require the witness to testify: (1) under oath, (2) in the personal presence of the trier of fact and (3) subject to cross-examination. Today, hearsay analysis tends to center on cross-examination.[99] To absolutely require all three conditions and ban all hearsay would, however, deprive the trier of fact of probative evidence. The common law solution has been to establish a rule against hearsay but to admit several necessary exceptions under circumstances which theoretically guarantee trustworthiness.[100] While the Confrontation Clause is meant to exclude some forms of hearsay, the Supreme Court has repeatedly recognized the "truism that 'hearsay rules and the Confrontation Clause are generally designed to protect similar values. . .and stem from the same roots.' "[101] Actually the necessity and reliability criteria of *Roberts* are not much different than the usual common law rationales for allowing hearsay exceptions.[102] Advocates of taped interviews and depositions argue that they are reliable because they contain the recognized protections of live testimony.[103] Furthermore this type of proposal is said to provide a much

96. Melton, *A Psycholegal Dilemma, supra* note 3; *see infra* text accompanying notes 67 to 167.

97. *See infra* text accompanying notes 67 to 167.

98. *Roberts*, 448 U.S. at 67-73.

99. FED. R. EVID. art. VIII, Advisory Committee's Note, Introductory Note; *see also Roberts*, 448 U.S. at 70.

100. Ohio v. Roberts, 448 U.S. 56, 67 (1980). *See* E. CLEARY, MCCORMICK ON EVIDENCE & 244 (2d ed. 1972) (history of rule).

101. Ohio v. Roberts, 448 U.S. 56, 67 (1980).

102. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 331-55 (1981); *see infra* notes 67 to 167 and accompanying text.

103. *See* Parker, *Child Witnesses, supra* note 2, at 695; *Proving Parent-Child Incest, supra* note 8, at 149-51.

greater degree of reliability than other hearsay exceptions which lack all three conditions of live testimony and which the Supreme Court has repeatedly allowed over Confrontation Clause challenges.[104]

The problem with this type of analysis is that it ignores, for no apparent reason, the important policy issue of regularly using taped depositions of available witnesses as a substitute for the trial process. The fact that deposition testimony is just as good as or better than other forms of hearsay is therefore unconvincing. Deposition testimony has long been acknowledged to be one of the most reliable forms of hearsay, yet it is usually admitted only under strict standards of unavailability.[105] Perhaps the area of confusion here is that a deposition, although technically hearsay under the prior testimony exception, is conceptually different than most forms of hearsay and implicates related, but different policy interests. This difference creates the supposed logical inconsistencies identified by commentators when they assess the constitutionality of new forms of depositions by relying on a case such as *Roberts*.[106]

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104. Such exceptions include dying declarations, *see* Ohio v. Roberts, 448 U.S. 56, 64 (1980) and excited utterances, *see* United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980).

105. *See supra* note 95.

106. McCormick includes depositions (depositions to preserve evidence only) in the definition of former testimony and notes that deposition testimony may be classified, depending upon the precise formulation of the rule against hearsay, as an exception to the hearsay prohibition or as a class of evidence in which the requirements of the hearsay rule are complied with. C. McCormick, Law of Evidence § 254, at 614 (2d ed. 1972). *See, e.g.*, Fed. R. Crim. P. 15. Wigmore favored this latter position, which is interesting, given Wigmore's minimization and misinterpretation of the Confrontation Clause. C. McCormick, Law of Evidence § 254, at 614; 5 Wigmore, Evidence 131 (3d ed. 1940); *see also* Gutman, *supra* note 102. McCormick takes the former position, that deposition testimony is hearsay, for the reason that it is the familiar usuage to the profession and that it facilitates the wider admissions of former testimony under a liberalized exception. C. McCormick, *supra*, § 254, at 614-15. He does however emphasize the need for further reform. Like the modern advocates of taped child depositions, McCormick realizes that, compared to other hearsay exceptions such as excited utterances, the restrictions upon declarations in the form of sworn testimony seem "fantastically strict." C. McCormick, *supra* § 261 at 626. McCormick's solution is to urge liberality under the former testimony. by suggesting that the standard of unavailability of the witness should be no more exacting than that for depositions under the Federal Rules of Civil Procedure, with this caveat: "In criminal cases, the constitutional right of confrontation imposes stricter standards of unavailability." C. McCormick, § 261 at 626.

One commentator who advocates the liberal use of videotape in criminal proceedings, takes a more radical position and argues that Confrontation Clause considerations may not even be pertinent:

> [T]he "trial" includes both the taping session and the presentation of the tape to the jury. The "court" includes both the room in which the jury observes the testimony and the room in which the testimony was

The foregoing analysis is not offered to discourage the use of videotaped depositions in cases of child abuse, but to suggest that reliance on the *Roberts* unavailability and reliability standards is misleading. The concept of psychological unavailability will usually mean little more than that there are important competing public policy interests in protecting child victims of sex-

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taped. For these same reasons, questions of availability to not arise. The witness is available, and he is testifying before the jury.

Barber & Bates, *Videotape in Criminal Proceeding*, 25 HASTINGS L. J. 1017, 1037. This "modern" interpretation sounds more like Wigmore's almost ancient view of both former testimony and the Confrontation Clause, which McCormick and the Supreme Court have soundly rejected. California v. Green, 399 U.S. 149, 155 (1970); C. MCCORMICK, *supra*, § 254 at 614; 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 800[04], at 800-19 (1979). Yet it is argued that the electronic deposition, like the new personal computer, is "a tool for modern times," which allows for accurate preservation of evidence, testimony under oath, cross-examination, and demeanor evidence. Some even speculate whether the right of confrontation was an attempt to secure these guarantees of reliability in a pre-technological society. Parker, *Child Witnesses*, *supra* note 2, at 695. Although the more psychologically minded may still feel that the pre-technological requirement of face-to-face confrontation with the defendant and jury adds an important dimension to the reliability of testimony. *See, e.g.*, United States v. Benfield, 593 F.2d 815 (8th Cir. 1979).

This argument, that videotaped depositions and interviews are just as good as other forms of hearsay or even the trial process itself, confuses important considerations of public and judicial policy. These considerations are clearly expressed in the Advisory Committee's note to the former testimony exception to the federal hearsay rule, which explains why former testimony, although highly reliable, is included under Rule 804 (declarant unavailable) instead of Rule 803 (availability of declarant immaterial):

> Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact. The only missing one of the ideal conditions for the giving of testimony is the presence of the trier and opponent ("demeanor evidence"). This is lacking with all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should be included under Rule 803. . . . However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. . . . In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available. The exception indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

FED. R. EVID. 804, Advisory Committee's Note, at 270 (West 1983).

Assessed against these policy interests, the argument that special child depositions would be just as or reliable than other forms of hearsay seems less cogent. Even the use of videotape, which would in part overcome the absence of demeanor evidence, could probably not satisfy the policy preference for the presence of available witnesses. Any notion of psychological unavailability would have to be carefully defined and limited to preserve this policy. There is adequate precedent for using depositions for highly traumatized and essentially unavailable witnesses such as rape victims. At the other end of the continuum it is difficult to imagine a victim of any sexual or other violent crime who could not make a strong argument for "psychological unavailability.

ual abuse. To assert that videotaped or closed-circuit depositions are just as reliable as other admissible hearsay ignores the policy preference for the presence of available witnesses. The proper justification for admitting into evidence specially taped child depositions and interviews is that the strong public policy interest in protecting child victims of sexual assault should be balanced against the strong public policy interest which favors the presence of available witnesses. Unfortunately, the Supreme Court, in its analysis and interpretation of the Confrontation Clause, has left no possiblity of this kind of "balancing test," except to assert, somewhat unconvincingly, that a strict analysis of unavailability and indicia of reliability will adequately accommodate all competing interests.[107] Moreover, the Court has been emphatic in declaring its intention not to begin its Confrontation Clause analysis anew.[108] Therefore, it is not surprising that advocates of special depositions for child victims of sexual abuse have felt the need to present their views only in terms of the unavailability and reliability language of *Roberts*.

There are several ironies that result from the Court's attempt to reconcile the hearsay doctrine with the Confrontation Clause. One such irony involves the constitutional support that the two hearsay proposals for child victims will probably receive. The Washington and Kansas statutes, which simply create a new hearsay exception, will probably be held constitutional, although they lack all of the protections of live testimony: oath, demeanor evidence and cross-examination. On the other hand, the second proposal, which favors the use of videotaped depositions and preserves all three of these conditions will probably receive less constitutional support.

### *Nick*, *Iron Shell* AND *Benfield*

Two recent cases in the same federal circuit indicate how differently the same court can approach Confrontation Clause issues raised first, by a recognized exception to a hearsay rule, and second, by a special closed-circuit, videotaped deposition. Both cases are analogous to the two new hearsay proposals for a child's statements for sexual abuse. *United States v. Iron Shell*[109] involved hearsay admitted under established exceptions to the federal hearsay rule, but it was the kind of hearsay that would be admitted under the new Washington and Kansas

107. *See infra* note 172 and accompanying text; *see also* Ohio v. Roberts, 448 U.S. 56, 65 (1980).
108. *Roberts*, 448 U.S. at 66 n.9.
109. 633 F.2d 77 (8th Cir. 1980).

exceptions. *United States v. Benfield*[110] involved the use of videotaped depositions to protect a traumatized adult victim of kidnapping.

John Louis Iron Shell was convicted of assault with intent to rape a nine-year-old girl. Her statements after the assault to a police officer were held admissible under the federal excited utterances exception,[111] and her statements to a treating physician were held admissible under the federal medical treatment exception.[112] The Eight Circuit[113] was willing to stretch the allowable time interval for an excited utterance considering the child's age, physical and mental condition, the characteristics of the event and the subject matter quoted.[114] Even though the girl was available to testify, the defense raised a Confrontation Clause objection which questioned whether the child was truly available for effective cross-examination due to her young age. The court held that even if the girl was thus "unavailable," the admitted hearsay bore sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.[115] In so ruling, the *Iron Shell* court relied heavily on the then very recent Supreme Court decision in *Ohio v. Roberts.*

In the course of its opinion, the *Iron Shell* court also cited *United States v. Nick.*[116] *Nick* is not as conceptually clear as *Iron Shell*, but it is one of the few recent court of appeals cases that deals directly with the issue of admitting a child's out-of-court statements of sexual abuse. In *Nick*, the victim was three years old, and the victim's hearsay statement, as in *Iron Shell*, was admitted under Federal Rule of Evidence 803(2) and 803(4). The *Nick* court noted that the child was not subjected to cross-examination and could not have been due to his "extremely tender years."[117] In this pre-*Roberts* case, the court turned to one of *Roberts'* predecessor, *Dutton v. Evans*,[118] to assess the reliability of the hearsay. The *Nick* court then went on to rely on the criteria of the federal residual exception to accomplish the task of determining whether the hearsay was sufficiently reliable. Using the residual exception criteria, the *Nick* court upheld

110. 593 F.2d 815 (8th Cir. 1979).
111. Fed. R. Evid. 803(2).
112. Fed. R. Evid. 803(4).
113. United States v. Benfield, 633 F.2d 77, 86 (8th Cir. 1980).
114. *Id.*
115. *Id.* at 87.
116. 604 F.2d 1199 (9th Cir. 1979).
117. *Id.* at 1202.
118. 400 U.S. 74 (1970).

the admission of the hearsay as highly reliable and probative.[119] Later in 1981, the same circuit in *United States v. Perez*[120] found the *Nick* court's reliance on Federal Rule of Evidence 803(24) unjustified. Specifically, the residual exception requirement that the statement be more probative on the point for which it is offered than any other evidence seemed unnecessarily strict under *Dutton* (and now *Roberts*). The *Nick* case has value, however, because it introduced the concept that a child, although physically available to testify, may be "unavailable" due to cognitive limitations and perhaps even trauma. *Iron Shell* cites *Nick* as representing the kind of case which poses a "special type" of unavailability.[121] Both cases may lend precedential support to the notion of psychological unavailability, which is thought to typify child sexual abuse.

*Nick* and *Iron Shell* involved "firmly rooted"[122] hearsay exceptions. Both courts found particularized indicia of reliability under either *Dutton* or *Roberts* when there was a question as to the victim's availability to testify. Neither court had any problems upholding the admission of a child's out-of-court statements of sexual abuse over Confrontation Clause objections. The question then remains whether the new Washington and Kansas exceptions for child victims will receive the same level of constitutional support. It also remains to be seen whether courts will consider the new laws as "firmly rooted exceptions" which provide the hearsay with an inherently high degree of reliability, or if they will require very particularized indicia of reliability. The standards for assessing these questions come from *Roberts*, which was a prior testimony case that required very particularized findings. The *Roberts* case itself may not be good precedent for consideration of the Washington and Kansas laws when compared to cases like *Nick* and *Iron Shell*. Although these latter cases rely on traditional hearsay exceptions, the hearsay which they allowed is very similar to the kind of hearsay which will be admitted under the new child sexual abuse exceptions. While the constitutional criteria may come from the language in *Roberts*, the *Nick* case and in particular, the *Iron Shell* decision are more on point.

The Eighth Circuit decided *Iron Shell* in 1980. A year earlier the same circuit had decided *United States v. Benfield*,[123] a case which involved a closed-circuit taped deposition procedure for a

119. 604 F.2d 1199, 1203 (9th Cir. 1979).
120. 658 F.2d 654, 661 n. 6 (9th Cir. 1981).
121. United States v. Iron Shell, 633 F.2d 77, 87 (8th Cir. 1980).
122. Ohio v. Roberts, 448 U.S. 56, 67 (1980) (excited utterances and statements made to a treating physician).
123. 593 F.2d 815 (8th Cir. 1979).

traumatized adult kidnap victim. The victim developed a pyschiatric "infirmity" following the ordeal and her treating psychiatrist indicated that she could not be subpoenaed for trial for months.[124] The Government then filed a request for a videotaped deposition. The trial court granted the request and ordered that the defendant could be present at the deposition, but not within the vision of the victim. During the deposition, the defendant sat in another room and observed the proceedings on a monitor. He was allowed to stop the questioning by sounding a buzzer in order to consult with counsel. Counsel was allowed to conduct cross-examination. The victim was kept unaware of the defendant's presence in the building.[125]

Despite these protections for the defendant, the court held the procedure unconstitutional. The opinion in *Benfield* is perplexing because it appears to minimize modern Confrontation Clause analysis while relying heavily on turn-of-the-century case law. Note that *Benfield* is a pre-*Roberts* but a post-*Mancusi* case.[126] While the court grudgingly acknowledged pre-*Roberts* line of cases, it none the less relied primarily on a series of cases decided between 1895 and 1911. The gist of the *Benfield* opinion is that the necessity-reliability cases which ultimately led to *Roberts* do not substantially mitigate the right to a "face-to-face" confrontation between the witness and the accused. As the Court stated:

> Normally the right to confrontation includes a face-to-face meeting at trial at which time cross-examination takes place. . . . While some recent cases use other language, none denies that confrontation required a face-to-face meeting in 1791 and none lessens the force of the sixth amendment. . . . While a deposition necessarily eliminates a face-to-face meeting between witness and jury, we find no justification for further abridgement of the defendant's rights. A videotaped deposition supplies an environment substantially comparable to a trial, but where the defendant was not permitted to be an active participant in the video deposition, this procedural substitute is constitutionally infirm.[127]

The court must have placed great importance on the face-to-face confrontation to have characterized the defendant in *Benfield* as

124. *Id.*

125. *Id.*

126. Mancusi v. Stubbs, 408 U.S. 204 (1972). The line of cases leading to *Roberts* runs in the following order: Pointer v. Texas, 380 U.S. 400 (1965) (applying the Confrontation Clause to the states through the due process clause of the fourteenth amendment); Douglas v. Alabama, 380 U.S. 415 (1965); Barber v. Page, 390 U.S. 719 (1968); Bruton v. United States, 391 U.S. 123 (1968); California v. Green, 399 U.S. 149 (1970); Dutton v. Evans, 400 U.S. 74 (1970); Nelson v. O'Neill, 402 U.S. 622 (1971); Mancusi v. Stubbs, 408 U.S. 204 (1972); Ohio v. Roberts, 448 U.S. 56 (1980).

127. *Benfield*, 593 F.2d at 821.

unable to participate in the deposition, since he viewed the entire proceeding, could stop it at will and was able to assist his attorney in the process of questioning and cross-examination.

The *Benfield* court indicated that any exception to direct confrontation should be narrow in scope and based on necessity or waiver.[128] The *Benfield* court considered the possibility that a defendant could commit a crime so heinous as to excuse the victim from face-to-face confrontation.[129] Thus, *Benfield* approached the concept of psychological unavailability by means of a waiver theory. The court ruled, however, that the facts did not involve conduct of that magnitude, and to find such a waiver in this case would essentially destroy the right of confrontation in nearly all cases of alleged crimes against persons.[130] Oddly, the court did not, on the facts, find a showing of necessity, even though a psychiatrist testified that the victim's mental infirmity was directly related to the crime and rendered her unable to testify under normal trial conditions. The *Benfield* depositions procedure fell under Federal Rules of Criminal Procedure 15, which relies for its definition of unavailability on Federal Rules of Evidence 804(a), the latter includes then existing physical or mental illness or infirmity and thus seemingly applies to the *Benfield* fact situation. Rule 15, however, also guarantees the defendant the right to be in the presence of the witness during the examination.[131] Although this provision is, in part, meant to protect confrontation rights, the *Benfield* court was unclear in stating whether its decision relied solely on Confrontation Clause theory or on this specific provision of the applicable rules of criminal procedure. The court did, however, specifically refer to the right to face-to-face confrontation as a constitutional right, even though it conceded that often necessary hearsay is admitted despite the absence of confrontation with the accused.[132] The court indicated that it did favor the development of electronic video technology which more nearly approximates the traditional courtroom setting, specifically "face-to-face" confrontation with a witness who is aware of the defendant's presence.[133]

On its surface *Benfield's* analysis seems archaic and unenlightened in its interpretation of the Confrontation Clause. It

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128. *Id.* at 821. For an example of a defendant's behavior acting as waiver of confrontation rights, see United States v. Thevis, 665 F.2d 616 (5th Cir. 1982).

129. 593 F.2d at 821.

130. *Id.*

131. FED. R. CRIM. P. 15(b).

132. 593 F.2d at 819-21.

133. *Id.* at 821-22.

minimizes the line of cases which led to *Roberts* just one year later and instead, reaches back to the turn-of-the-century for support of its literalistic reliance on "face-to-face" confrontation. There appears to be a natural tension between *Dutton*, and *Roberts* on one hand, and *Benfield* on the other. The logical inconsistencies are apparent. Other less reliable hearsay is regularly admitted with virtually no confrontation, participation of the defendant or cross-examination but *Benfield* requires a face-to-face meeting for a psychologically unavailable witness who testifies under stringent standards of reliability and cross-examination. Although the *Benfield* court did not articulate the issue clearly, if at all, it seemed to sense the differences between a traditional hearsay exception and a deposition procedure intended to substitute for a part of the trial process.[134] The court clearly did not view *Benfield* as a hearsay case, and seemed to understand that a deposition implicates different policy values.[135] This may explain the court's repeated and apparently illogical insistence that none of the necessity-reliability cases (like *Dutton*) deny that confrontation requires a "face-to-face" meeting."[136] Viewed this way, *Benfield* is a little less unenlightened and archaic. However, the *Benfield* court failed to clearly articulate the different policy implications between depositions and other forms of hearsay. Various hearsay exceptions try to approximate conditions of reliability which substitute for trial reliability, while depositions try to approximate conditions of the trial as a substitute for the trial itself. This creates the irony that the policy preferences in taking depositions, such as requiring "face-to-face" confrontation are stronger than the policy preferences in the trial itself, which repeatedly yield to adequate substitutes of reliability.

After considering the two new hearsay proposals for child sexual abuse cases and analyzing *Roberts, Nick, Iron Shell* and *Benfield*, there appears to be more constitutional support for simply establishing a new hearsay exception for child reports of sexual abuse than for establishing a new class of "child depositions." This result seems ironic because child deposition procedures place only minor limits on the defendant's rights to cross-examination and confrontation while other hearsay exceptions provide no such protections other than certain "indicia of reliability." Yet this irony has already been played out within the

134. *See supra* text accompanying notes 45 to 167.

135. In one sense a deposition falls somewhere between a hearsay exception (in this case former testimony) and trial confrontation. The *Benfield* court never discussed the deposition procedure as a hearsay issue and instead focused on the trial right of face-to-face confrontation. 593 F.2d at 821.

136. *Id.*

same circuit of the United States court of appeals.[137]

### *The Limits of the Confrontation Clause—And Other Constitutional Rights*

The introduction of hearsay at a criminal trial raises complex Confrontation Clause issues which have constituted the bulk of the foregoing analysis. Actually, several clauses of the United States Constitution are potentially implicated by the two new hearsay proposals for child sexual abuse: the public trial, compulsory process and confrontation clauses of the sixth amendment,[138] the due process clauses of the fifth and fourteenth amendments[139] and the freedom of the press clause of the first amendment.[140]

While the relationship of the Confrontation Clause and the Compulsory Process Clause makes for an interesting discussion,[141] the Supreme Court in its most recent hearsay doctrine-Confrontation Clause cases has been unconcerned with the Compulsory Process Clause.[142] The Compulsory Process Clause would appear to guarantee the defendant a "right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."[143] Thus, defendants have a right to call available and competent witnesses on material and relevant issues. The right is not absolute, for example, there is no right of compulsory process when the witness is unavailable, as when he or she invokes the fifth amendment right against self-incrimination, or otherwise refuses to testify.[144] Perhaps one reason Confrontation Clause analysis has not required an examinations of the Compulsory Process Clause is that, to date, the former has required a strong showing of unavailability, which would seem to satisfy the latter. Parker, a strong advocate of taped child testimony, concedes that to automatically disqualify all children from testifying to a certain type of crime would "run afoul" of the Compul-

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137. *Compare* United States v. Benfield, 593 F.2d 815 (8th Cir. 1979) *with* United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980).

138. U.S. Const. amend. VI.

139. U.S. Const. amend. XIV.

140. U.S. Const. amend. I.

141. *See* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567 (1978).

142. *See* Ohio v. Roberts, 448 U.S. 56 (1980).

143. Washington v. Texas, 388 U.S. 14, 23 (1967).

144. *See, e.g.*, Washington v. Texas, 388 U.S. 14, 23 n.21 (1967); United States v. Roberts, 503 F.2d 598, 600 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975); Myers v. Frye, 401 F.2d 18, 21 (7th Cir. 1968).

sory Process Clause. However, Parker suggests that a court-appointed attorney charged with protecting the rights of the child victim could invoke the privilege not to testify on behalf of an individual child.[145] Much will depend on how courts respond to the argument that a child victim is "psychologically unavailable" and what circumstances will constitute a showing of psychological unavailability.

These new child hearsay proposals may also affect the public nature of the trial process. Under the sixth amendment, the defendant has a right to a public trial[146] and under present first amendment law, the public and press have a right of access to criminal trials.[147] Special procedures which protect the child by limiting access to the courtroom may affect these rights. However, these rights are not absolute. There seems to be adequate precedent for curtailing the defendant's right to a public trial in order to protect the psychological well-being of victim-witnesses.[148] In fact, some states have enacted legislation which excludes the general public from trials for certain sex crimes.[149] The leading case, *Globe Newspaper Co. v. Superior Court*,[150] is discussed in the next section of this article which explores the Court's different approaches to protecting child victims under the first and the sixth amendments.[151] One recognized generalization about the Supreme Court's resolution of right to trial issues is that the Court seems more willing to resolve the competing interests of the defendant and the press by means of a balancing test.[152] Confrontation Clause analysis, however, although referring to competing interests, is either more literalistic and absolutist, or relies on traditional hearsay analysis such as the *Roberts* necessity and reliability criteria.[153] This difference in interpretation raises the question of whether the most effective and constitutionally acceptable way to protect children is by clearing the courtroom or taking a special deposition.[154]

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145. Parker, *Child Witnesses*, *supra* note 2, at 704.
146. U.S. CONST. amend. VI.
147. Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 604 (1982).
148. *Id.* at 606-07; *see also* Parker, *Child Witnesses*, *supra* note 2, at 712-16.
149. *See* statutes collected in 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1835 at 449 n.3 (1976). *But see* MASS. GEN. LAWS ANN. ch. 278 § 16A (West 1972) which was held unconstitutional in Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982).
150. 457 U.S. 596 (1982).
151. *See supra* text accompanying notes 67 to 167.
152. *See* Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982).
153. *Roberts*, 448 U.S. at 66.
154. Ghent, *Victim Testimony in Sex Crime Prosecutions: An Analysis of the Rape Shield Provision and the Use of Deposition Testimony Under the Criminal Sexual Conduct Statute*, 34 S. C. L. REV. 583, 588-93 n.29 (1982).

Although these other clauses of the sixth amendment are conceivably relevant to the new hearsay proposals for child sexual abuse, the Supreme Court, in its own analysis of the hearsay-Confrontation Clause aggregate, has not felt the need to address these issues. The foregoing analysis has therefore primarily involved the Confrontation Clause. It should be remembered, however, that the Clause reads: "In all *criminal* prosecution, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."[155] The Clause does not apply to civil cases involving child abuse and neglect heard before juvenile or family courts.[156] This is an important distinction because most cases of child sexual abuse, for various reasons, do not reach criminal trial.[157] One could easily argue that loss of fundamental rights resulting from a termination of parental rights for abuse is far more serious than many potential criminal penalties, yet to date the Court has extended confrontation rights only to proceedings in which the juvenile is subject to loss of liberty.[158] By reason of these limits upon the Confrontation Clause, many of the reforms discussed in this article may be more easily implemented in civil proceedings[159] as long as due process protections are preserved.

One issue that has occasionally occupied the Court in the course of its Confrontation Clause analysis is the relationship between the Due Process Clause and the Confrontation Clause. Justice Harlan, in his concurring opinion in *California v. Green*,[160] clouded this relationship when he suggested that the Confrontation Clause requires the presence of available witnesses, while the Due Process Clause acts to bar convictions based on unreliable testimony.[161] In *Dutton v. Evans*,[162] Justice

155. U.S. CONST. amend. VI.

156. Actually the Supreme Court has not addressed the specific issue of whether the Confrontation Clause applies in civil trials for child abuse and neglect. However the Court has recently declined to extend other sixth amendment protections to juvenile and family courts. *See* Lassiter v. Department of Social Servs., 452 U.S. 18, 37 (1981) (appointment of counsel is not consitutionally required in every case involving termination of parental rights); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (extending the right to jury trial to all juvenile actions is not constitutionally required and would effectively end the unique nature of the juvenile process).

157. C. Rogers, *Child Sexual Abuse and the Courts: Empirical Findings*, Paper Presented at the Annual Convention of the American Psychological Association, Montreal, Canada, September, 1980 (Child Protection Center Special Unit, Children's Hospital, National Medical Center, Washington, D.C.).

158. *See In re* Gault, 387 U.S. 1, 13 (1967).

159. *See, e.g.*, N.Y. FAM. CT. ACT. § 1046(a)(vi) (McKinney 1983).

160. 339 U.S. 149 (1970).

161. *Id.* at 179-89 (Harlan J., concurring).

162. 400 U.S. 74, 96-97 (1970).

Harlan, in another concurring opinion, recanted his Confrontation Clause-due process dichotomy.[163] He suggested that the Confrontation Clause was "simply not well designed for taking into account the numerous factors that must be weighed in passing on the appropriateness of rules of evidence. . . . The task is far more appropriately performed under the aegis of the Fifth and Fourteenth Amendments. . . ."[164] Both of Justice Harlan's theories have received some support from commentators but were rejected by the *Roberts* court.[165] *Roberts* solves the confusion by suggesting that the Confrontation Clause requires both necessity and reliability.

In terms of the necessity/unavailability and reliability/trustworthiness criteria of *Roberts*, Justice Harlan first attributed the reliability issue to the Due Process Clause and the unavailability issue to the Confrontation Clause.[166] Then in *Dutton* he rejected the unavailability requirement as too strict and relied on the Due Process Clause only.[167] The *Roberts* court, on the other hand, interpreted the requirements for unavailability and reliability as both emanating from the Confrontation Clause and did not discuss the due process clause. *Roberts'* analysis is neither surprising nor radical since it basically relies on an "evidentiary" approach to the Confrontation Clause; necessity and trustworthiness have always been requirements for hearsay exceptions under the common law. Such an evidentiary approach does not require any analysis of the Due Process Clause, and, in fact, predates both the Confrontation Clause and the Due Process Clause.

## IV. The Problem of an Evidentiary Approach to a Constitutional Right

To this point, the constitutionality of the two new hearsay proposals for child sexual abuse cases has been assessed on the basis of case law, specifically the leading case of *Ohio v. Roberts*.[168] This approach seemed sensible because both proposals relied primarily on *Roberts*. *Roberts* was clearly intended to represent a forceful consolidation and clarification of the Court's Confrontation Clause theory and to quell the wide divergence of scholarly commentary.[169] However, the problem of child sexual

163. *Id.*
164. *Id.*
165. 448 U.S. 56, 67 n.9 (1980).
166. *See supra* note 160.
167. *See supra* note 162.
168. 448 U.S. 56 (1980).
169. *Id.* at 67 n.9.

abuse raises such a salient public policy issue that it highlights a fundamental flaw in the Supreme Court's attempt to reconcile the hearsay doctrine with the Confrontation Clause. This is a difficult point to underscore conceptually due to the long jurisprudential history by which the constitutional right of confrontation has come to be interpreted by means of an essentially evidentiary analysis based on the common law. That analysis utilizes the criteria of necessity and reliability as set forth in *Roberts*. As long as the Supreme Court continues to rely upon its common-law approach to the sixth amendment, it will be difficult to protect sexually abused children within our legal system.

In a well reasoned article, Howard Gutman noted the significant discrepancies between the Court's approach to the Confrontation Clause and other constitutional rights:

> All scholars and courts agree that the right of confrontation like all rights, cannot be absolute. However, despite the evolution of the various tests developed in constitutional jurisprudence to mediate rights and government interests, in the past eighty-one years no test has been formulated or identified to accommodate the right to confrontation and the state's countervailing interest . . . no scholar or judge has ever suggested reliance on the compelling state interest test to assess the constitutional validity of abridgements of the right of confrontation. Even conceding arguendo that the right of confrontation is less fundamental than other interests, no court or writer has ever applied the minimum rationality test, currently employed in mediating the state's interest with regard to less fundamental interests. Rather, since the time of Wigmore, the mediation of the government's interest and the guarantee of confrontation has been achieved, *sub silentio*, by reliance on the terms 'necessity' and 'reliability' to redefine the scope of the protection provided by the clause to conform to the requirements of the laws of evidence. . . .
>
> The inconsistency between the mode of mediation employed with regard to most constitutional rights and that relied on in confrontation cases is generally unrecognized. Where it is recognized, it is tolerated by jurists and scholars because of the different perspective from which the rights are viewed, and from which the tests were formulated. Constitutional rights today are viewed as existing by virtue of their inclusion in the Bill of Rights; their meaning is interpreted either by reference to the text of the Constitution alone, or as informed by changing social norms and values. Therefore, rights can be limited only by compelling and well-tailored states' interests. In contrast, the right to confrontation exists as an added rule of evidence whose scope has been defined with reference to pre-existing law of evidence, by the same balance of factors (reliability and necessity) that shape all rules of admissibility.[170]

While acknowledging that it would be a "gross overstatement" to blame one man's personal views for the present state

170. Gutman, *supra* note 102, at 344.

of confusion and inconsistency, Gutman nevertheless accused Wigmore,[171] whose minimization and misinterpretation of the Confrontation Clause has been well-documented and explicitly rejected by the Supreme Court.[172] Ironically, while the Supreme Court consciously rejects Wigmore's limited view of the Confrontation Clause, the Court nonetheless is unconsciously influenced by the powerful Wigmorean legacy which initially subjected the Confrontation Clause to common-law rules of evidentiary admissibility.

Although Gutman's article was published in 1981,[173] it appears to have been drafted prior to the *Ohio v. Roberts* decision.[174] Gutman's analysis relied on *Dutton v. Evans*,[175] but it is equally applicable to *Roberts*. This in part confirms Gutman's hypotheses. Interestingly, the court used language in *Roberts* which suggested that it was aware of the need to balance confrontation rights against competing societal interests:

> The Court, however has recognized that competing interests, if closely examined . . . may warrant dispensing with confrontation at trial . . . (general rules of law of this kind, however beneficient in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case). . . . This Court, in a series of cases, has sought to accommodate these competing interests.[176]

Immediately thereafter, however, the Court launched into a definition of the key words of its opinion: necessity and reliability.[177] Apparently the Court was implying that all competing societal interests were automatically balanced solely by reliance on the pre-constitutional criteria of necessity and reliability.

The problem of child sexual abuse underscores the inadequacy of using a common-law, evidentiary approach to interpret a clause of the United States Constitution. Advocates of new hearsay proposals to protect child sex abuse victims must go to absurd lengths to reconcile their proposals with the reasoning in *Roberts*. They have to establish the notion of "psychological unavailability" for victims who may be available to testify and who may be psychologically sound. In many cases "psychological

171. *Id.* at 340.

172. Dutton v. Evans, 400 U.S. 74, 86 (1970) ("It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stems from the same roots; California v. Green, 399 U.S. 149, 155 (1970). But this Court has never equated the two and we decline to do so now."). *See also* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 800[04] at 800-19 (1979).

173. Gutman, *supra* note 102.

174. 448 U.S. 56 (1980).

175. 400 U.S. 74 (1970).

176. 448 U.S. at 65.

177. *Id.* at 66.

unavailability" will only mean relying on the language of *Roberts* to express the thought. We should not require testimony from a limited class of traumatized child victims due to the competing societal interest in protecting all child victims of sexual abuse. *Benfield* suggests that any special deposition designed to protect the child victim must resemble live testimony so closely that the protections afforded the child are minimal.[178] However, due to the wording of *Roberts*, advocates of these deposition proposals feel they must go to great lengths to make the obvious argument that depositions are "just as reliable" as other forms of hearsay.[179] The problem of the Court's evidentiary approach to the Confrontation Clause may also complicate implimentation of a new hearsay exception for child reports of sexual abuse, similar to the laws of Washington and Kansas.[180] Those statutes contain the unavailability/reliability language of *Roberts*. Is this really the purpose of a hearsay exception and is this approach much better than a residual or catch-all exception approach?[181] The Court's present approach to the Confrontation Clause seems too limited to allow for the progressive growth of the hearsay doctrine in response to newly identified social issues and our expanding knowledge of the human condition. We are left with a variety of "firmly rooted",[182] archaic, unreliable hearsay exceptions.[183] Those exceptions receive almost unquestioned constitutional support. At the same time, new forms of reliable hearsay, which serve significant societal interests, are admitted on essentially a case-by-case basis.

The inconsistencies between the Court's approach to the Confrontation Clause and other clauses of the Bill of Rights is demonstrated in *Globe Newspaper Co. v. Superior Court.*[184] *Globe* raised the issue of protecting a child victim of sexual assault within the legal system. *Globe* was, however, a first amendment case involving a Massachusetts statute. The Massachusetts statute required the exclusion of the press and public from the courtroom during the testimony of victims at trials for specified sexual offenses involving victims under the age of eighteen.[185] The Globe Newspaper Company challenged the

178. 593 F.2d 815 (8th Cir. 1979).

179. *Proving Parent-Child Incest*, *supra* note 8, at 137-38; *see also* note 70 and accompanying text.

180. *See supra* text accompanying notes 10 to 66.

181. *See supra* text accompanying notes 10 to 44.

182. Ohio v. Roberts, 448 U.S. 56, 67 (1980).

183. E. CLEARY, MCCORMICK ON EVIDENCE § 261 at 625-26 (2d ed. 1972) (comparing questionable reliability of traditional exceptions with the high reliability of prior testimony).

184. 457 U.S. 596 (1982).

185. MASS. GEN. LAWS ANN., ch. 278 § 16A (West 1972).

trial court's barring of the press and public from the courtroom under this statute. Using language typical of first amendment interpretation, the Court held the statute unconstitutional. The right of access to criminal trials was found to be of "constitutional stature" but not absolute.[186] Any state limitation on the press and public's right of access must be a "weighty one" based on a "compelling governmental interest," and must be "narrowly tailored" to serve that interest.[187] The Court objected to the Massachusetts statute because the statute's mandatory-closure rule was overbroad and not tailored to serve the compelling state interest of safeguarding the physical and psychological well being of child victims of sexual assault.[188] In a forceful dissenting opinion, the Chief Justice deplored the Court's holding.[189] He noted that minors charged with rape are automatically insulated from the press, while minors who are victims of rape do not even have the right to mandatory courtroom closure while they testify.[190] The Chief Justice's opinion is also noteworthy for its strong reliance on "psychological" and "empirical" evidence to support his contention that the experience of open courtroom testimony can leave "devastating and permanent scars" on victims of sexual assault.[191]

*Globe* is a controversial case that has stimulated much commentary;[192] however, all of the justices, including the Chief Justice, agreed on the same principle of interpretation. The mandatory closure order infringed on the first amendment right to public access to criminal trials, while at the same time represented a compelling state interest in protecting child victims of sexual assault. The only real issue was whether the mandatory closure order was narrow enough to serve the compelling state interest. If the fact situation in *Globe* was altered so as to transform it into a hearsay-Confrontation Clause case, the result might have been different.

Suppose, for example, a victim had been so traumatized as to be unable to testify and that the victim might have made statements to a specially trained police investigator who had interviewed him ninety minutes after the attack, and the prosecution might have sought to admit those statements into evidence

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186. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602 (1982).
187. *Id.*
188. *Id.* at 603.
189. *Id.* at 605.
190. *Id.*
191. *Id.* at 603.
192. Melton, *A Psycholegal Dilemma*, *supra* note 3; Parker, *Child Witnesses Versus The Press: A Proposed Legislative Response to* Globe v. Superior Court, 47 ALB. L. REV. 408 (1983).

under the hearsay exception. Instead of considering the balance between the constitutional right to confrontation and the compelling state interest in protecting the victim, the court would instead immediately turn to a consideration of the unavailability and reliability criteria of *Roberts.* First, there would probably be a long analysis of whether the victim-witness was actually available. The court would have to define "psychological unavailability" and determine its limits. There would be a consideration of the prosecution's "good faith" efforts to establish the unavailability of the witness. Regardless of the Confrontation Clause issues, some exception to the hearsay rule would have to exist to admit into evidence the out-of-court declaration made to the police investigator. The prosecution would have to find an exception such as the excited utterance exception. The defense would argue that ninety minutes was too long of a time for the statement to qualify as an excited utterance. The prosecution would then have the officer testify to the child's distraught state, her disheveled hair and clothes, and the blood and bruises. If a traditional exception could not be found, the prosecution would rely on a residual exception, if one was available in that jurisdiction. If a residual exception applied, the prosecution would have to establish that the hearsay was more probative than any other evidence.[193] The trial court would then have to find particularized indicia of reliability, and decide whether the hearsay was to be admitted under a traditional exception, a residual exception or a special child sexual abuse exception. The court would have no real standards on which to base its decision. It might decide to interview the victim privately, it might require corroborating evidence, or it might ask the investigating police officer to testify as to the reliability of the child's report based on the officer's training in child sexual abuse investigations. This would, however, create the problem of asking the witness to assess the reliability of the hearsay statement the witness is about to utter.

This hypothetical case emphasizes how differently the Supreme Court would interpret the right to confrontation compared to other constitutional rights such as those involved in *Globe.* Arguably, the first and sixth amendments should be interpreted differently because they represent different constitutional rights.[194] Nonetheless, the comparison between the two amendments underscores how unresponsive present Confronta-

193. *See, e.g.,* FED. R. EVID. 804(b)(5)(B).

194. This argument however can quickly become circular, because to rely on the common law roots of the Confrontation Clause, is to ignore the constitutional issue. That constitutional issue is more properly viewed as whether the Confrontation Clause solely serves the instrumental end of facilitating the admission of probative and reliable evidence, or whether the

tion Clause analysis is to newly identified competing societal interests. The tone of the *Roberts* opinion suggests that the Court is not about to change its approach to the Confrontation Clause. For the present, it appears that the compelling state interest in protecting child victims of sexual abuse can only be achieved by stretching the evidentiary concepts of necessity and reliability beyond their original and intended meanings.

### *Do the Assumptions Underlying the Hearsay Rule and Confrontation Clause Apply to Child Victims of Sexual Abuse?*

The legal principles of cross-examination, hearsay and the right to confrontation were developed at a time when children were generally regarded as incompetent witnesses.[195] Emphasis on the basis of the hearsay rule today tends to focus on the condition of cross-examination.[196] The solution developed under the common law was that certain guarantees of trustworthiness or reliability were required to compensate for the great disadvantage of not subjecting the hearsay declarant to cross-examination. The hearsay doctrine and the Confrontation Clause are said to protect similar but not identical interests.[197] In *Roberts*, the Supreme Court held that a primary interest secured by the Confrontation Clause is the right to cross-examination.[198]

These assumptions are simply not valid when the hearsay declarant is a child victim of sexual abuse. Child reports of sexual abuse are inherently reliable and often have the "ring of verity" which only a child could utter.[199] A young victim of sexual abuse who is cross examined in court with the defendant (who

right to confrontation protects intrinsic value. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, 12-1 (1978); Gutman, *supra* note 102, at 347.

195. The modern trend is to admit the testimony of children, leaving the question of the weight and credibility of the testimony to the jury. *See, e.g.*, FED. R. EVID. 601, Advisory Committee's Note, at 203 (West 1983). In most states the rule for assessing competency of a child witness is established by case law. In states with statutory guidelines, often children above age 10 are presumed competent and children under 10 are presumed incompetent. However these presumptions are usually rebutable. Courts have held children as young as four years old competent to testify. United States v. Iron Shell, 633 F.2d 77, 87 (8th Cir. 1980). But it should be remembered that even a young competent witness maybe too young to be fully confronted and cross-examined by a defendant exercising her or his Confrontation Clause rights. *See* United States v. Iron Shell, 633 F.2d 77, 87 (8th Cir. 1980). *See generally* Melton, *Children's Competency*, *supra* note 29, at 73 n.1.

196. 5 WIGMORE, EVIDENCE § 1367, at 29 (1972).

197. Ohio v. Roberts, 488 U.S. 56, 64 (1980).

198. *Id.* at 64.

199. *See infra* text accompanying notes 67-167. United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980); United States v. Nick, 604 F.2d 1199 (9th Cir.

may be a family member) present, may appear to be unreliable even though the victim is telling the truth.[200] Guilt, fear, trauma, cognitive immaturity, and "incest dynamics" may all undermine the child's ability to testify effectively.[201] In contrast, the child is much more likely to provide a reliable account when interviewed and videotaped in a playroom by a specially trained child abuse investigator who understands child psychology and who uses dolls to facilitate the child's description of the incident. The difference between these two situations is the difference between obtaining truth from an adult and obtaining truth from a frightened child. Naturally, the latter procedure is more humane and better serves the compelling societal interest in protecting child victims of sexual assault. However, the focus here is not to further these interests but rather to better serve the stated purpose of the hearsay doctrine and the Confrontation Clause, which is to further the interests of justice by providing the trier of fact with only the most reliable forms of evidence.

Our present knowledge of child psychology and child sexual abuse indicates that a child's hearsay report of sexual abuse will often be more reliable than the child's courtroom testimony.[202] In such a paradoxical situation, the right to confrontation and cross-examination may not further the interests of justice nor protect the truth-seeking process. If we must use the "necessity" and "reliability" criteria as present Confrontation Clause analysis requires us to do, then "reliability" should be viewed as a double edged sword. When child victims of sexual abuse are involved, the inherent reliability of the hearsay report should be balanced against the inherent reliability or unreliability of the child's ability to testify effectively. This type of "balancing test" will yield a different result depending on the interpretation of the Confrontation Clause.

## V. The Reliability and Necessity of New Hearsay Exceptions for Sexually Abused Children

This article has focused on the Confrontation Clause keywords of necessity and reliability to assess the constitutionality of two new proposals for admitting into evidence a child's

1979); Lancaster v. People, 200 Colo. 448, 452, 615 P.2d 720, 723 (1980); Love v. State, 64 Wis. 2d 432, 442, 219 N.W.2d 294, 299 (1974).

200. Love v. State, 64 Wis. 2d 432, 434, 219 N.W.2d 294, 299 (1974); C. Adams & J. Fay, No More Secrets 63 (1981); Melton, *Procedural Reforms*, *supra* note 3.

201. *See supra* text accompanying notes 168 to 202.

202. Melton, *Procedural Reforms*, *supra* note 3, at 189.

prior statements of sexual abuse. In this section, these legal keywords will be used to organize a discussion of the available psychological evidence which may lend support to these two hearsay proposals. However, an important caveat is in order for those unfamiliar with empirical methodology.

One of the most unfortunate impediments to the conceptual integration of law and psychology has been the senseless controversy over the applicability of empirical social science research to legal issues. The justices of the Supreme Court have at times scorned the use of "numerology derived from statistical studies,"[203] and deplored "the judicial equivalent of a doctoral examination" in social science methods.[204] Social scientists generally view the Court's intuitive skepticism of empirical research as unfortunate, ignorant, and totally unscientific.[205] However, when the Court does rely on empirical data, the same social scientists point out that the data has been misapplied, misinterpreted and is full of methodogical flaws.[206]

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203. Ballew v. Georgia, 435 U.S. 223, 246 (1978).

204. Craig v. Boren, 429 U.S. 190, 224 (1976) (Rehnquist, J., dissenting).

205. Meehl, *Law and the Fireside Inductions: Some Reflections of a Clinical Psychologist*, 27 J. Soc. Issues 65 (1971).

206. Melton, *A Psycholegal Dilemma*, *supra* note 3. Each profession, law and psychology, relies on different epistemological methods. Professor Paul Meehl, one of the leading pioneers in modern clinical psychology research, characterizes the legal method as one of "fireside inductions" (common sense, ancedotal introspective, and culturally transmitted beliefs about human behavior). Meehl, *supra* note 205, at 65. Layman, lawyer's and psychologist's method of human understanding, while often effective, contains considerable sources of error. However, Professor Meehl notes that the empirical, statistical methods of social scientists "are plagued with methodological" problems which often render their generalized conclusions equally dubious. Meehl, *supra* note 205, at 65. Fireside inductions can result in broad conclusions about the most complex human behavior but lack empirical support and are often untestable. *See generally* Meehl, *supra* note 205. Empirical research, on the other hand, is usually limited to the specific controlled conditions of the experiment. Causal relationships between variables are rarely absolutely established but instead must be inferred from only statistical correlations. Meehl, *Theoretical Risks and Tabular Asterisks: Sir Karl, Sir Ronald, and the Slow Process of Psychology*, 46 J. Consulting & Clin. Psy. 806 (1978) [hereinafter cited as Meehl, *Progress of Psychology*]. *See also* Meehl, *supra* note 205, at 65. Even if a causal relationship can be clearly established, the conditions of the experiment must be so closely controlled and defined that the empirical results cannot be generalized to to other "Real-World" situations. Most empirical research regarding complex human behavior, although "scientific in method," is often inconclusive. Consequently, the concluding platitude of many a social science research article is "that we need more research." Meehl, *supra* note 205, at 96. Interestingly, many of the most influential psychological theories are themselves more like fireside inductions than modern day empirical research. Meehl notes that the possible irony that modern psycholanalytic theories fall under this definition of fireside inductions, but he avoids taking a stand on this issue and instead chooses to highlight the differences between the law and empirical psychology. *See* Meehl, *supra* note 205, at 66. *See also*, Meehl, *Progress of Psychology*, *supra* at 829-

*Is A New Hearsay Exception For Child Sexual Abuse "Necessary?"*

One of the primary rationales for the new hearsay proposals is that most child victims are psychologically unavailable to testify, and that they would be traumatized and psychologically damaged by the experience of having to recount sexual abuse under normal courtroom conditions. The debate over this assumption recently reached the Supreme Court in *Globe Newspaper Co. v. Superior Court*.[207] In *Globe* the Court concluded that there was insufficient "empirical support" for the state's mandatory courtroom closure rule to protect child victims of sexual assault. In his dissenting opinion, the Chief Justice characterized the Court's search for empirical evidence as a "cavalier disregard of the reality of human experience."[208] However, the Chief Justice cites six authorities in support of his contention that for a child victim the ordeal of testifying in an open courtroom could "be devastating and leave permanent scars."[209]

*Globe* underscores the debate between empiricism and fireside inductionism. It also serves as a reminder that neither approach can establish with absolute scientific certainty that most child victims of sexual assault are psychologically damaged by the experience of testifying. Even a rather obvious truth based on the "reality of human experience" is difficult to scientifically prove. One such assertion is that, "the majority of survivors of commercial jetliner disasters are psychologically but perhaps unconsciously scarred by the experience."[210] The present methodological obstacles to measuring such long-term, unconscious and complex human reactions are simply too numerous. The assertion that child victims are permanently harmed by their courtroom experience may similarly be one of these obvious but empirically unprovable truths based on the "reality of human experience."

Despite this debate, a growing body of empirical data, case studies and increasingly sophisticated "fireside inductions", however, suggests that child sexual assault victims are in fact traumatized by the experience of testifying, regardless of whether they are victims of a violent sexual assault or a non-

31. Freud's theory of the oedipal complex, for example, is essentially untestable and derived from his "fireside induction" that his empirical results could not possibly be true.

207. 457 U.S. 596 (1982).

208. *Id.* at 608.

209. *Id.* at 608-09.

210. Meehl, *Progress of Psychology*, *supra* note 20[illegible].

violent molestation.[211] While good empirical studies are scarce,[212] many experts draw their conclusions from case studies and their experience in working with sex abuse victims and their families. These case study conclusions, while lacking empirical validity, are based on clinical experience. They fall somewhere between an empirical study and a simple fireside induction.[213] Some commentators object to these conclusions as premature. They note the scarcity of good empirical studies, as well as the fact that child sexual abuse is typically "non-violent" and therefore not analogous to the experience of adult rape victims.[214] Some commentators even hypothesize that at least for some children the experience of testifying may be cathartic, may provide a means of emotionally taking control of the situation and may help achieve a sense of vindication.[215] However, at present, such hypotheses also lack empirical support and only serve as competing untested theories.

New hearsay exceptions for child reports of sexual abuse are also necessary because of the frequency with which children falsely retract their stories of abuse or refuse to cooperate once the criminal prosecution has commenced.[216] A child may retract the report out of fear, guilt, shame, or self-blame. In cases of incest, even more pressures on the child to retract the report exist. If the child is removed from the home for protection, the child may feel punished and lonely. If the child is kept in the

211. *See* E. HIBERMAN, THE RAPE VICTIM 53-54 (1976); S. KATZ & MAZUR, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 1982-2000 (1979); SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS, *supra* note 3; Katz, *supra* note 10, at 91-96; Melton, *Procedural Reforms*, *supra* note 3; *Proving Parent-Child Incest*, *supra* note 8.

212. *But see* Burgess & Holmstrom, *The Child and the Family in the Court Process*, SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS (A. Burgess, A. Groth, L. Holmstrom & S. Sgrois eds. 1978); DEFRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS (American Humane Association 1969).

213. Such techniques include interviewing victims, see Burgess & Holmstrom, *supra* note 212, and the clinical observations of psychotherapists who treat the victims and help them deal with the experience of testifying. For the opinions of judges who regularly assess the state of such victim-witnesses see Bohmar, *Judicial Attitudes Toward Rape Victims*, 57 JUDICATURE 303, 306 (1974) (reporting a survey of judges' perceptions of the traumatic effects of testimony).

214. Melton, *A Psycholegal Dilemma*, *supra* note 3. *But see* Glove Newspaper Co. v. Superior Ct., 457 U.S. 596, 608 n.7 (1982) (Burger, J., dissenting) ("Holmstrom and Burgess report that nearly half of all adult rape victims were disturbed by the public setting of their trials. Certainly the impact on children must be greater."). *Id.*

215. Melton, *A Psycholegal Dilemma*, *supra* note 3; Rogers, *supra* note 157.

216. Love v. States, 64 Wis. 2d 432, 442, 219 N.W.2d 294, 299 (1974); Goodwin, Sahd & Rada, *Incest Hoax: False Accusations, False Denials*, 6 BULL. AM. ACAD. PSYCHIATRY & LAW 269 (1978) [hereinafter cited as *Incest Hoax*].

home and the offender is removed, the child may feel responsible and guilty for causing the offender to be taken away. The child may also have to deal with the mixed feelings of other family members. Many children fear that participation in the process of legal intervention, could cause the offender to be sent to prison. In cases of incest, the child victim may have mixed feelings toward the offender. By making the report, most children are simply asking for their parents to love them in the right way.[217] Pre-trial recantations of sexual abuse can be considered a typical reaction which is congruent with a pattern of intrafamilial sexual abuse.[218]

Admitting hearsay reports of child abuse is also considered necessary because many victims are simply too young to be available as witnesses due to their cognitive immaturity. Even if the prosecution is willing to put such a vulnerable witness on the stand, the defense may claim that the child is too young to be subjected to effective cross-examination and trial confrontation.[219] While the modern trend is to admit the testimony of younger children,[220] many child victims of sexual abuse are so young that they are incompetent to testify.[221]

A final reason that such hearsay exceptions are necessary is that the sexual abuse cases are difficult to prosecute. Often the only witnesses to the event are the offender and the child victim.[222] Corroborating physical evidence may be inconclusive or non-existent, depending on the type of sexual abuse.[223] Under

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217. Because of the complex dynamics of infrafamilial sexual abuse children may have mixed feelings about the abuse because the offender inappropriately uses sexual contact to give the child a measure of affection, attention and importance; most children continue to want these things—but without the sexual contact. *See* Katz, *supra* note 10, at 88; Lloyd, *supra* note 12, at 112; K. MacFarlane, *Sexual Abuse of Children*, in THE SEXUAL VICTIMIZATION OF WOMEN 94-96 (J. Chapman & M. Gates eds. 1978).

218. State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983); Berliner, Blick and Bulkley, *Expert Testimony on the Dynamics of Intra-Familial Child Sexual Abuse and the Principles of Child Development*, in CHILD SEXUAL ABUSE AND THE LAW, *supra* note 2; S. Mele-Sernovitz, *Parental Sexual Abuse of Children: The Law as a Therapeutic Tool For Families*, in LEGAL REPRESENTATION OF THE MALTREATED CHILD 70 (1979) (describing the "sexually abused child syndrome"). *See Defiance*, TIME, Jan. 23, 1984, at 35 (reporting a highly publicized case in which a judge sent a twelve year old incest victim to solitary confinement until she would agree to testify against her father).

219. United States v. Iron Shell, 633 F.2d 77, 87 (8th Cir. 1980).

220. *See infra* note 221 and accompanying text.

221. Many victims are two or three years old or younger. *See, e.g.*, United States v. Nick, 604 F.2d 1199, 1202 (9th Cir. 1979) (victim-witness in case of child sexual abuse "could not have been subjected to cross-examination . . . by reason of his extremely tender years").

222. *See supra* text accompanying notes 10 to 44.

223. *See* Lloyd, *supra* note 12.

such conditions, the ability to consider a child's prior report of the incident may provide the trier of fact with necessary and highly probative evidence.

*Are Child Reports of Sexual Abuse Inherently "Reliable?"*

The criteria of reliability are two fold. The first aspect is whether child reports of abuse are inherently truthful. The second aspect is whether there are factors, other than truthfulness, which would enhance or mitigate the reliability of a child's out-of-court report of abuse. The question of truthfulness must be assessed in an historical context. For most of the twentieth century, both law and psychology institutionalized theories and practices which formally discounted reports of child sexual abuse. As noted, Wigmore was the most influential legal authority to assert that reports of sexual abuse were often false. In a scathing but scholarly law review article, Leigh Bienen reveals that Wigmore supported his own personal and prejudiced beliefs with questionable, inaccurate and sometimes purposely distorted "scientific evidence."[224] Despite modern evidence to the contrary, Wigmore's legacy of misinformation lives on.[225] Today, Wigmore's theories about both child reports of sexual abuse and the Confrontation Clause are disfavored.[226]

In the field of psychology, Freud is the most influential figure to have formally discounted reports of child sexual abuse. In his early psychoanalytic career, Freud believed his patients' reports of child sexual abuse. When he decided the reports could not be true, he was devestated. Only Freud himself can do justice to his own confused thinking:

> Influenced by Charcot's view of the traumatic origin of hysteria, one was readily inclined to accept as true and aetiologically significant the statements made by patients in which they ascribed their symptoms to passive sexual experiences in early childhood—broadly speaking, to seduction. When this aetiology broke down under its own improbability and under contradiction in definitely ascertainable circumstances, the result at first was helpless bewilderment. Analysis had led by the right paths back to these sexual traumas, and yet they were not true. Reality was lost from under one's feet. At that time I would have gladly given up the whole thing, just as my predecessor, Breur, had done when he made his unwelcome discovery. Perhaps I persevered only because I had no choice and could not then begin again at anything else.[227]

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224. Bienen, *supra* note 11.

225. This legacy is reflected in modern statutes requiring corroborative evidence in cases of child sexual abuse. *See* Lloyd, *supra* note 12.

226. *See supra* note 172 and accompanying text.

227. S. FREUD, THE HISTORY OF THE PSYCHOANALYTIC MOVEMENT 51-52 (1914).

Years later Freud commented:

> If the reader feels inclined to shake his head at my credulity, I cannot altogether blame him. . . . When, I was at last obliged to recognize that these scenes were only phantasies which my patients had made up or which I myself forced on them, I was for a time completely at a loss.[228]

Freud's solution, of course, was the Oedipal complex, one of the central tenets of psychoanalytic theory. Since that time, psychoanalytic theory has been used to attribute child reports of sexual abuse, not to reality, but to fantasy.

Today many mental health experts believe that Freud had discovered reality, a reality that was too difficult for him to accept.[229] Freud never reported a false accusation of incest. In addition, there is evidence that he purposely suppressed evidence of an actual incident in one of his most influential case studies.[230] However, psychoanalytic theory need not be discarded in order to maintain the inherent trustworthiness of child reports of sexual abuse. Childhood fantasy can take many forms, but it is bound by the child's cognitive limitations and psychological immaturity.[231] Oedipal fantasy could not account for the fact that child reports of sexual abuse often include vivid descriptions of penile erection, ejaculation, semen, anal intercourse, fellatio and other "adult" behaviors.[232] Child reports which include detailed accounts of sexual behavior are inherently more reliable than vague assertions which are congruent with a young child's way of perceiving and fantasizing about the world.

The foregoing discussion addresses the issue of unconscious fantasy but does not address the problem of conscious lying. Do children lie about such incidents of sexual abuse? Do they make false reports? The overwhelming opinion of mental health workers, social welfare workers, and police investigators is that children almost never make false reports.[233] Empirical studies (one which involved the use of a polygraph) confirm the

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228. S. FREUD, AN AUTOBIOGRAPHICAL STUDY 34 (1925).

229. F. RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN (1980); *Incest Hoax*, *supra* note 216. Peters, *Children Who Are Victims of Sexual Assault and the Psychology of Offenders*, 30 AM. J. PSYCHOTHERAPY 398, 402 (1976). *See generally* Beinen, *supra* note 11, at 237 nn. 4-7.

230. Peters, *supra* note 229, at 402.

231. RUSH, *supra* note 229, at 80-81; Lloyd, *supra* note 12, at 105-6; Peters, *supra* note 229, at 420.

232. Lloyd, *supra* note 12, at 105.

233. F. INBAU & J. REID, CRIMINAL INTERROGATIONS AND CONFESSIONAL 111 (1976); RUSH, *supra* note 229, at 156; *Incest Hoax*, supra note 216.

fact that false reports are extremely rare.[234] Studies also indicate that false denials or retractions by the victim are actually more common than false reports.[235] Of the few reported false accusations, the child is usually coaxed to lie by an adult and readily admits the lie upon direct questioning.[236]

The Washington statute, which establishes a hearsay exception for child reports of sexual abuse, applies only to children under ten years of age.[237] There is no empirical evidence to suggest that older children are more likely to make false reports, but there are some sound psychological reasons for establishing an age limit around ten years old. At this age, children are not physically or psychologically sexually developed, nor have they developed the cognitive facilities of adulthood. Children in the age range of seven to eleven are still in the concrete-operational stage of cognitive development.[238] Their thinking is often characterized by logical inconsistencies based on incapacities to use symbolic logic, manipulate logical categories and consider logical alternatives.[239] These skills are not fully developed until the child reaches the stage of formal-operational thought in early adolescence.[240] Arguably, effective cross-examination depends on the witness's ability to function at this more advanced stage of cognitive development.[241]

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234. *Incest Hoax*, *supra* note 216; Groth, *The Psychology of the Sexual Offender*, Workshop Presented By Psychological Associates of the Albemarle in Charlotte, N.C. (March 1980).

235. DeFrancis, Protecting the Child Victim of Sex Crimes Committed by Adults, American Humane Association (1969); *Incest Hoax*, *supra* note 216.

236. *Incest Hoax*, *supra* note 216, at 270.

237. *See supra* note 135 and accompanying text.

238. J. Flavell, Cognitive Development 61-100 (1977).

239. *Id. See generally* Melton, *Children's Competency*, *supra* note 32.

240. J. Flavell, *supra* note 238, at 101-12.

241. These theories of cognitive stages were developed by Jean Piaget, who also believed that children passed through different stages of moral development. J. Piaget, The Moral Development of the Child (1932). Lawrence Kohlberg, who has developed Piaget's theories of moral judgment, suggests children up to the age of nine are at the pre-conventional level of moral judgment which roughly corresponds to Piaget's stage of heteronomous morality. Kohlberg, *Moral Stages and Socialization: The Cognitive Development Approach*, Moral Development and Behavior: Theory Research and Social Issues (T. Lickona ed. 1976). Children at this stage are characterized by their egocentrism and their inability to effectively view social relations from the perspective of others. To lie effectively about being sexually abused in order to punish someone requires considerable cognitive skill which most young children do not have. This does not mean that children do not lie, but only that their ability to lie is limited by their egocentrism, cognitive functioning and social immaturity. Burton, *Honesty and Dishonesty*, Moral Development and Behavior: Theory, Research and Social Issues, (T. Lickona ed. 1976). As children grow older

One irony of these cognitive-developmental considerations is that the lack of the child's cognitive skills increases rather than decreases the inherent reliability of reports of sexual abuse. A second irony is that the child's hearsay report of sexual abuse may be more inherently reliable than the child's courtroom testimony under cross-examination. A child's testimony could be completely truthful but suffer from lapses of memory, incomplete details and even logical inconsistencies.[242] Trauma, guilt and fear resulting from testifying in an open courtroom and in the presence of the offender, may further reduce the child's ability to testify effectively. One leading commentator on psycholegal issues speculates: "[I]t is plausible that face-to-face confrontation by particularly vulnerable victims (like children) may actually diminish reliability of their testimony rather than enhance it. . . ."[243]

This brief review of the relevant psychological literature suggests that a child's out-of-court statements of sexual abuse are inherently reliable. False accusations are extremely rare; false denials and recantations are much more common. Psychoanalytic theories of incestuous fantasy do not detract from the inherent reliability of reports of sexual abuse. Limiting such new hearsay exceptions to children under ten or eleven years old may, however, provide an extra measure of reliability due to factors of emotional cognitive and sexual development. These same cognitive and emotional limitations may significantly detract from the child's ability to testify reliably and effectively. A child's out-of-court statement of abuse may be more reliable than the child's in-court testimony.

## VI. Summary and Conclusions

Legal intervention in response to child sexual abuse is often said to constitute a second victimization of the child. Reform efforts to protect child victims within the legal system include two recent proposals to admit into evidence a child's prior statements of sexual abuse. The first proposal would simply create a new hearsay exception for child reports of abuse. The second proposal would admit into evidence special videotaped interviews and depositions which, depending on the specific proposal, may or may not provide for full cross-examination and direct face-to-face confrontation. The present system of traditional

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they are capable of assuming the perspective of others to create more convincing lies and to use lies more cleverly to punish others.

242. C. Adams & J. Fays, No More Secrets 63 (1981); Melton, *Children's Competency*, *supra* note 29.

243. Melton, *Procedural Reforms*, *supra* note 3, at 189.

hearsay exceptions and modern residuals allows some flexibility for admitting a child's prior statements of sexual abuse. However, the existing exceptions to the hearsay rule do not adequately protect the child victim through the legal process

Today, attitudes toward societal intervention have shifted away from a punitive model which removed the child from the home, prosecuted the offender and destroyed the family. Progressive intervention models are based on temporary removal of the offender from the home, individual and family psychotherapy and ultimate reunification and strengthening of the family. However, offenders often rely on a strong system of denial and rationalization to avoid voluntary treatment. Coercive legal pressure, such as pre-trial diversion, is often necessary to initiate the offender's investment in treatment. Therefore, new hearsay exceptions which potentially facilitate prosecution should be a shared goal of the legal system and mental health community.

Statutes which establish new hearsay exceptions for a child's out-of-court statements of sexual abuse appear to be constitutionally sound. In fact, these statutes incorporate the necessity and reliability criteria of the leading Supreme Court cases which attempt to reconcile the hearsay doctrine and the Confrontation Clause. However, it remains unclear how courts will interpret the necessity and reliability criteria in cases of child sexual abuse. Specifically, it is unclear how far courts will go in recognizing new forms of "psychological unavailability" for victim-witnesses who are physically available to testify. It is also unclear how courts will assess the inherent reliability of newly legislated hearsay exceptions under present Confrontation Clause analysis.

Proposals to admit videotaped interviews and depositions into evidence may not receive a similar degree of constitutional support. While there is adequate precedent for taking depositions of traumatized victims, many proposals to protect child victims place some limits on the right to cross-examination and face-to-face confrontation. Such limitations are said to satisfy the necessity and reliability criteria which the Supreme Court uses to reconcile the Confrontation Clause with the hearsay doctrine. However, courts treat depositions differently from other forms of hearsay because of strong policy interests which favor live testimony, the presence of available witnesses, the right to face-to-face confrontation and other Confrontation Clause values.

Ironically, courts may be willing to uphold new hearsay exceptions for child reports of sexual abuse which provide for no

cross-examination and confrontation, while at the same time striking down new taped interview and deposition procedures which only minimally restrict the defendant's right to cross-examination and face-to-face confrontation. This irony has already been tested in the United States court of appeals.

One reason for this irony is the strict evidentiary approach which the Supreme Court takes to the Confrontation Clause. By relying on the keywords of necessity and reliability, the Court reduces all considerations of competing societal interests to evidentiary criteria which date back to the common law. In contrast, the Court balances first amendment rights against the compelling state interest in protecting child victims of sexual assault. While the first and sixth amendments may be said to protect different rights and require differential analysis, it is unlikely that common-law evidentiary criteria can resolve these subtle constitutional tensions.

For the present, the hearsay doctrine and the Confrontation Clause are reconciled by the criteria of necessity and reliability. The available psychological evidence, although incomplete, suggests that the newly proposed hearsay exceptions for child statements of sexual abuse are necessary and inherently reliable. Children are often psychologically or otherwise unavailable to testify in such cases. A child's out-of-court statements of sexual abuse are not only inherently reliable but may even be more reliable than the same child's in-court testimony. This would prove an exception to the most fundamental assumptions underlying the hearsay doctrine and Confrontation Clause, which after all, were formulated at a time when children were generally regarded as incompetent witnesses and when society denied the problem of child sexual abuse.

Although present Confrontation Clause analysis and present psychological theory leave many questions unanswered, there is sufficient constitutional support and psychological evidence to justify continued implementation of new hearsay exceptions and taped deposition procedures for a child's statements of sexual abuse. These new proposals will challenge the judicial system to reconcile the Confrontation Clause, the hearsay doctrine and competing societal interests. Perhaps these proposals will serve as a social experiment, testing the flexibility of modern Confrontation Clause analysis to allow for the progressive growth of the hearsay doctrine in response to newly identified social issues and our expanding knowledge of the human condition.

# A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases

The incidence of sexual abuse of young children has increased dramatically in recent years.[1] The crimes committed are predominantly nonviolent in nature[2] and almost always occur in secrecy, with the child usually being the only witness.[3] No particular age group is immune to sexual abuse,[4] nor are the offenders confined to any particular class of persons.[5] Indeed, more often than not, the offender is a parent, relative, or an acquaintance of the child.[6]

Detecting sex abuse, as well as convicting its perpetrators, is exceptionally difficult,[7] due to the lack of witnesses[8] and corroborative physical evidence,[9] and to the reluctance or inability of the victim to testify against the defend-

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1. The American Humane Association's national study of state child-protection statistics showed a 200% increase in the reporting of sexual abuse since 1976. By 1980, there were 25,000 reported cases of child sex abuse per year. Collins, Studies Find Sexual Abuse of Children is Widespread, N.Y. Times, May 13, 1982, at C1, col. 1, C10, col. 2.

These statistics may, in fact, understate the problem, for a substantial number of the cases are never reported. Either the child does not report the incident, see National Center on Child Abuse and Neglect, Child Sex Abuse: Incest, Assault and Sexual Exploitation 2 (1981); Landis, Experiences of 500 Children with Adult Sexual Deviation, 30 Psychiatric Q. Supp. 91, 99 (1956), or the parents refuse to go to the authorities, see Collins, supra, at C10, cols. 5–6.

Estimates of the actual number of sexual assaults have varied widely. The National Center on Child Abuse and Neglect estimated that more than 100,000 cases of sexual abuse occur annually. See National Center on Child Abuse and Neglect, supra, at 2. Other estimates have reached as high as 200,000 to 500,000 sexual assaults per year for female children only. See Schultz, The Child Sex Victim: Social, Psychological and Legal Perspectives, 52 Child Welfare 147, 148 (1973).

2. See Flammang, Interviewing Child Victims of Sex Offenders, *in* The Sexual Victimology of Youth 175, 177 (L. Schultz ed. 1980); MacFarlane, Sexual Abuse of Children, *in* The Victimization of Women 86, 87 (1978); Schultz, supra note 1, at 149.

3. See Stevens & Berliner, Special Techniques for Child Witnesses, *in* The Sexual Victimology of Youth 246, 248 (L. Schultz ed. 1980).

4. The ages of the victims range from early infancy (one or two months) to 17 or 18 years. Sgroi, Sexual Molestation of Children, Children Today, May-June 1975, at 18, 20.

5. See Collins, supra note 1, at C1, col. 1 (excerpt from an interview with Dr. Gene Abel, Director of the Sexual Behavior Clinic of the New York State Psychiatric Institute):

> For the most part parents have told their children to stay away from men who are wearing raincoats and carrying candy. . . . But none of our patients [sex offenders of children] wear raincoats and carry candy. They come from all walks of life and all socioeconomic categories, and they look just like the neighbor next door. They may even be the neighbor next door.

6. See D. Finkelhor, Sexually Victimized Children 73 (1979); MacFarlane, supra note 2, at 86; Sgroi, supra note 4, at 20; Stevens & Berliner, supra note 3, at 246.

7. In a 1969 study of 250 cases of child sex abuse that had been reported to New York City's protective services, less than one percent of the molesters were sent to jail. Collins, supra note 1, at C10, col. 5.

Only 50% of the sex offenders (238 men) in the Sexual Behavior Clinic at the New York State Psychiatric Institute had ever spent time in jail. These men had committed a total of 16,666 acts of child molestation, an average of 68.3 molestations per offender. Id. at C1, col. 1, C10, col. 1.

8. See Stevens & Berliner, supra note 3, at 248; infra notes 47–49 and accompanying text.

9. See MacFarlane, supra note 2, at 87, 88; Schultz, supra note 1, at 149; infra notes 44–46 and accompanying text.

ant.[10] Even when the child does appear in court and testifies, he or she is often met with skepticism and disbelief.[11] Consequently, to establish the guilt of the defendant, many prosecutors have tried to introduce the out-of-court statements of the victim into evidence through the testimony of witnesses who heard the statements.[12] Since the hearsay rule[13] generally prohibits the introduction of these statements, an exception to the rule is often sought.[14] Courts have used a variety of approaches in determining whether an exception should apply.

This Note argues that the various approaches that have been taken by the courts to child hearsay statements in sex abuse cases are unsatisfactory. Given the unusual circumstances attendant to child sex abuse and the special characteristics of its young victims, the rationale of the hearsay rule and its exceptions requires that an alternative approach be employed to assess the admissibility of child hearsay statements. The Note begins by examining the traditional bases of the hearsay rule and the underlying logic of its exceptions. After analyzing the need for and reliability of out-of-court statements by children in such cases, the Note reviews and then critiques the various ways courts have treated these hearsay declarations. The Note concludes that these approaches inadequately assess the probative value of child hearsay statements in sex abuse cases. Instead, it proposes the adoption of an analysis similar to that embodied in a recently enacted Washington statute. The statute admits a child's out-of-court declaration if the time, content, and circumstances of the statement provide sufficient indicia of reliability.[15]

## I. Background Law

### A. *The Hearsay Rule*

Hearsay consists of "[out-of-court] statement[s] . . . offered in evidence to prove the truth of the matter asserted."[16] Under traditional formulations of

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10. See Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, *in* The Sexual Victimology of Youth 187, 233 (L. Schultz ed. 1980); MacFarlane, supra note 2, at 99-100; infra notes 60-62 and accompanying text.

11. See Brown v. United States, 152 F.2d 138, 139 (D.C. Cir. 1945); Fitzgerald v. United States, 443 A.2d 1295, 1299 (D.C. 1982); Stevens & Berliner, supra note 3, at 252.

12. See, e.g., United States v. Nick, 604 F.2d 1199 (9th Cir. 1979) (federal government attempts to introduce testimony of child's mother as to statement made by child after allegedly being sodomized by his babysitter); State v. Boodry, 96 Ariz. 259, 394 P.2d 196 (1964) (state tried to introduce testimony of child's mother and neighbor as to statements made by the child after her alleged rape); infra notes 72-115, 123-35, 141-53 and accompanying text.

13. The hearsay rule prohibits the introduction into evidence of testimony or written evidence of a statement made out of court when the statement is being offered as an assertion to show the truth of the matters asserted therein. See E. Cleary, McCormick on Evidence 579-86 (2d ed. 1972) [hereinafter cited as McCormick].

14. See infra notes 72-115, 123-35, 141-53, and accompanying text.

15. The statute also requires that the hearing on admissibility be conducted outside the presence of the jury and either that the child testify at the proceeding or, if the child is unavailable, corroborative evidence of the act be provided. 1982 Wash. Legis. Serv. ch. 129, § 2 (West).

16. Fed. R. Evid. 801(c); accord McCormick, supra note 13, at 584. Such statements may be oral or written and may even incorporate nonverbal conduct if the conduct was intended to be an assertion. Fed. R. Evid. 801(a).

the hearsay rule, evidence concerning these statements is barred from use in court unless the original declarant testifies in court, where he may be cross-examined as to the grounds of his out-of-court assertion and as to his qualifications to make the assertion.[17]

The rule against admission of hearsay statements stems from the long-established belief that cross-examination is the best vehicle for discovering the truth and that the most reliable statements come from the witness stand.[18] By questioning in court the person who made the original statement, the trier of fact can detect and eliminate any inaccuracies in the witness's perception, memory, and narration of the event.[19] The opportunity to put the declarant under oath and to observe his or her demeanor is another traditional reason for requiring an appearance in court.[20]

### B. *Exceptions to the Hearsay Rule*

Despite the primacy attached to cross-examination, exceptions to the hearsay rule have long existed in evidentiary law.[21] The reasons for allowing hearsay to be used are twofold. First, reliability of certain hearsay statements can be assured even without cross-examination of the original declarant.[22] Trustworthiness can be inferred from the fact that the statement was made under or subjected to certain conditions that insure a degree of reliability comparable to that found in a cross-examined statement.[23] Moreover, the recurring need for hearsay evidence constitutes another justification for allow-

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17. See Fed. R. Evid. art. VIII advisory committee note; 5 Wigmore, Evidence in Trials at Common Law 12 (J. Chadbourn rev. 1974) [hereinafter cited as 5 Wigmore]; McCormick, supra note 13, at §§ 579-81.

18. See Ohio v. Roberts, 448 U.S. 56, 64-65 (1980); California v. Green, 399 U.S. 149, 159 (1970); Fed. R. Evid. art. VIII advisory committee note; 5 Wigmore, supra note 17, at 32 (cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth.").

19. See G. Lilly, An Introduction to the Law of Evidence 159 (1978); McCormick, supra note 13, at 581-82.

20. See California v. Green, 399 U.S. 149, 158 (1970); McCormick, supra note 13, at 582. But see 5 Wigmore, supra note 17, at 10 (oath is merely incidental to cross-examination and is not an essential justification for the hearsay rule).

21. See 5 Wigmore, supra note 17, at 158.

22. See id. at 252:

> There are many situations in which it can be easily seen that such a required test [of cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a skeptical caution would look upon it as trustworthy . . . it would be pedantic to insist on a test whose chief object is already secured.

See also Fed. R. Evid. art. VIII advisory committee note ("Common sense tells that much evidence which is not given under . . . [traditionally required] conditions may be inherently superior to much that is.").

23. See 4 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 800[01], at 800-11 (1981 & Cum. Supp. 1982) [hereinafter cited as Weinstein's Evidence] (credibility of declarant depends upon the opportunity declarant had to observe event, circumstances surrounding the statement, and declarant's relationship to the case; excluding statements merely because they have not been given in court cripples judicial process).

ing its use in contravention of the hearsay rule.[24] Such need is usually found in situations where the declarant is dead or otherwise unavailable for cross-examination,[25] or where the statements contain unique evidentiary value, unobtainable from other sources.[26]

These two principles, trustworthiness and necessity, thus serve as the underlying rationales for exceptions to the hearsay rule.[27] In applying these two principles, judges over time have set aside certain classes of hearsay statements that possess similar or identical guarantees of trustworthiness.[28] The class-exception system constitutes the general framework under which hearsay statements are evaluated for their credibility, although in many jurisdictions the trial judge retains the power to admit evidence that falls outside a specific class exception but nevertheless is still reliable and necessary.[29] Today, the class-exception system exists in statutory form at the federal level[30] and in some states,[31] as well as in common law form in others.[32]

### C. *Constitutional Constraints on the Use of Hearsay Statements*

Despite the widespread acceptance of hearsay rule exceptions, their use is constitutionally restricted. The sixth amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[33] This provision has never been read to exclude the

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24. See Fed. R. Evid. art. VIII advisory committee note ("[W]hen the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without.").

25. 5 Wigmore, supra note 17, at 253.

26. Id.

27. See Fed. R. Evid. 803 & 804 advisory committee notes; Cornelius v. State, 12 Ark. 782, 804 (1852); Garwood v. Dennis, 4 Binn. 314, 328 (Pa. 1811).

28. Fed. R. Evid. art. VIII advisory committee note; 5 Wigmore, supra note 17, at 253-55 ("the exceptions have been established casually in the light of practical experience, and with little or no effort . . . at generalization or comprehensive planning. The courts have had in mind merely to sanction certain situations as a sufficient guarantee of trustworthiness.").

29. See, e.g., Fed. R. Evid. 803(24) & 804(b)(5); Ariz. R. Evid. 803(24) & 804(5)(6); S.D. R. Evid. 19-16-35; Wyo. R. Evid. 803(24), 804(b)(6). But see Note, Residual Exception to the Hearsay Rule, 10 Loy. U. Chi. L.J. 611, 613-14 (1979) (Illinois retains a rigid common law system of hearsay exceptions; evaluation of evidence is restricted to the framework of these established exceptions.).

30. The Federal Rules of Evidence contain 24 exceptions to the hearsay rule that can be invoked regardless of whether the declarant is available for cross-examination. These exceptions include present sense impressions, recorded recollections, records of regularly conducted activity, and public records and reports. See Fed. R. Evid. 803. There are five additional exceptions in the Federal Rules that can be used only if the declarant is unavailable. These include former testimony and statements against interest. See Fed. R. Evid. 804.

31. See, e.g., Me. R. Evid.; Mont. R. Evid.; Okla. Stat. Ann. tit. 12 §§ 2803(24), 2804(5) (1980); Wyo. R. Evid. 803(24) & 804(b)(6). Approximately 22 states have statutory rules of evidence similar to the Federal Rules; the remaining states possess common law rules of evidence. See 4 Weinstein's Evidence, supra note 23, art. VIII.

32. See, e.g., People v. Robinson, 73 Ill. 2d 192, 383 N.E.2d 164 (1978) (court applies excited utterance exception); People v. Egan, 78 A.D.2d 34, 434 N.Y.S.2d 55 (1980) (court admits statements as declarations against penal interest). State hearsay exceptions, both statutory and common law, closely parallel the federal statutory exceptions.

33. U.S. Const. amend. VI.



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34. See Ohio v. Rob.
(1895).
35. See Mancusi v.
36. California v. Gr
37. Id. at 158-61.
38. Ohio v. Roberts.
39. Id.
40. See supra notes
41. See infra notes 4
42. See infra notes 5
43. See Joint Hearin
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1982) (child's hearsay sta
mony of Lucy Berliner,
on file at the office of the
44-51 and accompanying

admission of all hearsay evidence,[34] yet it has nonetheless placed significant limits on the use of such evidence.[35]

Although the Supreme Court has been reluctant to lay down principles that would determine the constitutionality of all hearsay exceptions under the confrontation clause,[36] admitting a declarant's out-of-court statements in situations where the declarant is available as a witness probably does not violate the confrontation clause.[37] However, when the declarant is not testifying and is unavailable to be cross-examined, the use of hearsay exceptions must fulfill certain constitutional requirements. In this context, to be admitted, the hearsay statement must either fall within a firmly rooted hearsay exception[38] or, if the statement does not qualify for any exception, present particularized guarantees of trustworthiness.[39]

## II. Application of Hearsay Principles to Children's Hearsay Statements in Sex Abuse Cases

The principles underlying the hearsay rule require that an out-of-court statement be admissible only if the requisite need and reliability can be shown.[40] Because of the unique circumstances of child sex abuse, hearsay statements of the victim are especially necessary to establish the guilt of the defendant.[41] In addition, the reliability of such statements must be evaluated with careful attention to these circumstances. Even though out-of-court declarations by the victim may not be inherently reliable, they are, at the very least, as reliable as his or her in-court statements, and moreover, trustworthiness can ultimately be determined by looking to circumstantial indicia of reliability.[42]

### A. *Need for Children's Hearsay Statements*

The unusually compelling need for children's hearsay statements in sex abuse cases is demonstrated primarily by the fact that the statements often constitute the only proof of the crime.[43] Physical corroboration is rare, for the

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34. See Ohio v. Roberts, 448 U.S. 56, 64 (1980); Mattox v. United States, 156 U.S. 237, 243 (1895).
35. See Mancusi v. Stubbs, 408 U.S. 204 (1972); Lilly, supra note 19, at 275.
36. California v. Green, 399 U.S. 149, 162 (1970).
37. Id. at 158-61.
38. Ohio v. Roberts, 448 U.S. 56, 66 (1980).
39. Id.
40. See supra notes 16-39 and accompanying text.
41. See infra notes 43-51 and accompanying text.
42. See infra notes 52-71, 108-15 and accompanying text.
43. See Joint Hearings on SB 4461 before the Washington State Senate Judiciary Comm. and Washington State House Ethics, Law & Justice Comm., 47th Leg., 1982 sess. 23 (January 28, 1982) (child's hearsay statements are usually the only evidence in a child molesting case) (testimony of Lucy Berliner, social worker, Sexual Assault Center in Seattle, Washington) (transcript on file at the office of the Columbia Law Review) [hereinafter cited as Joint Hearings]; infra notes 44-51 and accompanying text.

crimes committed are predominantly nonviolent in nature.[44] Most crimes consist of petting, exhibitionism, fondling, and oral copulation, activities that do not involve forceful physical contact.[45] The lack of physical corroboration can also be attributed to the fact that most children, for a variety of reasons, do not resist their attackers and succumb easily.[46]

In addition, witnesses other than the victim and perpetrator are rare; people simply do not molest children in front of others.[47] Most often, the offender is a relative or close acquaintance of the child[48] who is likely to have many opportunities to be alone with the child.[49]

Finally, since a child's memory fades rapidly over time, the account given closer in time to the actual event is the one more likely to be accurate.[50] The

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44. See Flammang, supra note 2, at 177:

> Types of offenses run the totality of the continuum of the human sexual experience. The offenses include homosexuality, sodomy, incest, normally accepted acts of intercourse, various methods of oral copulation, and numerous incidents of sex play. The latter is most frequently encountered, due to the physical differences between the victim and the adult offender and the pain that is likely to occur during the act of penetration.

See also MacFarlane, supra note 2, at 87; Schultz, supra note 1, at 149; Joint Hearings, supra note 43, at 22-23 (testimony of Lucy Berliner, social worker, Sexual Assault Center in Seattle, Washington) (child sex abuse basically consists of nonviolent molestation).

45. See, e.g., Haley v. State, 157 Tex. Crim. 150, 151, 247 S.W.2d 400, 401 (1952); Flammang, supra note 2, at 177.

46. See MacFarlane, supra note 2, at 88:

> Children are accessible targets for a number of reasons. They have been conditioned to comply with authority; they are in subordinate positions and are fearful of threats; they are intensely curious; they are susceptible to bribes and the promise of reward. In addition, children are often naive with regard to social norms and values, and . . . may respond willingly to intimate and gentle contact which they may associate with feelings of being loved . . . . Thus, the use of physical violence is rare because it isn't necessary; children by their very nature make ideal victims of sexual exploitation.

> Even when physical injury is inflicted, there is a chance that it may not be diagnosed as related to sex abuse due to the unwillingness of many parents and physicians to entertain the possibility that a child has been sexually assaulted.

> Recognition of sexual molestation in a child is entirely dependent on the individual's inherent willingness to entertain the possibility that the condition may exist. Unfortunately, willingness to consider diagnosis of suspected child molestation frequently seems to vary in inverse proportion to the individual's level of training . . . . The lack of preparation and willingness of many physicians to assist patients with sexual problems in general has often been noted. When the patient is a child, these deficiencies are extremely serious.

Sgroi, Sexual Molestation of Children, supra note 4, at 21; see also R. Brant & V. Tisza, The Sexually Misused Child, *in* The Sexual Victimology of Youth 46 (L. Schultz ed. 1980).

47. See Joint Hearings, supra note 43, at 23 (testimony of Lucy Berliner, social worker, Sexual Assault Center in Seattle, Washington).

48. See Finkelhor, supra note 6, at 73; MacFarlane, supra note 2, at 86; Sgroi, supra note 4, at 20; Stevens & Berliner, supra note 3, at 246; Joint Hearings, supra note 43, at 21 (testimony of Steve Adkins, detective, Special Assault Section of King County Police Department) (in King County, Washington, stepfathers constitute the highest percentage of sex offenders).

49. See United States v. Nick, 604 F.2d 1199, 1201 (9th Cir. 1979) (babysitter sexually assaults three-year-old victim in privacy of locked bedroom); State v. Ritchey, 107 Ariz. 552, 553-54, 490 P.2d 558, 559-60 (1971) (family friend molests two sisters while on an outing); Oldham v. State, 167 Tex. Crim. 644, 646, 322 S.W.2d 616, 618 (1959) (neighbor in his own house molests child who had come to play with neighbor's dogs).

50. See A.D. Yarmey, The Psychology of Eyewitness Testimony 204-05 (1979) (children possess inferior long-term and short-term memories when compared to adults); Stevens & Berliner, supra note 3, at 254 (child's memory of details blurs quickly). But see Altemeyer, Fulton & Berney, Long-Term Memory Improvement: Confirmation of a Finding by Piaget, 40 Child

child's inability to recollect details is especially significant in light of the great lapse of time between the commission of the crime and the trial.[51]

### B. *Reliability of Children's Hearsay Statements*

Whether out-of-court statements by children are intrinsically reliable is questionable. Some courts and commentators hold that such statements, standing alone, are trustworthy. Two justifications are commonly offered. First, it is highly unlikely that children persist in lying to their parents or other figures of authority about sex abuse.[52] Second, children do not have enough knowledge about sexual matters to lie about them.[53] In contrast, other courts and commentators, focusing on the well-established tendency of children to fantasize and tell stories, have concluded that these statements are not inherently reliable.[54]

Nevertheless, in child sex abuse cases, the victim's out-of-court statements may, in fact, be more trustworthy than his or her in-court testimony. Requiring a child victim to testify in a sex abuse case adversely affects his or her perception[55] and memory[56] and yields poor and unconvincing evidence. The courtroom experience is extremely traumatic and stressful for most children,[57] despite the steps taken to alleviate this problem.[58] Children are fre-

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Dev. 845 (1969) (study finds that memories of kindergarten children improved over a period of six months).

51. See United States v. Jones, 477 F.2d 1213 (D.C. Cir. 1973) (eight- to nine-month lapse between incident and trial); People v. Debreczeny, 74 Mich. App. 371, 253 N.W.2d 776 (1977) (20-month lapse between date of defendant's arrest and commencement of trial); Stevens & Berliner, supra note 3, at 248 (average time for adjudication of child sex abuse cases in Seattle is six months).

52. Stevens & Berliner, supra note 3, at 250.

53. See Wold v. State, 57 Wis. 2d 344, 357–58, 204 N.W.2d 482, 491 (1973); Williams v. State, 145 Tex. Crim. 536, 549, 170 S.W.2d 482, 490 (1943). See also Flammang, supra note 2, at 184 (details about sexual acts are not within the common experiential knowledge of a child).

54.

> A woman's uncorroborated tale of a sex offense is not more reliable than a man's. A young child's is far less reliable. "It is well recognized that children are more highly suggestible than adults. Sexual activity, with the aura of mystery that adults create about it, confuses and fascinates them. Moreover they have, of course, no real understanding of the serious consequences of the charges they make . . . ."

Wilson v. United States, 271 F.2d 492, 492–93 (D.C. Cir. 1959) (citing Guttmacher & Weihofen, Psychiatry & the Law 374 (1952)); accord United States v. Wiley, 492 F.2d 547, 550 (D.C. Cir. 1973); Brown v. United States, 152 F.2d 138, 139 (D.C. Cir. 1945).

55. See infra notes 57–65 and accompanying text; cf. Yarmey, supra note 50, at 208–09 (citing 1977 study that found that children are adversely affected by the stress inherent in making identifications from lineups, in contrast to identifications made from colored slides; 12% accuracy compared to 29% accuracy).

56. Live testimony thus exacerbates a child's loss of memory over time. See supra note 50 and accompanying text.

57. See Joint Hearings, supra note 43, at 24 (testimony of Lucy Berliner, social worker, Sexual Assault Center in Seattle, Washington) (child froze in court despite pretrial confidence; testimony disjointed and jumbled); Libai, supra note 10, at 194–95 (description of "legal process trauma" experienced by children); MacFarlane, supra note 2, at 99; Stevens & Berliner, supra note 3, at 254–55.

58. Some courts, recognizing the trauma exerted on the child, have refused to require the child to testify in certain situations. See State v. Boodry, 96 Ariz. 259, 264–65, 394 P.2d 196, 200,

quently subjected to long and extended series of questions and to hostile attacks on their credibility.[59] The stress is intensified if the victim must face the accused again,[60] or if he or she must testify against a close relative,[61] a situation that often occurs in sex abuse cases.[62] Under these circumstances, children, if they reply at all, often give confused and inaccurate answers.[63] Children are susceptible to leading questions[64] and often tailor their replies to appease the examining attorney.[65]

Consequently, in light of the unusual need for child hearsay statements in sex abuse cases,[66] as well as their potentially superior trustworthiness to in-court testimony,[67] the traditional reasons for barring use of such hearsay statements[68] become less compelling. If circumstantial guarantees of trustworthiness are present, the out-of-court declaration should be admitted.[69] Any

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cert. denied, 379 U.S. 949 (1964). But see Ketcham v. State, 240 Ind. 107, 113, 162 N.E.2d 247, 249-50 (1959) ("[T]he delicacies of the situation should not be permitted to outweigh the fact that a man's liberty and reputable life is at stake. The consequential embarrassment is a small price to pay in return for a showing of the witness' understanding of the details."; quoting Riggs v. State, 235 Ind. 499, 503, 135 N.E.2d 247, 249 (1956)).

59. See Schultz, supra note 1, at 150; Stevens & Berliner, supra note 3, at 255. See also State v. Berry, 101 Ariz. 310, 314, 419 P.2d 337, 341 (1966) (noting defense counsel's vigorous attempts to extract inconsistencies in six-year-old child's testimony by use of calendar dates; court finds no fatal variance between charge set forth and evidence at trial).

60. See Joint Hearings, supra note 43, at 24 (testimony of Lucy Berliner, social worker, Sexual Assault Center in Seattle, Washington) (speaker suggests that judges should allow children to sit away from the defendant to lessen courtroom trauma).

61.

> This author will never forget the look on the face of a 9-year-old incest victim when her father was brought into the courtroom with chains and handcuffs around his hands and waist. With support and reassurance from concerned professionals and family members, she had, up until that point, coped remarkably well with the rigors of the judicial process. Her only comment before she withdrew into a spasmodic, twitching episode . . . was "I did *that* to my Daddy?"

MacFarlane, supra note 2, at 99.

62. See, e.g., State v. Duncan, 53 Ohio St. 2d 215, 216, 373 N.E.2d 1234, 1235 (1978) (stepfather); State v. Boodry, 96 Ariz. 259, 261, 394 P.2d 196, 197, cert. denied 379 U.S. 949 (1964) (father); People v. Baker, 251 Mich. 322, 323, 232 N.W. 381, 382 (1930) (father).

63. Joint Hearings, supra note 43, at 8-9 (testimony of Mary Kay Barbieri, Chief, Criminal Division, King County Prosecutor's Office) (child's testimony is often confused, disjointed and punctuated by long, painful silences).

64. Yarmey, supra note 50, at 200 (children are afraid of authority and will want to please adults by giving the "correct" answer).

65. See McCormick, supra note 16, at 10; Yarmey, supra note 50, at 213 (citing studies showing children's sensitive reactions to suggestive questions).

66. See supra notes 43-51 and accompanying text.

67. See supra notes 55-65 and accompanying text.

68. See supra notes 16-20 and accompanying text.

69. See infra notes 108-15 and accompanying text. In examining the underlying rationale for each of the established exceptions to the hearsay rule, it can be argued that the compelling need for children's hearsay statements, alone, justifies their admission. See 5 Wigmore, supra note 17, at 254:

> These two principles—necessity and trustworthiness—are only imperfectly carried out in the detailed rules under the exceptions . . . . The two principles are not applied with equal strictness in every exception; sometimes one, sometimes the other, has been chiefly in mind. In one or two instances one of them is practically lacking.

prejudice to the defendant caused by attempts to introduce unreliable child hearsay statements[70] could be avoided by requiring the judge to make the evidentiary ruling outside the presence of the jury.[71]

## III. Judicial Approaches to the Problem of Child Hearsay Statements in Sex Abuse Cases

Courts, in practice, have evaluated and admitted child hearsay statements using a variety of approaches and exceptions to the hearsay rule. For the most part, these judicial approaches have not properly dealt with the unique circumstances surrounding child sex abuse.

### A. *Spontaneous Exclamation Exception*

1. *Description.* The hearsay statements of child victims of sex crimes have almost uniformly been handled under the spontaneous exclamation exception to the hearsay rule.[72] The underlying rationale of the exception is that under certain circumstances extreme excitement or shock may still the declarant's capacity to reflect and contrive.[73] Any statement arising during this

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> In a trial for sexual assault, a child's out of court testimony is often the sole and crucial evidence the state has. The issue usually arises before a jury so that the witness is led up to the point of testifying concerning hearsay statements. Then objection is interposed by defense counsel. The trial judge is faced with a situation where so much of the foundation has already been presented to a jury that nothing will remove the impact of the witness' testimony and the inferences to be drawn therefrom.

Anderson, Children's Out-of-Court Statements Under Rule 908.03 of the Wisconsin Rules of Evidence, 47 Wisc. Bar. Bull. 47, 54 (1974).

71. The Federal Rules of Evidence state that evidentiary rulings should be made outside the presence of the jury "when the interests of justice require or, when an accused is a witness, if he so requests." Fed. R. Evid. 104(c); see also Fed. R. Evid. 103(c) ("In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury."). Many states have similar provisions. See, e.g., S.D. Codified Laws Ann., § 19-9-9 (verbatim version of Fed. R. Evid. 104(c)); Wyo. R. Evid. 104(c) (same).

In light of the strong societal feelings against child sex offenders, a hearing out of the presence of the jury may well indeed be essential to the protection of the defendant's rights. See Slough & Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325, 333-34 (1956):

> One need not display an imposing list of statistics to indicate that community feelings everywhere are strong against sex offenders. Murderers and thieves may be evil persons, but in common parlance they are not degenerate or perverted, and their crimes are not unnatural and detestable. In the eyes of the layman, the normal person may kill or steal, but only the queer and the abnormal will stoop to the hoidinous crimes of incest, sodomy, and rape. Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.

See also People v. Burton, 55 Cal. 2d 328, 340-41, 359 P.2d 433, 11 Cal. Rptr. 65, 69 (1961) (court must be wary of jury's tendency to be easily swayed by improper evidence in sexual assault cases); Anderson, supra note 70, at 54 (recommending that rulings on child hearsay statements in sex abuse cases be made outside the hearing of the jury).

72. The author has found only four states that have looked beyond the spontaneous declaration exception: Michigan, Wisconsin, Washington and Kansas. See infra notes 123-35, 141-53, 164-65, 189 and accompanying text.

73. See Lancaster v. People, 200 Colo. 448, 615 P.2d 720, 722 (1980); State v. Messamore, 2 Hawaii App. 643, 639 P.2d 413, 418 (1982); Fed. R. Evid. 803(2) advisory committee note; 6 J.

period is thus assumed to be free of conscious fabrication and is considered a sincere and trustworthy response.[74] The exception also entails an element of necessity. Once the condition of shock is over, subsequent utterances by the declarant may not possess the same superior assurance of reliability due to the declarant's regained capability to reflect and distort.[75]

The use of the spontaneous exclamation exception in child sex abuse cases is virtually indistinguishable from its use in cases involving adults. First, there must be a sufficiently startling occurrence that produces, or is likely to produce, the requisite shock or nervous excitement in the child declarant.[76] Second, the resultant shock or nervous excitement must affect the child at the time the statement is made.[77] Although this requirement has been phrased in a variety of ways, all interpretations emphasize the importance of the absence of "reasoned reflection" and premeditation.[78] Finally, the courts have required that the time lapse between the incident and the statement be relatively brief.[79]

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Wigmore, Evidence in Trials at Common Law 195 (J. Chadbourn rev. 1976) [hereinafter cited as 6 Wigmore]. The spontaneous exclamation exception is also known as the "excited utterance," see Fed. R. Evid. 803(2), or "res gestae" exception. See Robinson v. State, 222 Ga. 123, 129, 208 S.E.2d 210, 214-15 (1974); Oldham v. State, 167 Tex. Crim. 644, 646-47, 322 S.W.2d 616, 618-19 (1959).

74. See supra note 73; Harnish v. State, 9 Md. App. 546, 549, 266 A.2d 364, 365 (1970) ("[T]he basis for the admission of declarations under the *res gestae* rule is the belief that spontaneous and instinctive utterances, made without opportunity or time for reflection or deliberation, are more likely to produce a true and accurate picture of the transaction or event . . . .").

75. See 6 Wigmore, supra note 73, at 199 (the superior trustworthiness of these extrajudicial statements creates a necessity of resorting to them for unbiased testimony).

76. See State v. Ritchey, 107 Ariz. 552, 555, 490 P.2d 558, 561 (1971) (exception requires a "startling event"); People v. Orduno, 80 Cal. App. 3d 738, 746, 145 Cal. Rptr. 806, 810 (1978) (there must be "some occurrence startling enough to produce nervous excitement and render the utterance spontaneous and unreflecting"), cert. denied, 439 U.S. 1074 (1979). Most courts assume, however, that the alleged sexual assault constitutes such an occurrence, especially for a young child. See People v. Miller, 58 Ill. App. 3d 156, 161, 373 N.E.2d 1077, 1080 (1978).

77. Compare People v. Stewart, 39 Colo. App. 142, 145, 568 P.2d 65, 68 (1977) (child was found to be still in a state of shock when she reported incident to the police), and Wheeler v. United States, 211 F.2d 19, 24 (D.C. Cir. 1953) (sufficient evidence existed to show that child was still highly distraught and in shock when she spoke), cert. denied, 347 U.S. 1019 (1954), with Ketcham v. State, 240 Ind. 107, 112, 162 N.E.2d 247, 249 (1959) (utterance was not made under "uncontrolled domination of the senses"; story was reluctantly drawn out by questions).

78. See Bass v. State, 375 So.2d 540, 543 (Ala. Crim. App. 1979) (statement must be "the reflex product of the immediate sensual impressions, unaided by retrospective mental action") (quoting McElroy's Ala. Evid. § 265.01(11) (1977)); People v. Orduno, 80 Cal. App. 3d 738, 746, 145 Cal. Rptr. 806, 810 (1978) (utterance must be made "while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance"), cert. denied, 439 U.S. 1074 (1979); Ketcham v. State, 240 Ind. 107, 112, 162 N.E.2d 247, 249 (1959) (utterance must be made under "the immediate and uncontrolled domination of the senses"); Oldham v. State, 167 Tex. Crim. 644, 647, 322 S.W.2d 616, 619 (1959) (declarations must be "the natural and spontaneous outgrowth of the main fact and must exclude the idea of premeditation").

Some courts in older cases drew a line between statements given in response to questions and statements given without prompting. See Smith v. United States, 215 F.2d 682, 683 (D.C. Cir. 1954); Ketcham v. State, 240 Ind. 107, 112, 162 N.E.2d 247, 249 (1959). Recent decisions, however, have not found the distinction compelling. See Fitzgerald v. United States, 443 A.2d 1295, 1304 (D.C. 1982).

79. See State v. Ritchey, 107 Ariz. 552, 555-56, 490 P.2d 558, 561-62 (1971).

In applying these standards, several courts have barred the introduction of narratives by

This requirement, in essence, is merely an additional assurance that the statements have been made spontaneously, before the child has had time to contrive and misrepresent.[80]

In *State v. Boodry*[81] and *People v. Miller*,[82] the children's statements were admitted under the spontaneous exclamation exception. Both courts found that the sexual acts committed constituted sufficiently startling events[83] and that the children spoke spontaneously and without fabrication within minutes of the alleged assault.[84] By contrast, in *Ketcham v. State*,[85] a child's hearsay statement was excluded for lack of spontaneity.[86] This finding was supported by the fact that the child did not report the incident until two hours after the alleged attack and had to be repeatedly questioned in order to bring out the full story.[87]

2. *Inadequacy of Spontaneous Exclamation Exception in Child Sex Abuse Cases.* The analytic framework of the spontaneous exclamation exception in child sex abuse cases and the exception's criteria of trustworthiness are built on the premise that the declarant has the psychology, behavior, and experience of an adult and reacts accordingly. Invocation of the exception in this context assumes that the rationale, criteria, and application of the exception are identical for the statements of both children and adults.[88] This view, however, is unfounded. By treating child declarants as adults, the exception fails to take into account the special circumstances surrounding child sex

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children, stating that such relation of past events does not contain the requisite spontaneity). See Brown v. United States, 152 F.2d 138, 139 (D.C. Cir. 1945); State v. Shambo, 133 Mont. 305, 310, 322 P.2d 657, 660 (1958). But see Comment, Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana, 29 La. L. Rev. 661, 669 (1969) (arguing that form of statement is irrelevant).

80. See 6 Wigmore, supra note 73, at 202-05. Since the crucial element that buttresses the reliability of such declarations is their spontaneity, the authorities and the case law are concerned that the time span between the event and the making of the statement be very short. State v. Messamore, 2 Hawaii App. 643, 639 P.2d 413, 418 (1982). Generally, courts have not applied this requirement strictly, see Beausoliel v. United States, 107 F.2d 292, 295 (D.C. Cir. 1939); Williams v. State, 145 Tex. Crim. 536, 548-49, 170 S.W.2d 482, 490 (1943), but most are still wary of admitting statements made after a significant delay without a special showing that the child was still under emotional stress. See State v. Wilson, 20 Or. App. 553, 559-60, 532 P.2d 825, 828 (1975) (event producing excited state of declarant was ongoing; victim fled from father and told first person she encountered what had happened); State v. Pace, 301 So. 2d 323, 326 (La. 1974) (child was in company of defendant until she returned home); Haley v. State, 157 Tex. Crim. 150, 151-52, 247 S.W.2d 400, 401 (1952) (defendant remained in child's home until the following morning).

81. 96 Ariz. 259, 394 P.2d 196, cert. denied, 379 U.S. 949 (1964).

82. 58 Ill. App. 3d 156, 373 N.E.2d 1077 (1978).

83. Id. at 161, 373 N.E.2d at 1080; State v. Boodry, 96 Ariz. 259, 264-65, 394 P.2d 196, 200, cert. denied, 379 U.S. 949 (1964).

84. *Boodry*, 96 Ariz. at 264-65, 394 P.2d at 200; *Miller*, 58 Ill. App. at 160-61, 373 N.E.2d at 1080.

85. 240 Ind. 107, 162 N.E.2d 247 (1959).

86. Id. at 112, 162 N.E.2d at 249.

87. Id. at 109, 112, 162 N.E.2d at 248, 249.

88. See supra notes 72-87 and accompanying text.

abuse.[89] It ignores the unusual need for child hearsay statements and, in addition, fails to analyze properly their reliability.[90]

The major weakness of the exception in this context stems from its undue reliance on spontaneity as an indicator of trustworthiness, to the exclusion of other equally valid indicia of reliability.[91] This emphasis on spontaneity is improper for two reasons. First, most children do not view a sexual episode as shocking[92] or even as particularly unusual.[93] Children thus often do not recount the event with the shock or emotion required under the exception. Children are simply not as highly sexualized or moralized as adults. They may not know what has happened to them is wrong.[94] This may be especially true if the child has been involved in an incestuous relationship. A parental imprimatur on the entire situation may often cause the child to view everything as normal.[95] A sexual incident may not be traumatic for other reasons as well. Often, the victims themselves are searching for warmth and affection. "For some, it represents the first time they experience what they perceive to be recognition or special attention from the parent or parent figure."[96] Sexual relationships of substantial duration between children and adults are not uncommon.[97]

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89. See supra notes 43–65 and accompanying text.

90. Id.

91. See infra notes 108–15 and accompanying text.

92. See Finkelhor, supra note 6, at 65 (only 26% of women assaulted as children surveyed felt shock; 20% felt surprised; 8% remember feeling pleasure); Landis, supra note 1, at 98 (only 12.9% of men and 25.3% of women surveyed viewed experience as shocking); Schultz, supra note 1, at 149.

93. T. McCahill, L. Meyer & A. Fischman, The Aftermath of Rape 44 (1979) ("In many cases, the nature of the event (or events) is merely confusing. Whereas the event is disturbing to the victim, it is perhaps no more disturbing than so many other aspects of a child's life.").

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> [C]hildren have only a dim sense of adult sexuality. What may seem like a horrible violation of social taboos from an adult perspective need not be so to a child. A sexual experience with an adult may be something unusual, vaguely unpleasant, even traumatic at the moment, but not a horror story. Most children's sexual experiences involve encounters with fondlers and exhibitionists, . . . and "it is difficult to understand why a child, except for its cultural conditioning, should be disturbed at having its genitals touched, or disturbed at seeing the genitals of other persons."

Finkelhor, supra note 6, at 31, quoting A. Kinsey, Sexual Behavior in the Human Female [2] (1953). See also Joint Hearings, supra note 43, at 23 (testimony of Lucy Berliner, social worker, Sexual Assault Center in Seattle, Washington) (children act normally because they are not taught what child molesting is).

95. See People v. Taylor, 66 Mich. App. 456, 460, 239 N.W.2d 627, 629 (1976):

> She [the victim] testified further that she never told anyone because her father said that "it wouldn't be right" to tell, and that she felt that "it was private" and thought that "he could get in trouble." In her words: "Because, you know, I mean he never told me it was really wrong, because he was my father and everything."

See also Joint Hearings, supra note 43, at 25 (testimony of Brian Leavitt) (testifying witness was raped and molested repeatedly by stepfather; did not discover such behavior was wrong until sex education teacher told him).

96. MacFarlane, supra note 2, at 88–89.

97. See People v. Taylor, 66 Mich. App. 456, 457, 239 N.W.2d 627, 628 (1976) (father had sexual relations with daughter for four years on a regular basis); Joint Hearings, supra note 43, at 25 (testimony of Brian Leavitt) (testifying witness was raped and molested by stepfather for over one-and-one-half years); Finkelhor, supra note 6, at 3; Schultz, supra note 1, at 149–50.

This childhood perspective on sexual experiences naturally does not produce the shock or excitement that the law presumes to exist after such an event. Quite often, the incident is related as part of the day's activities without any indication from the child that it was traumatic or unusual. For example, in *Brown v. United States*[98] the three-year-old victim calmly reported her assault in school that day during the course of normal dinnertime conversation. The statement was subsequently excluded for lack of spontaneity.[99]

Second, a significant delay frequently precedes the child's statement, thereby violating the time requirement of the spontaneous exclamation exception.[100] Even when a child is aware of the nature of his or her assault, a report of the event may still not be instantly forthcoming.[101] This delay may be caused by a variety of factors: the victim's fears of not being believed,[102] feelings of confusion and guilt,[103] efforts to forget,[104] and threats against the victim by the defendant.[105] Consequently, a child often keeps silent until something compels him or her to relate what has happened. For example, in one case[106] the five-year-old victim broke silence about his prior sexual assault to prevent being sent to the defendant's house again.[107]

The spontaneous exclamation exception thus unnecessarily bars a significant proportion of probative evidence that should be admitted. By relying solely on spontaneity, the exception ignores the presence of other cogent

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98. 152 F.2d 138 (D.C. Cir. 1945).

99. Id. at 138; see also Smith v. United States, 215 F.2d 682, 683 (D.C. Cir. 1954) (child spent the time between the alleged offense and the telling of it to her mother in a normal manner in the household); Oldham v. State, 167 Tex. Crim. 644, 646, 322 S.W.2d 616, 618 (1959) (child relates incident in asking for a glass of chocolate milk).

Indeed, many child psychologists note that children are traumatized more by the reactions of their family and society to the incident than by the incident itself. See MacFarlane, supra note 2, at 87; National Center on Child Abuse & Neglect, supra note 1, at 5; Renshaw & Renshaw, Incest, *in* Traumatic Abuse and Neglect of Children at Home 420 (1980).

100. See supra notes 79-80 and accompanying text.

101. See Joint Hearings, supra note 43, at 22 (testimony of Doris Stevens, Director, Sexual Assault Center in Seattle, Washington) ("[T]he younger the victim is and the closer the relationship is to the assailant, the more likely it is to be a longer period of time [before the child reports the incident]. Most children do not report immediately.").

102. Id. at 23.

103. See Stevens & Berliner, supra note 3, at 251; Schultz, supra note 1, at 150; National Center on Child Abuse and Neglect, supra note 1, at 2.

104. See Joint Hearings, supra note 43, at 23 (testimony of Lucy Berliner, social worker, Sexual Assault Center in Seattle, Washington).

105. See Fitzgerald v. United States, 443 A.2d 1295, 1298 (D.C. 1982); Ketcham v. State, 240 Ind. 107, 109, 162 N.E.2d 247, 248 (1959); People v. Bonneau, 323 Mich. 237, 239, 35 N.W.2d 161, 161-62 (1948); see also Joint Hearings, supra note 43, at 19 (testimony of Steve Adkins, Detective, Special Assault Section of King County Police Department) (children feel great fear from even the mildest of threats).

A child may not spontaneously relate the event for other reasons as well. He or she may want to protect younger siblings, see MacFarlane, supra note 2, at 90, or may fear blame for the incident, see National Center on Child Abuse and Neglect, supra note 1, at 2.

106. Harnish v. State, 9 Md. App. 546, 266 A.2d 364 (1970).

107. Id. at 365; see also State v. Messamore, 2 Hawaii App. 643, 639 P.2d 413, 416 (1982) (child unable to control her urination as a result of being raped; tells mother what happened in order to avoid being spanked for urinating on the stairs); People v. Tayler, 66 Mich. App. 456, 460-61, 239 N.W.2d 627, 629-30 (1976) (victim reports being sexually assaulted by her father

circumstantial guarantees of trustworthiness, and the fact that the requisite need for and reliability of children's hearsay statements can be established independently of a showing of shock. To determine accuracy, circumstances such as the age of the child,[108] his or her physical and mental condition,[109] the exact circumstances of the alleged event,[110] the language used by the child,[111] the presence of corroborative physical evidence,[112] the relationship of the accused to the child,[113] the child's family, school, and peer relationships,[114] and the reliability of the testifying witness,[115] can be examined.

3. *Attempts to Mitigate the Harshness of the Spontaneous Exclamation Exception.* Some courts, recognizing the flaws inhering in a mechanical application of the spontaneous exclamation exception to child hearsay statements in sex abuse cases,[116] have attempted to mitigate the arbitrariness of the rule.

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after being told that her younger sister had told others of being sexually molested by father as well).

108. See Beausoliel v. United States, 107 F.2d 292, 295 (D.C. Cir. 1939) (reflective powers of a young child less likely to be used in sex abuse situation); State v. Ritchey, 107 Ariz. 552, 556, 490 P.2d 558, 562 (1971); Smith v. State, 6 Md. App. 581, 587, 252 A.2d 277, 281 (1969) (tender age of child makes it unlikely that exciting influence of event had subsided quickly); Williams v. State, 145 Tex. Crim. 536, 549, 170 S.W.2d 482, 490 (1943) (tender age of victim makes it unlikely that she knew anything about sexual matters).

109. See United States v. Iron Shell, 633 F.2d 77, 86 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981); State v. Wilson, 20 Or. App. 553, 559, 532 P.2d 825, 828 (1975).

110. See State v. Pace, 301 So. 2d 323, 326 (La. 1974); Haley v. State, 157 Tex. Crim. 150, 154-55, 247 S.W.2d 400, 401-02 (1952) (delay in reporting incident due to the fact that child was in the company of the defendant for an extended period of time; child reported assault at first available opportunity).

111. See United States v. Nick, 604 F.2d 1199, 1204 (9th Cir. 1979) ("The childish terminology has the ring of verity and is entirely appropriate to a child of his tender years."); Williams v. State, 145 Tex. Crim. 536, 549, 170 S.W.2d 482, 490 (1943) (childlike manner in which statement was related was entirely appropriate and natural for the victim; disproves notion that statement was premeditated); Joint Hearings, supra note 43, at 9 (testimony of Mary Kay Barbieri, Chief, Criminal Division in King County Prosecutor's Office) (children's statements are often phrased in language that tells a jury that the event occurred).

112. See United States v. Nick, 604 F.2d 1199, 1204 (9th Cir. 1979) (sperm on pants, medical examination); Soto v. Territory, 12 Ariz. 36, 40, 94 P. 1104, 1105 (1908) (lacerated and bleeding rectum); Johnson v. State, 201 Tenn. 11, 13, 296 S.W.2d 832, 833 (1956) (bruises around rectum); Bertrang v. State, 50 Wis. 2d 702, 705-06, 184 N.W.2d 867, 868-69 (1971) (blood on panties).

113. See United States v. Nick, 604 F.2d 1199, 1204 (9th Cir. 1979) (victim knew defendant-babysitter well, not likely to mistake his assailant); People v. Taylor, 66 Mich. App. 456, 460, 239 N.W.2d 627, 629 (1976) (delay in reporting assault is natural when father is the perpetrator; victim likely to have no sense of outrage) (citing People v. Baker, 251 Mich. 322, 326, 232 N.W.2d 381, 383 (1930)).

114. See People v. Price, 33 Misc. 2d 476, 479, 226 N.Y.S.2d 460, 463 (N.Y. Ct. Spec. Sess. 1962) (hearsay statement was not made "in the setting of a hate-filled controversy where the child finds itself involved as a partisan, which setting so often renders children's testimony untrustworthy and even dangerous"); Haley v. State, 157 Tex. Crim. 150, 154, 247 S.W.2d 400, 402 (1952) (child had been ignored by her mother, natural for her to tell neighbors about incident).

115. See United States v. Nick, 604 F.2d 1199, 1204 (9th Cir. 1979) (mother not likely to forget her child's simple shocking seven-word statement; mother was also subjected to cross-examination); Bertrang v. State, 50 Wis. 2d 702, 708, 184 N.W.2d 867, 870 (1971); Joint Hearings, supra note 43, at 8 (testimony of Mary Kay Barbieri, Chief, Criminal Division in King County Prosecutor's Office) (relationship between defendant and testifying witness important in determining reliability of child's statement); see also infra notes 132-35 and accompanying text.

116. See supra notes 91-107 and accompanying text.

Although ostensibly applying the exception, they have gone beyond its established limits and have admitted statements which would normally be excluded under traditional formulations of the spontaneous exclamation exception.

For example, in *Smith v. State*,[117] the Maryland Court of Special Appeals admitted the hearsay statement of a four-year-old rape victim despite the fact that four-and-one-half to five hours had elapsed before she spoke to her mother about the incident.[118] The court ignored the fact that the child was calm at the hospital, hours before she made her statement,[119] and that at trial, the examining doctor had characterized the child's demeanor as "placid."[120]

However, in avoiding the harsh results of the spontaneous exclamation exception in this manner, courts have virtually destroyed the integrity of the exception, stretching it far beyond its traditional bounds,[121] and creating much uncertainty in its application. What courts are in fact doing is looking to various circumstantial guarantees of trustworthiness, of which spontaneity is just one.[122]

### B. *Tender Years Exception*

1. *Description.* The Michigan courts have also attempted to escape the arbitrary strictures of the spontaneous exclamation exception through the development of a "tender years" exception specifically applicable to out-of-court statements made by child victims of sex crimes.[123] Although the exception has been recently eliminated by the adoption of the Michigan Rules of

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117. 6 Md. App. 531, 252 A.2d 277 (1969)

118. Id. at 583-85, 252 A.2d at 278-79.

119. Id. at 583, 252 A.2d at 278.

120. Id. Similarly in State v. Ritchey, 107 Ariz. 552, 490 P.2d 558 (1971), the Arizona Supreme Court allowed the admission of hearsay statements by two sisters, four and six years of age, who had been molested by a family friend. Id. at 555-56, 490 P.2d at 559-60. The statements were accepted under the spontaneous exclamation exception despite the fact that the children did not exhibit any shock or nervous excitement and were merely subdued in their manner. Id. at 555, 490 P.2d at 561; see also People v. Stewart, 39 Colo. App. 142, 145, 568 P.2d 65, 68 (1977) (court admits statement of a six-year-old victim made to police officer two hours after sexual assault, even though child had opportunity to tell others earlier); State v. Noble, 342 So. 2d 170, 172-73 (La. 1977) (court admits statement of four-year-old victim made two days after rape); Haley v. State, 157 Tex. Crim. 150, 151-52, 247 S.W.2d 400, 401 (1952) (court admits statement of four-and-one-half-year-old victim made more than eight hours after rape).

121. See Joint Hearings, supra note 43, at 9 (testimony of Mary Kay Barbieri, Chief, Criminal Division in King County Prosecutor's Office) (Washington courts have extended the excited utterance exception for children in sex abuse cases).

122. See supra notes 108-15 and accompanying text.

123. See, e.g., People v. Turner, 112 Mich. App. 381, 316 N.W.2d 426 (1982), vacated, 332 N.W.2d 150 (Mich. 1983); People v. Dermartzex, 29 Mich. App. 213, 185 N.W.2d 33 (1970), aff'd, 390 Mich. 410, 213 N.W.2d 97 (1973). The exception has been expressly confined to these situations. See People v. Washington, 84 Mich. App. 750, 753-54, 270 N.W.2d 511, 512 (1978) (court refuses to apply "tender years" exception to hearsay statements of young child who witnessed murder of parents; exception limited to sex crime situations). However, the Michigan courts, in at least one case, have extended the exception to child witnesses of sex crimes. See People v. Lovett, 85 Mich. App. 534, 543-45, 272 N.W.2d 126, 129-30 (1978).

Evidence,[124] its genesis and development is still instructive in the area of child hearsay statements in sex abuse cases.

The tender years exception has been characterized as a variation of the spontaneous exclamation exception,[125] but is, in fact, markedly different. The requirement of contemporaneity is dispensed with entirely. The exception admits statements of young victims regardless of how much time has elapsed between the assault and the statement.[126] The delay, however, must be properly explained either by fear instilled in the child or by another "equally effective circumstance."[127] The underlying rationale appears to be the assumption that the child is under continuing duress throughout the entire period.[128] Moreover, the tender years exception allows hearsay to be introduced only for the purposes of corroborating the child's in-court testimony.[129] The exception was first recognized in *People v. Gage*,[130] where the court admitted the hearsay statements of a ten-year-old victim of sexual assault that were made approximately three months after the incident.[131]

By merely requiring that the delay be adequately explained, the tender years approach properly recognized that spontaneity is not the sole indicator of trustworthiness in evaluating children's statements. Michigan courts used the exception to incorporate more appropriate criteria of reliability by broadly

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124. See People v. Kremer, 415 Mich. 372, 329 N.W.2d 716, 717 (1982) (tender years exception to the hearsay rule no longer exists).

125. See People v. Baker, 251 Mich. 322, 326, 232 N.W. 381, 383 (1930) ("the admissibility of details of complaint, in the case of very young girls, has been permitted on a liberal extension of the res gestae doctrine"); People v. Turner, 112 Mich. App. 381, 385, 316 N.W.2d 426, 427 (1982) ("[t]he tender years exception is a species of the res gestae exception"), vacated, 332 N.W.2d 150 (Mich. 1983).

126. See People v. Gage, 62 Mich. 271, 275, 28 N.W. 835, 836 (1886) ("[t]he lapse of time occurring after the injury, and before complaint made, is not the test of admissibility . . . ."); infra note 127 and accompanying text.

127. People v. Baker, 251 Mich. 322, 326, 232 N.W. 381, 383 (1930); see also People v. Bonneau, 323 Mich. 237, 240, 35 N.W.2d 161, 162 (1948) (delay excusable due to defendant's threats); People v. Debreczeny, 74 Mich. App. 371, 394, 253 N.W.2d 776, 778 (1977) (delay adequately explained by fact that child interviewer at police station was off duty; statement was made at earliest opportunity the following morning); People v. Dermartzex, 29 Mich. App. 213, 218, 185 N.W.2d 33, 35 (1970), aff'd, 390 Mich. 410, 213 N.W.2d 97 (1973) (delay properly explained by fear engendered in victim by defendant; court notes that defendant was a large man of about 225 pounds and that victim's parents lived in Canada).

128. See People v. Gage, 62 Mich. 271, 275, 28 N.W. 835, 836–37 (1886):

> The female outraged was a girl of tender years . . . and through fear caused by threats made by the accused she refrained from telling her parents of the outrage until they heard it from others whom she had told. She appears to have been under a sort of duress, caused by fear of the whipping which the respondent had impressed upon her mind would befall her if she told her parents, and it was with great reluctance she finally disclosed the facts to her mother, caused by the fear respondent had engendered in her mind.

See also People v. Edgar, 113 Mich. App. 528, 317 N.W.2d 675 (1982).

129. See People v. Kremer, 415 Mich. 372, 329 N.W.2d 716, 719 (1982) (exception permits hearsay only to corroborate the testimony of the complainant); People v. Taylor, 66 Mich. App. 456, 461, 239 N.W.2d 627, 630 (1976) (hearsay testimony corroborating the details of the alleged statutory rape is permissible under the tender years exception).

130. 62 Mich. 271, 28 N.W. 835 (1886).

131. Id. at 273–74, 28 N.W. at 835–36.

interpreting what constitutes an "equally effective circumstance" for purposes of justifying the delay. Such circumstances have been read to include the presence of threats by the offender,[132] the absence of the child's parents at the time of the assault,[133] the relationship of the offender to the child,[134] and the nature and duration of sexual relations between the child and offender.[135]

2. *Inadequacy of the Tender Years Approach*. Despite the flexibility and sensitivity of the Michigan courts towards the statements of child sex abuse victims, the tender years exception, as it was employed, is flawed. It ignores the unique problems posed by child hearsay statements in these situations and fails to require the presence of sufficient assurances of reliability.

The major shortcoming of the tender years approach is that in many situations the exception allowed impermissible bootstrapping; statements, whose delay was explained solely by the child's hearsay statement itself rather than by independent corroborative evidence, were admitted under the exception. For example, in *People v. Edgar*,[136] the court justified admitting a victim's out-of-court statement made one week after the event because the child's hearsay statement alleged threats of whipping by the defendant.[137] The court ignored the fact that children's statements are not inherently truthful,[138] and that a child's memory is likely to fade quickly over time.[139] While the reliability of the assertion itself may be one factor indicating its admissibility, it cannot be the only factor. To allow the content of the hearsay statement to determine its own validity merely begs the question.[140]

## C. *The Residual Exception*

1. *Description*. Another approach that has been used to determine the admissibility of child hearsay statements is the residual hearsay exception. The exception has been employed in Wisconsin[141] and is embodied in sections

132. See People v. Bonneau, 323 Mich. 237, 240, 35 N.W.2d 161, 162 (1948); People v. Gage, 62 Mich. 271, 275, 28 N.W. 835, 837 (1886); People v. Edgar, 113 Mich. App. 528, 534, 317 N.W.2d 675, 678 (1982).

133. See People v. Dermartzex, 29 Mich. App. 213, 218, 185 N.W.2d 33, 35 (1970), aff'd, 390 Mich. 410, 213 N.W.2d 97 (1973).

134. See People v. Taylor, 66 Mich. App. 456, 460, 239 N.W.2d 627, 629 (1976).

135. Id.

136. 113 Mich. App. 528, 317 N.W.2d 675 (1982).

137. Id. at 530-31, 317 N.W.2d at 676-78; see also People v. Bonneau, 323 Mich. 237, 239, 35 N.W.2d 161, 162 (1948) (child's statement alleges that defendant "would get after her" if she told); People v. Gage, 62 Mich. 271, 273, 28 N.W. 835, 836 (1886) (child's statement reported threats by defendant of whipping).

138. See supra notes 52-54 and accompanying text. See also Anderson, supra note 70, at 51 (there is no reason for attaching any trustworthiness to that part of the out-of-court statement relating to the reasons for the delay unless there are other independent facts to render the statement reliable).

139. See supra notes 50-51 and accompanying text.

140. When the child's in-court testimony corroborates her hearsay statements, the bootstrapping problem remains unsolved. The hearsay statement still has no guarantee of reliability independent of the child.

141. See Bertrang v. State, 50 Wis. 2d 702, 184 N.W.2d 867 (1971); see also Thomas v. State, 92 Wis. 2d 372, 377, 284 N.W.2d 917, 921 (1979) (state attempts to admit hearsay statement of 16-

908.03(24) and 908.045(6) of the Wisconsin Rules of Evidence.[142] The exception, which parallels rules 803(24) and 804(b)(5) of the Federal Rules of Evidence,[143] admits hearsay statements falling outside the enumerated exceptions if they possess "comparable circumstantial guarantees of trustworthiness."[144]

The Wisconsin courts have employed the residual approach to go beyond the limits of the spontaneous exclamation exception and, like the Michigan courts, have looked for indicia of reliability more suitable for young children. In *Bertrang v. State*,[145] the Supreme Court of Wisconsin admitted the hearsay statement of a nine-year-old victim made two days after she was sexually assaulted by the defendant.[146] In assessing the trustworthiness of the statement, the court looked at the age of the child,[147] the nature of the assault,[148] the presence of physical evidence of the assault,[149] the relationship of the child to the defendant,[150] and the spontaneity of the statement.[151]

Because of its flexibility, the residual exception is superior to the judicial approaches to child hearsay statements examined thus far. Unlike the excited utterance exception, the rule allows the court to look to indicia of reliability in addition to spontaneity, which by itself does not specifically address the special nature of sex abuse cases.[152] Moreover, the residual approach requires that these indicia be independent of the hearsay statement, thereby preventing the bootstrapping problems of the tender years exception.[153]

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year-old mentally deficient victim of rape under rule 908.03(24) (court allows statement in as a prior consistent statement under 908.01(4)(a)).

142. Both rules state: "A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness [is admissible]." Wis. R. Evid. 908.03(24), 908.045(6). Rule 908.03(24) applies whether or not the declarant is available to testify; rule 908.045(6) can be used only when the declarant is unavailable. Cf. Fed. R. Evid. 803(24), 804(b)(5) (residual exceptions under the federal rules).

143. The Wisconsin Rules of Evidence were modeled after the Federal Rules of Evidence, see Wis. R. Evid., 59 Wis. 2d Rp. [illegible] by Chief Justice [illegible]; the federal advisory committee notes to the Federal Rules were accordingly included for informational purposes, see id. at R2.

144. Wis. R. Evid. 908.03(24), 908.045(6).

145. 50 Wis. 2d 702, 184 N.W.2d 867 (1971).

146. Id. at 708, 184 N.W.2d at 870.

147. Id. at 706, 184 N.W.2d at 869.

148. Id. at 708, 184 N.W.2d at 870.

149. Id.

150. Id.

151. Id. at 707-08, 184 N.W.2d at 869-70. The court also stated that the reliability of the assertions themselves and the reliability of the testifying witness could also be considered in determining the admissibility of a child's statement. Id. at 708, 184 N.W.2d at 870.

Although purporting to apply the spontaneous exclamation exception, id. at 706-08, 184 N.W.2d at 869-70, the court in *Bertrang* went far beyond the traditional limitations of the exception; the statement was made after a two-day time lapse and was prompted by direct questioning by the victim's mother. Id. at 705-06, 184 N.W.2d at 868-69. See Mitchell v. State, 84 Wis. 2d 325, 332, 267 N.W.2d 349, 352 (1978) (statements in *Bertrang* "were of a type normally covered by a specific exception [spontaneous utterance], but the facts presented did not satisfy the requirements of the specific exception"). In fact, the Judicial Council Committee used *Bertrang* as a basis for establishing the residual exception in the Wisconsin Rules of Evidence and as an example of how the exception should properly be employed. Wis. R. Evid. 908.03(24) judicial council committee note.

152. See supra notes 91-107 and accompanying text.

153. See supra notes 136-39 and accompanying text.

2. *Inadequacy of the Residual Exception.* Despite the potential application of the residual exception to child hearsay statements in child sex abuse cases, the availability of the exception is sharply limited. The exception was never intended to create formal class exceptions to the hearsay rule and cannot be applied to child hearsay statements as a group.[154] Rather, it was intended to be used rarely and only in exceptional circumstances.[155] Thus, the mere availability of the residual exception does not guarantee that courts will not resort to the more traditional analyses that thus far have proved inadequate.[156]

Even if the residual approach is used in the form of a class exception for child hearsay statements, there is great potential for judicial abuse of discretion. Beyond requiring the presence of circumstantial guarantees of trustworthiness, the exception, as it exists in Wisconsin, provides no guidance to the courts in considering the special circumstances of these statements.[157] The open-ended nature of the residual approach is simply not suited for class exceptions, including child hearsay statements in sex abuse cases. These exceptions require more particularized standards of need and trustworthiness.[158]

## IV. Solution: Washington Statutory Exception

The unique nature of child sex abuse cases imposes rigorous demands on courts when assessing the admissibility of child hearsay statements. Not only must the courts be sensitive to the critical need for these statements,[159] but they must also address the various reliability problems posed by the statements.[160] This is essential if the underlying principles of the hearsay rule are to be followed[161] and the defendant's rights under the confrontation clause

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154. See Wis. R. Evid. 908.03(24) federal advisory committee note, 59 Wis. 2d R301-02 (1973) (exception does not contemplate an unfettered exercise of judicial discretion: it should be used only to treat new and presently unanticipated situations).

155. See Wis. R. Evid. 908.03(24) federal advisory committee note, 59 Wis. 2d R301-02 (1973). Cf. S. Rep. No. 1277, 93rd Cong., 2d Sess. 20, reprinted in 1974 U.S. Code Cong. & Ad. News 7051, 7066 ("The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule . . . ."); 4 Weinstein's Evidence, supra note 23, ¶ 803(24)[01], at 803-296 (emphasis added):

> Congress did not wish to see the courts create new, formal exceptions to the hearsay rule except by the formal method of promulgation by the Supreme Court subject to the veto of Congress . . . [;] it authorized *individual case decisions* admitting hearsay not within the precise bounds of a recognized exception.

156. See supra notes 72–140 and accompanying text.

157. See Wis. R. Evid. 908.03(24) and 908.045(6). Indeed, some commentators have noted that the *ordinary*, as opposed to class, application of the *federal* residual exception, which is more detailed than its Wisconsin counterpart, has resulted in widely varying standards of trustworthiness and need among the circuits. See Yasser, Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule, 11 Tex. Tech. L. Rev. 587, 597, 603-04 (1980); Note, The Residual Exceptions to the Hearsay Rule in the Federal Rules of Evidence: A Critical Examination, 31 Rutgers L. Rev. 687, 707 (1978); see also Note, The Federal Courts and the Catchall Hearsay Exceptions, 25 Wayne L. Rev. 1361, 1377 (1979) (recommending that trial courts' discretion under the residual exception be restricted to prevent standards of trustworthiness from falling too low).

158. See supra notes 21–32 and accompanying text.

159. See supra notes 43–51 and accompanying text.

160. See supra notes 52–71 and accompanying text.

161. See supra notes 16–32 and accompanying text.

protected.[162] None of the approaches examined above, however, has adequately met these demands.[163]

An approach that properly addresses the need for children's hearsay statements, realistically and effectively ensures their trustworthiness, and poses no threat to defendants' rights, is found in a newly enacted Washington statute. The statute establishes a specific hearsay exception for child declarants in sex abuse cases:[164]

> 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.
>
> A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.[165]

### A. *Analysis of Washington Statutory Exception*

The Washington exception addresses the special nature of child hearsay statements in sex abuse cases in several ways. First, unlike the spontaneous exclamation exception, admissibility is not conditioned upon the fulfillment of one inflexible criterion of trustworthiness.[166] The exception permits the courts to look to other pertinent and persuasive indicia of reliability, indicia which have in fact been recognized as suitable guarantees of trustworthiness in these cases.[167] This allows a broad range of reliable statements to be admitted that would otherwise be summarily excluded because they failed to meet the requirements of the spontaneous exclamation exception. For example, in *Ketcham v. State*,[168] the court might have decided differently[169] if instead of focusing on spontaneity, its attention had been directed to the fact that there

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162. See supra notes 33-39 and accompanying text.
163. See supra notes 72-158 and accompanying text.
164. 1982 Wash. Legis. Serv. ch. 129, § 2 (West).
165. Id.
166. See supra notes 88-115 and accompanying text.
167. See supra notes 108-15, 132-35, 145-51 and accompanying text.
168. 240 Ind. 107, 162 N.E.2d 247 (1959).
169. See supra notes 85-87 and accompanying text (child's statement in *Ketcham* was excluded for lack of spontaneity; requirements of the excited utterance exception not met).



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170. Ketcham v. S
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171. Id.
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177. See supra note
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was physical evidence of the assault[170] and that the defendant had been seen alone with the child around the time of the alleged crime.[171]

While the exception permits the court to examine a variety of indicia indicating reliability, the exception avoids the bootstrapping problem of the tender years exception.[172] The statute requires the court to examine not only the content of the out-of-court declaration, but the time and circumstances surrounding the statement as well.[173] Moreover, the exception requires the presence of corroborative evidence if the child is unavailable to testify.[174]

The Washington statute is also superior to the residual exception approach, as adopted in Wisconsin. The statute requires courts to look for alternative indicia of reliability if the statement falls outside all of the established class exceptions.[175] It therefore ensures that courts will not be limited to traditional hearsay analyses. The exception, in effect, is a class one, intended to prevent children's hearsay statements from being arbitrarily evaluated and excluded.[176] The residual exception, in contrast, does not provide this guarantee of judicial scrutiny. Since it was never intended as a catch-all for any class of statements,[177] there is no assurance that courts will not continue to resort to the conventional—and flawed—approaches.

In addition, the Washington exception mitigates the possibility of judicial abuse of discretion and provides detailed guidance to the courts seeking to apply it.[178] It prescribes specific substantive rules to determine how child hearsay statements should be assessed, as well as procedural rules governing the exception's operation.[179]

Finally, the statute goes to great lengths to prevent prejudice to the defendant. All rulings on the admissibility of child hearsay statements must, under the exception, be made outside the hearing of the jury.[180] Given the emotional nature of child sex abuse[181] and the potential prejudicial affects of foundation testimony,[182] this additional requirement represents a significant advance over all the other approaches.

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170. Ketcham v. State, 240 Ind. 107, 112, 162 N.E.2d 247, 249 (1959) (physician testified as to bruises and injuries around the pelvis and vagina of the child).

171. Id.

172. See supra notes 136-40 and accompanying text.

173. 1982 Wash. Legis. Serv. ch. 129, § 2 (West).

174. Id.

175. Id.

176. See Joint Hearings, supra note 43, at 9 (testimony of Mary Kay Barbieri, Chief, Criminal Division in King County Prosecutor's Office) (excited utterance exception too limited despite efforts of Washington courts to stretch its requirements; much trustworthy evidence still excluded).

177. See supra notes 154-56 and accompanying text.

178. See supra notes 157-58 and accompanying text.

179. See 1982 Wash. Legis. Serv. ch. 129, § 2 (West).

180. Id.

181. See People v. Burton, 55 Cal. 2d 328, 340-41, 359 P.2d 433, 437, 11 Cal. Rptr. 65, 69 (1961) (court must be wary of jury's tendency to be easily swayed by improper evidence in sexual assault cases); Slough & Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325, 333-34 (1956) (community feelings are strong against sex offenders); supra notes 70-71 and accompanying text.

182. See Anderson, supra note 70, at 54 (in most child sex abuse cases, much foundation evidence will be already introduced before an objection to the hearsay statement is interposed; the impact of this foundation testimony upon the jury is impossible to remove).

### B. *Constitutionality*

The Washington exception was carefully drafted to avoid any confrontation clause problems.[183] In fact, it appears to go beyond the constitutional requirements set forth by the Supreme Court.[184] The exception demands that the hearsay statement contain "sufficient indicia of reliability" whether or not the child is available to testify.[185] Such indicia have been required by the Supreme Court only when the declarant is unavailable.[186] If the declarant testifies, the sixth amendment imposes no such standard of trustworthiness.[187] In addition, the Washington exception requires the concurrent presence of corroborative evidence if the child is unavailable to testify.[188] The Supreme Court merely requires that the statement contain "adequate indicia of reliability;" independent corroboration is not necessary under the confrontation clause.[189]

## CONCLUSION

Thus far, courts have improperly analyzed the hearsay statements of children in child sex abuse cases. A new approach is needed, one which is sensitive to the special circumstances of child sex abuse and its victims. This Note proposes that the newly adopted Washington statute serve as a model for other states. Using this approach not only provides a means by which the probative value of child hearsay statements can be cogently assessed, but also ensures proper protection for the accused.

*Judy Yun*

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183. See Joint Hearings, supra note 43, at 2-7.

184. See Ohio v. Roberts, 448 U.S. 56 (1980); California v. Green, 399 U.S. 149 (1970); supra notes 33-39 and accompanying text.

185. 1982 Wash. Legis. Serv. ch. 129, § 2 (West).

186. See Ohio v. Roberts, 448 U.S. 56, 66 (1980); supra note 39 and accompanying text.

187. See California v. Green, 399 U.S. 149, 158-59 (1970) (any inaccuracies in declarant's prior statement are exposed by cross-examination).

188. 1982 Wash. Legis. Serv. ch. 129, § 2 (West); see also Joint Hearings, supra note 43, at 10 (testimony of Mary Kay Barbieri, Chief, Criminal Division in King County Prosecutor's Office) (discussing what type of corroboration satisfies the exception; such corroboration includes the presence of venereal disease or medical trauma).

189. See Ohio v. Roberts, 448 U.S. 56, 66 (1980); see also supra notes 33-39 and accompanying text; Joint Hearings, supra note 43, at 6 (testimony of Mary Kay Barbieri, Chief, Criminal Division in King County Prosecutor's Office) (corroborative evidence requirement goes beyond what the Constitution requires).

Kansas has recently enacted a statutory exception for child hearsay statements similar to Washington's. See Kan. Stat. Ann. ch. 60, art. 460 § dd (Supp. 1982). However, the Kansas exception is noticeably more relaxed in its admissibility standards. A statement need only be "apparently reliable" if the child is unavailable as a witness. Id. Doubts concerning the statement's trustworthiness affect the *weight* of the statement rather than its admissibility. Id. Therefore, although the exception is a much-needed liberalization of present evidentiary law, it is of questionable constitutional validity. See supra notes 33-39 and accompanying text.

## Rule 803. Hearsay Exceptions — Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance. 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.

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) offered to prove his present condition or future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Business Records. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from

information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of Record.** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of subdivision (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public Records and Reports.** (a) To the extent not otherwise provided in (b) of this subdivision, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

(b) The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the state in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness. Any writing admissible under this subdivision shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before

the trial, unless the court finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

(9) Records of Vital Statistics. Records or data compilations, in any form, of birth, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of Religious Organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates. Statements of facts contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records. Statements of fact concerning personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings and urns, crypts, or tombstones, or the like.

(14) Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable

statute authorizes the recording of documents of that kind in that office.

(15) **Statements in Documents Affecting an Interest in Property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market Reports, Commercial Publications.** Market quotations, tabulations, lists, directories, codes, standards, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned Treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation Concerning Personal or Family History.** Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) **Reputation Concerning Boundaries or General History.** Reputation in a community, arising before controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) **Reputation as to Character.** Reputation of a person's character among his associates or in the community.

(22) **Judgment as to Personal, Family, or General History, or Boundaries.** A judgment as proof of a matter of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(23) **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 interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant. (Added by Supreme Court Order 364 effective August 1, 1979)

## Rule 804. Hearsay Exceptions — Declarant Unavailable.

(a) **Definition of Unavailability.** Unavailability as a witness includes situations in which the declarant

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) establishes a lack of memory of the subject matter of his statement; or

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

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), (4), or (5), of this rule, his attendance or testimony) by reasonable means including process.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement Under Belief of Impending Death.* A statement made by a declarant while believing that his death was

imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of Personal or Family History.* (A) A statement concerning the declarant's own birth, adoption, marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statment concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *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. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant. (Added by Supreme Court Order 364 effective August 1, 1979)

Court rules are promulgated by Supreme Ct. (Constitutional authority)
Rules may be changed by 2/3 leg. vote.

SB 3



## Rule 804. Hearsay Exceptions — Declarant Unavailable.

(a) **Definition of Unavailability.** Unavailability as a witness includes situations in which the declarant

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) establishes a lack of memory of the subject matter of his statement; or

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

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), (4), or (5), of this rule, his attendance or testimony) by reasonable means including process.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement Under Belief of Impending Death.* A statement made by a declarant while believing that his death was

POSITION PAPER

COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 3

For an act entitled "An Act relating to the admissibility of certain hearsay evidence in grand jury proceedings for certain sexual offenses and amending Rule 6(r), Alaska Rules of Criminal Procedure".

This bill would allow admission at grand jury proceedings of hearsay statements of children under 10 years of age relating to sexual offenses. The bill would provide a means for admitting evidence from children at grand jury proceedings while protecting those children from additional emotional trauma. The bill may also increase the likelihood of successful prosecution of sexual offenses committed against children.

The department is extremely pleased that the Legislature has addressed the problem and offered a solution to reduce child sexual abuse in Alaska. The department supports CS SB 3 and supports admitting certain hearsay evidence by children but believes that the hearsay exception should apply to children under 13 years of age. The trauma to a child between 10 and 12 years of age may be as damaging as the trauma to a child under 10 years of age. The older child more clearly understands what is happening and the social and legal implications.

The criminal statutes in Title 11 also make a distinction between a child under or over 13 years of age. For example if a person 16 years or older sexually penetrates a minor under the age of 13 he/she will be charged with sexual assault in the first degree, an unclassified felony. Should the same person sexually penetrate a minor who is "13, 14, or 15 years of age and at least three years younger than the offender", that person will be charged with sexual assault of a minor in the second degree, a class B felony. Similarly if a person 16 years or older has sexual contact with a minor under the age of 13 that person will be charged with sexual assault in the second degree. Should the same

imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of Personal or Family History.* (A) A statement concerning the declarant's own birth, adoption, marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statment concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *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. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant. (Added by Supreme Court Order 364 effective August 1, 1979)

person have sexual contact with a minor who is "13, 14, or 15 years of age and at least three years younger than the offender", that person will be charged with sexual assault in the third degree, a class C felony. The department suggests that Senate Bill 3 be consistent with the Title 11 age classification.

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

DATE: April 25 1985

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

DATE: 4-25-85

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

not adopted

Revision Date: ______

**REQUEST**
Bill/Resolution No.: CSHB 67
Title: An Act Relating to Hearsay Evidence
Sponsor: ______
Requestor: ______
Date of Request: ______

**FISCAL DETAIL**
Agency Affected: Alaska Court System
Program Category Affected: Administration of Justice
BRU, Program or Subprogram(s) Affected: Trial Courts

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING | FY 85 | FY 86 | FY 87 | FY 88 | FY 89 | FY 90 |
|---|---|---|---|---|---|---|
| 100 PERSONAL SERVICES | | 255.2 | 270.5 | 286.7 | 303.9 | 322.1 |
| 200 TRAVEL | | 9.0 | 9.5 | 10.1 | 10.7 | 11.3 |
| 300 CONTRACTUAL | | 6.0 | 6.4 | 6.8 | 7.2 | 7.6 |
| 400 SUPPLIES | | 2.0 | 2.1 | 2.2 | 2.3 | 2.4 |
| 500 EQUIPMENT | | 16.5 | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS, CLAIMS | | | | | | |
| 800 MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | | 288.7 | 288.5 | 305.8 | 324.1 | 343.4 |
| CAPITAL | | | | | | |
| REVENUE | | | | | | |

FUNDING: (Thousands of Dollars)

| | FY 85 | FY 86 | FY 87 | FY 88 | FY 89 | FY 90 |
|---|---|---|---|---|---|---|
| GENERAL FUND | | 288.7 | 288.5 | 305.8 | 324.1 | 343.4 |
| FEDERAL FUNDS | | | | | | |
| OTHER | | | | | | |
| TOTAL | | 288.7 | 288.5 | 305.8 | 324.1 | 343.4 |

POSITIONS:

| | FY 85 | FY 86 | FY 87 | FY 88 | FY 89 | FY 90 |
|---|---|---|---|---|---|---|
| FULL-TIME | | 4 | 4 | 4 | 4 | 4 |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

**ANALYSIS:** Attach a separate page if necessary

Prepared By: Robert G. Fisher / Karla Forsythe
Phone: 264-0561/264-0634
Division: Alaska Court System
Date: 4/5/85

Approved by Commissioner: Arthur H. Snowden II
Date: 4/11/85
Agency: Alaska Court System

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

ALASKA COURT SYSTEM

HB 67 - HEARSAY EVIDENCE IN CHILD ABUSE CASES
FISCAL IMPACT

PERSONAL SERVICES:

| | SALARY | BENEFITS | TOTAL COST |
|---|---|---|---|
| Superior Court Judge - Anchorage | $73,620 | $82,718 | $156,338 |
| In-Court Clerk - Anchorage (Range 12B) | 24,512 | 8,116 | 32,628 |
| Law Clerk - Anchorage (Range 13A) | 25,332 | 8,299 | 33,631 |
| Secretary - Anchorage (Range 12B) | 24,512 | 8,116 | 32,628 |
| | | | ------- |
| Total Personal Services | | | 255,225 |
| | | | ------- |

| | |
|---|---|
| TRAVEL (Judicial travel to outlying courts) | 9,000 |
| CONTRACTUAL (Word processing equipment, telephone, postage, etc.) | 6,000 |
| SUPPLIES | 2,000 |
| EQUIPMENT: (one-time items) | |
| Standard office equipment for all employees and legal reference materials for judge and law clerk. | 16,534 |
| | -------- |
| TOTAL FY 86 COST | $288,759 |
| | ======== |

Subsequent fiscal years adjusted to reflect 6% inflation.

NARRATIVE

CSHB 67 (HESS)

According to information provided verbally by the Department of Law, the department projects 250 child sexual assault cases during FY 85 (up from 120 in FY 83). The department also estimates that 80 - 90% of these cases would involve the testimony of a minor, and would require the hearing contemplated in paragraph (d). It is further estimated by the department that the majority of these hearings will require one-half day of court time.

Based on these estimates, 225 half-day hearings would require 112 days of judicial time. The department indicates that approximately two-thirds of these cases are heard in Anchorage. Thus, judicial resources would be needed to cover 78 days of judicial time in Anchorage, and 34 days elsewhere in the state.

These hearings would require an additional superior court judge to sit in Anchorage and to cover other court locations. The cost of this position and related court staff are detailed on the previous page, along with the cost of travel to court locations outside of Anchorage.

18-0
4

**HB 67 HEARSAY EVIDENCE** (SENATE H.E.S.S. HEARD SB 3 BY KERTTULA)

HOUSE-PASSED VERSION IS TIGHTER THAN THE SENATE VERSION, SO LESS OPEN TO ABUSES.

1. GRAND JURY ONLY (SAME AS SENATE)

2. CHILDREN UNDER AGE 10 (SAME AS SENATE)

3. SEXUAL OFFENSES ONLY (SAME AS SENATE)

4. CHILD MUST BE THE VICTIM (SENATE DIDN'T HAVE THIS LIMITATION, SO WOULD HAVE ALLOWED HEARSAY STATEMENT OF A YOUNG BROTHER OR SISTER WHO MIGHT HAVE WITNESSED AN OFFENSE.)

5. MUST BE CORROBORATIVE EVIDENCE (SAME AS SENATE)

6. CHILD MUST TESTIFY AT GRAND JURY PROCEEDING OR BE AVAILABLE TO TESTIFY AT TRIAL. (SENATE REQUIRES THAT THE CHILD BE UNAVAILABLE, AND DEFINES UNAVAILABILITY TO MEAN "BECAUSE OF DEATH OR INFIRMITY OR WILL SUFFER PSYCHOLOGICAL OR EMOTIONAL HARM" AND REQUIRES THAT THE GRAND JURY BE INFORMED OF THE REASON FOR THE UNAVAILABILITY.)

KERTTULA MAY PROPOSE A FLOOR AMENDMENT TO DEFINE UNAVAILABILITY. BOTH THE PROSECUTORS (A.G.'S OFFICE) AND THE PUBLIC DEFENDERS OFFICE OPPOSE THIS DEFINITION, BECAUSE PSYCHOLOGICAL AND EMOTIONAL HARM ARE VERY HARD TO PROVE. THE HEARSAY BILL IS PREDICATED ON THE ASSUMPTION THAT ALL CHILDREN WHO ARE SEXUALLY ABUSED SUFFER SUBSTANTIAL HARM AND SO SHOULD BE SPARED THE ADDITIONAL TRAUMA OF TESTIFYING. REMEMBER THAT THE BILL IS RESTRICTIVE -- MUST BE A VICTIM UNDER 10 AND THERE MUST BE CORROBORATIVE EVIDENCE -- AND THE ATTORNEYS FEEL IT WOULD BE ALMOST INEFFECTIVE IF THEY HAD TO PROVE PSYCHOLOGICAL HARM.

Passed out of HESS with all Do Pass.

Passed House 34-0

House-passed version tightens children apply to ~~doesn't allow "unavailability"~~

Offered: 5/2/85
Referred: Rules

Original sponsor: Phillips

1 IN THE HOUSE BY THE FINANCE COMMITTEE

2 OK CS FOR HOUSE BILL NO. 67 (Finance)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

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

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

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

12 Sec. 12.40.110. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL
13 OFFENSES. (a) In a prosecution for an offense under AS 11.41.410 -
14 11.41.440 or 11.41.455, hearsay evidence of a statement related to the
15 offense, not otherwise admissible, made by a child under the age of 10
16 who is the victim of the offense may be admitted into evidence before
17 the grand jury if

18 (1) the circumstances of the statement indicate its relia-
19 bility;

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

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

24 (b) In this section "statement" means an oral or written asser-
25 tion or nonverbal conduct if the nonverbal conduct is intended as an
26 assertion.

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



in Sen Fin 5/8/85 - no reference to fact that child must be traumatized. Hoetski - difficult to prove. Came from Washington statutes, which addressed trial.

proceedings for certain sexual offenses.

Offered: 4/8/85
Referred: Judiciary

Original sponsors: Kerttula, V.Fischer, Halford and Faiks

1 IN THE SENATE — BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

2 CS FOR SENATE BILL NO. 3 (HESS)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

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

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

10 * Section 1. AS 12.40 is amended by adding a new section to read:
11 Sec. 12.40.110. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL
12 OFFENSES. (a) In a prosecution for an offense under AS 11.41.410 -
13 11.41.440 or 11.41.455, hearsay evidence of a statement related to the
14 offense, not otherwise admissible, made by a child under the age of 10
15 may be admitted into evidence before the grand jury if
16 (1) the circumstances of the statement indicate its relia-
17 bility; and
18 (2) the child
19 (A) testifies at the grand jury proceeding; or
20 (B) is unavailable as a witness, the grand jury mem-
21 bers are informed of the reason for the child's unavailability,
22 and there is additional evidence introduced to corroborate the
23 statement.
24 (b) In this section,
25 (1) "statement" means an oral or written assertion or
26 nonverbal conduct if the nonverbal conduct is intended as an asser-
27 tion;
28 (2) "unavailable" means the child
29 (A) is unable to attend or testify at the hearing

1 because of death or a then existing physical or mental illness or
2 infirmity;
3 (B) is likely to suffer substantial psychological,
4 emotional, or physical harm if required to testify; or
5 (C) is absent from the hearing and beyond the juris-
6 diction of the court to compel appearance and the proponent of
7 the statement has exercised reasonable diligence in attempting to
8 procure the child's attendance.
9 (c) A child is not unavailable under this section if the un-
10 availability is due to the procurement or wrongdoing of the proponent
11 of the statement to prevent the child from attending or testifying.
12 * Sec. 2. AS 12.40.110, added by sec. 1 of this Act, has the effect of
13 amending Rule 6(r), Alaska Rules of Criminal Procedure, by making certain
14 hearsay evidence admissible in grand jury proceedings for certain sexual
15 offenses without requiring compelling justification.

Chapter 41

circumstances under which hearsay evidence may be introduced in grand jury proceedings for certain sexual offenses.

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.

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* 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 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) the child is under 10 years of age when the hearsay evidence is sought to be admitted;

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

(4) 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

# LAWS OF ALASKA

1985

**Source** CSHB 67(Fin) am S

**Chapter No.** 41

**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 TH OF ALASKA:**

THE ACT FOLLOWS ON PA INF 11

Approved by the Governor: May 29, 1985
Actual Effective Date: August 27, 1985

--SB 3

Official Business

# Alaska State Legislature

## Senate

Committee on

Health, Education & Social Services

Pouch V
State Capitol
Juneau, Alaska 99811

M E M O R A N D U M

TO: Members, Senate Committee on Health, Education and Social Services

FROM: Committee Staff

RE: Committee Meeting, Thursday, January 24, 1985

DATE: January 22, 1935

---

On Thursday, January 24, from 1:30 - 3:30 pm in the Beltz Room, the Senate Committee on Health, Education and Social Services will hear the following bills:

SB 3 Relating to the admissibility of certain hearsay evidence in grand jury proceedings for certain sexual offenses and amending Rule 6(r), Alaska Rules of Criminal Procedure.

SB 3 permits the admittance of hearsay evidence in grand jury proceedings for cases involving child sexual assault, and amends Rule 6(r) of the Alaska Rules of Criminal Procedure to permit the introduction of hearsay evidence absent compelling justification.

The bill is intended to enhance prosecution of cases involving sexual assault of children under the age of 16. Often a young victim of sexual assault will tell the non-offending parent or teacher but be unwilling to repeat details of the incident to law enforcement officials.

Under current criminal rules, hearsay evidence is admissable only when there is 'compelling justification', as in the case of death. The bill essentially removes 'compelling justification' as a requirement for accepting hearsay evidence in certain cases of sexual assault.

STATE OF ALASKA
THE LEGISLATURE

**LEGISLATIVE AFFAIRS AGENCY**

LEGISLATIVE REFERENCE LIBRARY

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

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

HESS 4-4-85 1:48pm
1-24-85 1:32pm

# 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 16 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.

k. c. moon

# TROUBLESHOOTER

□ **$39.75 WON'T BUY PERFECTION IN JEWELRY:** For ten months I've been waiting to wear my Seiko watch. I ordered a replacement watchband for it in March from Paul's Jewelry downtown. When I placed the order I paid $39.75. The watchband finally arrived in September, and I picked it up from Paul's. But after taking it home I noticed a small scratch on it. I took it back to Paul's and asked them to reorder a new one. Now they tell me Seiko won't replace it and I have to accept a flawed watchband. Can you help? — J.B.

It seemed you had a valid complaint — until I went

# Mat-Su property values continue rapid rise

By DOUG O'HARRA
Daily News reporter

PALMER — Property values in the Matanuska-Susitna Borough may have increased at a record pace for a second year in a row, according to borough officials.

"The overall value of property in the borough — including new construction — has increased about 40 percent," said borough assessor Gary Lewis.

The figures, according to Lewis, are just "glimpses" into the borough's increased value, which won't be final until the end of next month.

But if preliminary estimates hold out, the borough's assessed valuation could crank up from about $1.66 billion to around $2 billion in a trend that began in 1982 when the borough became the fastest growing community in the state.

With that boom, the value of the borough jumped 40 percent last year, with most of the valuation coming from residential property and new residential construction.

Although the bulk of new construction this year is still residential, the percentage of commercial construction has become much greater, said Lewis.

With about 95 percent of the borough covered, assessors have found more than 2,000 new buildings valued at nearly $163 million, Lewis said. More than 240 of those new structures are commercial. Last year, the assessors found only 161 new commercial structures.

As in previous years, the growth has been centered around Wasilla and the suburban heart of the Valley, said Lewis.

"There has been a dramatic increase in value," he said. "There is no doubt about it."

Whether the increased assessments will mean higher taxes cannot be known until the borough assembly sets taxation levels in late spring.

Nonetheless, under the present taxation level, property owners would pay an additional $7.30 in taxes for every increase in value of $1,000.

## Knowles

Continued from Page C-1

recommendation to count bal

## Bumpus clinches win with absentee votes

Continued from Page C-1

council from 1978 to 1983. He

— one more than permitted