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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(b)(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.

admission of all hearsay evidence,[33] yet it has nonetheless placed significant limits on the use of such evidence.[34]

Although the Supreme Court has been reluctant to lay down principles that would determine the constitutionality of all hearsay exceptions under the confrontation clause,[35] 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.[36] 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

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 Carey 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.
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> 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.
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> 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

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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 154 (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.[58] The stress is intensified if the victim must face the accused again,[59] or if he or she must testify against a close relative,[60] a situation that often occurs in sex abuse cases.[61] Under these circumstances, children, if they reply at all, often give confused and inaccurate answers.[62] Children are susceptible to leading questions[63] and often tailor their replies to appease the examining attorney.[64]

Consequently, in light of the unusual need for child hearsay statements in sex abuse cases,[65] as well as their potentially superior trustworthiness to in-court testimony,[66] the traditional reasons for barring use of such hearsay statements[67] become less compelling. If circumstantial guarantees of trustworthiness are present, the out-of-court declaration should be admitted.[68] 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):
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> > 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 loathsome 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]

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, 205 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. [illegible] calls 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 questioner).

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

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82. 58 Ill. App.

83. Id. at 161, 373
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84. *Boodry*, 96 Ar
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85. 240 Ind. 107,

86. Id. at 112, 162

87. Id. at 109, 112

88. See supra note

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. Shamblo, 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) (argument that form of statement is irrelevant).

80. See 6 Wigmore, supra note 73, at 202-03. 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. Mesamore, 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 460, 461 (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]

89. See supra notes 43–63 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.").

94.

> [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 121 (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.

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102. Id. at 23.

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106. Harnish v. State,

107. Id. at 365; see al
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460–61, 239 N.W.2d 627,

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

98. 152 F.2d 138 (D.C. Cir. 1945).

99. Id. at 138; see also Smith v. United States, 215 F.2d 662, 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. 545, 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. Taylor, 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. 561, 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. 581, 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. Kramer, 415 Mich. 372, 329 N.W.2d 716, 717 (1982) (tender years exception to the hearsay rule far longer exists).

125. See People v. Baker, 253 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. 361, 365, 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, 253 Mich. 322, 326, 232 N.W. 381, 383 (1930); see also People v. Boisneau, 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. Dermatzes, 29 Mich. App. 213, 218, 185 N.W.2d 33, 35 (1970), aff'd, 390 Mich. 410, 213 N.W.2d 97 (1972) (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. 529, 317 N.W.2d 675 (1982).

129. See People v. Kramer, 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

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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). A 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. (foreword by Chief Justice Hanley); 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. 20 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, 93d 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

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.
172. See supra note
173. 1982 Wash. L
174. Id.
175. Id.
176. See Joint He
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177. See supra note
178. See supra note
179. See 1982 Wash
180. Id.
181. See People v.
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182. See Anderson,
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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 effects 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

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POSITION PAPER/Department of Health & Social Services

POSITION PAPER

COMM.TTEE 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.

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POSITION PAPER/Department of Health & Social Services

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

DATE: April 25 1985

APPROVED: John R. Pugh
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)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
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)

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:

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

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

IN THE HOUSE BY THE FINANCE COMMITTEE

OK CS FOR HOUSE BILL NO. 67 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

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

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

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

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

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

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

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

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

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

in Sen Jud 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

IN THE SENATE

BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

CS FOR SENATE BILL NO. 3 (HESS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

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

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

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

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

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

(2) the child

(A) testifies at the grand jury proceeding; or

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

(b) In this section,

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

(2) "unavailable" means the child

(A) is unable to attend or testify at the hearing

because of death or a then existing physical or mental illness or infirmity;

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

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

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

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

Chapter 41

circumstances under which hearsay evidence may be introduced in grand jury proceedings for certain sexual offenses.

Chapter 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.

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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

Alaska State Legislature

Senate

Committee on

Health, Education & Social Services

Official Business

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

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

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

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