North Dakota Law Review

Volume 66 | Number 4 Article 2

1990

Application of the Hearsay Exceptions and Constitutional Challenges to the Admission of a Child's Out-of-Court Statements in the Prosecution of Child Sexual Abuse Cases in North Dakota

Anna Frissell

James M. Vukelic

APPLICATION OF THE HEARSAY EXCEPTIONS AND CONSTITUTIONAL CHALLENGES TO THE ADMISSION OF A CHILD'S OUT-OF-COURT STATEMENTS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES IN NORTH DAKOTA

ANNA FRISSELL* AND JAMES M. VUKELIC**

There has been a startling increase in the reported incidence of child sexual abuse.[1] This increased incidence rate and the resultant heightened public awareness have led to a proliferation of statutory and rule changes aimed at minimizing the trauma for child victims of sexual abuse often associated with the criminal justice system.[2]

---

* Anna M. Frissell, J.D. University of North Dakota School of Law, 1985. Presently employed as Assistant Attorney General for the State of North Dakota.

** James M. Vukelic earned a B.S. in Education in 1971 and a M.S. (counseling and guidance) in 1973, and J.D. in 1978, all from the University of North Dakota, Grand Forks, ND. He is currently deputy attorney general for the state of North Dakota.

1. The American Humane Association's national study of child-protection statistics showed a 200% increase in the reporting of sexual abuse incidents from 1976 through 1983. Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1745 n.1 (1983)[hereinafter *A Comprehensive Approach*]. In 1976 there were only 6,000 confirmed reports of child sexual abuse. *Children's Veracity Cross-Examined*, Insight On the News, at 50 (Feb. 26, 1990)[hereinafter *Children's Veracity Cross-Examined*]. By 1980 there were 25,000 reported cases of child sexual abuse per year. *A Comprehensive Approach*, *supra* at 1745 n.1. In 1986, the last year for which the American Humane Association has figures available, 315,000 incidents of molestation were reported, out of a total 2.1 million abuse reports of all kinds, and 132,000 proved "well-founded" after investigation. *Children's Veracity Cross-Examined*, *supra*, at 50.

2. Provisions Allowing for Use of One-Way Closed-Circuit Television, One-Way Screens, or One-Way Mirrors: ALA. CODE § 15-25-3 (Supp. 1988); ALASKA STAT. § 12.45.046 (Supp. 1988); ARIZ. REV. STAT. ANN. § 13-4253 (Supp. 1988); CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1989); FLA. STAT. § 92.54 (West Supp. 1989); ILL. ANN. STAT. ch. 38, ¶ 106A-3 (Smith-Hurd Supp. 1989); IND. CODE ANN. § 35-37-4-8 (Burns Supp. 1989); IOWA CODE ANN. § 910A.14 (West Supp. 1989); KAN. STAT. ANN. § 22-3434 (1988); KY. REV. STAT. ANN. § 421.350 (Baldwin Supp. 1989); LA. REV. STAT. ANN. § 15:283 (West Supp. 1989); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1988); MASS. GEN. LAWS ANN. ch. 278, § 16D (West Supp. 1989); MINN. STAT. ANN. § 595.02 (West 1988); N.J. STAT. ANN.§ 2A:84A-32.4 (West Supp. 1989); OKLA. STAT. ANN. tit. 22, § 753 (West Supp. 1989); PA. CONS. STAT. ANN. tit. 42, § 5985 (Purdon Supp. 1989); R.I. GEN. LAWS § 11-37-13.1 (Supp. 1988); TEX. CRIM. PROC. CODE ANN. art. 38.071 (Vernon Supp. 1989); UTAH CODE ANN. § 77-35-15.5 (Supp. 1989); and VT. R. EVID. 807.

Provisions Allowing for Use of Two-Way Closed-Circuit Television: CAL. PENAL CODE § 1347 (West Supp. 1989); HAW. R. EVID. 616; N.Y. CRIM. PROC. LAW §§ 65.20 (McKinney Supp. 1989); OHIO REV. CODE ANN. § 2907.41 (Page 1987); and VT. R. EVID. 807.

Provisions Allowing for Preservation of Testimony on Videotape: ALA. CODE § 15-25-2 (Supp. 1988); ARIZ. REV. STAT. ANN. § 13-4253 (1985); ARK. CODE ANN.§ 16-44-203 (1987); CAL. PENAL CODE § 1346 (West Supp. 1989); COLO. REV. STAT. § 18-3-413 (1986); CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1989); DEL. CODE ANN. tit. 11, § 3511 (1987); FLA. STAT. § 92.53 (West Supp. 1989); HAW. R. EVID. 616; ILL. ANN. STAT. ch. 38, ¶ 106A-2 (Smith-Hurd Supp. 1989); IND. CODE ANN. § 35-37-4-8 (Burns Supp. 1989); IOWA CODE ANN. § 910A.14 (West Supp. 1989); KAN. STAT. ANN. § 22-3434 (1988); KY. REV. STAT. ANN. § 421.350 (Baldwin Supp. 1989); MASS. GEN. LAWS ANN. ch. 278, § 16D (West Supp. 1989); MINN. STAT. ANN. § 595.02 (West 1988); MO. ANN. STAT. §§ 491.680-.687 (Vernon Supp. 1989); MONT. CODE ANN. §§ 46-15-401 to -403 (1987); NEV. REV. STAT. ANN. §§ 174.227 &

In North Dakota some provisions have been made to accommodate the special needs of child victims and witnesses of crime.[3] The most recent innovation is an amendment to the hearsay exceptions to include a special exception for a child's statement about sexual abuse.[4]

Coinciding historically with the genesis of these protective measures are events that may place their future in jeopardy. In 1988, the United States Supreme Court decided *Coy v. Iowa*,[5] striking down a statute that excused a child victim from viewing her attacker while testifying, and holding that the sixth amendment requires an unobstructed visual encounter between accuser and accused.[6] The *Coy* decision left many questions unanswered, not the least of which is the constitutionality of the numerous statutes and rules promulgated to ease courtroom trauma for child victims. Perhaps partly in recognition of the confusion caused by *Coy*, on January 16, 1990, the Supreme Court accepted certiorari on two cases that promised to further clarify the constitutionality of these protective provisions.[7]

Another event impacting public opinion and the prosecution of child sexual abuse cases is the costly and unsatisfying result[8] of

---

174.229 (Michie 1986); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1988); N.M. STAT. ANN. § 30-9-17 (1984); OHIO REV. CODE ANN. § 2907.41 (Page 1987); OKLA. STAT. ANN. tit. 22, § 753 (West Supp. 1989); PA. CONS. STAT. ANN. tit. 42, § 5984 (Purdon Supp. 1989); R.I. GEN. LAWS § 11-37-13.1 (Supp. 1988); S.D. CODIFIED LAWS ANN. § 23A-12-9 (1988); TENN. CODE ANN. § 24-7-116 (Supp. 1988); TEX. CRIM. PROC. CODE ANN. art. 38.071 (Vernon Supp. 1989); UTAH CODE ANN. § 77-35-15.5 (Supp. 1989); VT. R. EVID. 807; and WIS. STAT. § 967.04(7) (Supp. 1988). The terms "sexual abuse" and "sexual assault" are commonly interchanged. This article will use whichever term is appropriate. Although both terms are used throughout this article, the North Dakota criminal statutes most often invoked for the prosecution of child sexual assault are gross sexual imposition, sexual imposition, and sexual assault. *See* N.D. CENT. CODE §§ 12.1-20-03, 12.1-20-04 and 12.1-20-07 (1987 & Supp. 1989)(statutes which uniformly use the term "sexual assault").

3. *See, e.g.*, N.D. CENT. CODE ch. 12.1-34 (1987 & Supp. 1989) (sets forth the minimum statutory requirements for the fair treatment of victims and witnesses of crime); N.D. CENT. CODE ch. 12.1-35 (Supp. 1989)(citing Section 1 of chapter 175, S.L 1 (1987))(wherein the North Dakota legislature has explicitly stated that child victims and witnesses deserve special considerations: "The legislature finds that it is necessary to provide child victims and witnesses with additional consideration and fair treatment than that usually afforded to adults. The legislature intends, in this Act, to provide these children with additional rights and protections during their involvement with the criminal justice system.")

4. *See infra* notes 183-87 and accompanying text (a child's statement about sexual abuse is admissible as evidence if it meets certain criteria).

5. 487 U.S. 1012 (1988).

6. Coy v. Iowa, 487 U.S. 1012, 1015 (1988).

7. Maryland v. Craig, 316 Md. 551, 560 A.2d 1120 (1989), No. 89-478, *cert. granted*, 110 S. Ct. 834 (U.S. Jan. 16, 1990)(No. 89-478), *vacated* 110 S. Ct. 3157; Idaho v. Wright, 116 Idaho 382, 775 P.2d 1224 (1989), No. 89-260, *cert. granted*, 110 S. Ct. 833 (U.S. Jan. 16, 1990)(No. 89-260), aff'd, 110 S. Ct. 3139.

8. *The McMartin Nightmare: After the Verdict Solace for None*, People Weekly 68-80 (Feb. 5, 1990) (evidencing the heightened public interest in this case is the fact that this popular publication dedicated a "cover story" to the result and noted that the *McMartin* verdict left no one satisfied: jurors admitted they believed that molestation had occurred

the McMartin Preschool case in California.[9] Despite 124 witnesses and 974 major exhibits filling nearly 64,000 pages of transcript over thirty-three months of trial, at a cost of thirteen million dollars, allegations were leveled that the prosecution was ill-prepared and that the truth was never reached.[10]

The verdict in *McMartin* has generated much comment on the prosecution of child sexual abuse cases. Positive lessons will be gleaned from post-verdict reflection on the handling of the *McMartin* case. Undoubtedly, this reflection will culminate in further systemic changes.[11]

This article will offer an overview of the hearsay exceptions most commonly invoked in the prosecution of child sexual abuse cases in North Dakota.[12] This article will also discuss the sixth amendment confrontation clause challenges that must be considered to meet the potential constitutional barriers to the admission of a child's out-of-court statement.

I. THE DEFENDANT'S RIGHT: THE CONFRONTATION CLAUSE

The sixth amendment to the United States Constitution provides that ". . .in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[13] The rights guaranteed by the sixth amendment confrontation clause extend to proceedings in the state courts by way of the fourteenth amendment.[14]

---

but felt that the prosecution had failed to prove where, when, and by whom; victims spent the majority of their adolescence as witnesses in criminal action, only to feel angry with the result; scholars speculate that the truth was never reached; parents are disconsolate and angry; the prosecutor was frustrated with the "excruciatingly long" legal process, and; the defendants suffered lengthy incarceration and financial ruin.)

9. *McMartin Preschool's Lessons; Abuse Case Plagued by Botched Investigation, Too Many Counts*, A.B.A.J. 28-29 (Apr. 1990). On January 18, 1990, Raymond Buckey and his mother, Peggy McMartin Buckey, were acquitted of several charges of child sexual abuse. *Id.*

10. *Id.*

11. *See Children's Veracity Cross-Examined*, *supra* note 1, at 50. "The lengthy McMartin proceedings and others have spurred a movement to amend the California Constitution . . . overturn seven different Bird court rulings favoring defendants in criminal cases and [provide for] other provisions aimed at speeding up proceedings and expanding the death penalty." *Id.*

12. *See infra* notes 143-71 and accompanying text.

13. U.S. CONST. amend VI. Section 29-01-06(3) of the North Dakota Century Code provides: "In all criminal prosecutions the party accused shall have the right . . . to meet the witnesses against him face to face." N.D. CENT. CODE § 29-01-06(3) (1987 & Supp. 1989). Interpretation of the North Dakota statutory provision probably does not vary from that of the sixth amendment by virtue of the added language, "face to face." *See* 5 WIGMORE ON EVIDENCE § 1397, at 155-58 n.1 (Chadbourn rev. ed. 1974).

14. Pointer v. Texas, 380 U.S. 400, 403-05 (1965). U.S. CONST. amend. XIV, § 1 provides:

Most litigation does not pose a confrontation question because witnesses are generally available to testify in the presence of the defendant and before the fact-finder.[15] Likewise, the defendant's right to confrontation is not always offended where there is not a face-to-face confrontation between the accuser and the accused.[16]

The cross-examiner may attempt to discredit the witness by challenging the witness' perceptions, ability to recall and articulate recollections, veracity and character.[17] Any infringement, whether by law or by trial court ruling, on the defendant's right to conduct a thorough cross-examination of the witness is a potential violation of the confrontation clause.[18]

The United States Supreme Court has noted that an analysis of the language of the confrontation clause leads to three major categories of potential litigation.[19] First, there will be questions as to the right explicit in the language of the confrontation clause, the right physically to face those who testify against the defendant.[20] Second, the clause poses questions as to the appropriateness of a restriction on the scope of cross-examination.[21] Third, questions

---

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

15. *See* California v. Green, 399 U.S. 149, 162 (1970)(if declarant is present to testify and to submit to cross-examination there is no confrontation violation); Cogburn v. State, 292 Ark. 564, __, 732 S.W.2d 807, 811 (1987)(court upheld the constitutionality of a child hearsay statute and denied defendant's challenge because the seven-year-old child witness was present at trial and subject to cross-examination).

16. Ohio v. Roberts, 448 U.S. 56, 63 (1980). "If one were to read this language [the confrontation clause] literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial. . . . But thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Id.* at 63. *See also* Coy v. Iowa, 487 U.S. 1012, 1024 (1988) (O'Connor, J., concurring)(citing Chambers v. Mississippi, 410 U.S. 284, 295 (1973)) ("Of course, the right to confront . . . is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal process"). *See also* Illinois v. Allen, 397 U.S. 337, 347 (1970)(defendant's misconduct constituted a forfeiture of the right to be present at trial); Barber v. Page, 390 U.S. 719, 725 (1968)(intentional waiver of constitutional right to confront witnesses is permissible); State v. Black, 291 N.W.2d 208, 214 (Minn. 1980)(witness intimidated into silence by defendant found to have caused defendant to forfeit right of confrontation); State v. Garvey, 283 N.W.2d 153, 156 (N.D. 1979)(permitted admission at trial of officer's preliminary hearing testimony, pursuant to Rule 804(b)(1) of the North Dakota Rules of Evidence, over the defendant's objection that there was less incentive to conduct adequate cross-examination at a preliminary hearing). *But see* State v. Campbell, 299 Or. 633, __, 705 P.2d 694, 705-06 (1985)(en banc)(prosecution and defense cannot stipulate to incompetence of a three-year-old witness so as to render the child unavailable as a witness).

17. Davis v. Alaska, 415 U.S. 308, 316 (1974).

18. Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987).

19. *Coy*, 487 U.S. at 1016.

20. *Id.* at 1017 (citing Pennsylvania v. Ritchie, 480 U.S. 39, 53 (1987)).

21. *See generally* Coy v. Iowa, 487 U.S. 1012, 1016-18 (1988).

arise as to the admissibility of out-of-court statements.[22] This breakdown into categories of litigation is deceptively simple because even though the analysis of each category is separate and distinct,[23] many confrontation cases do not fall neatly into the categories. For instance, the Supreme Court has addressed confrontation clause questions in conjunction with the defendant's right to be present at trial,[24] the right to have the jury observe the demeanor of the witnesses,[25] and the right to be present at pretrial hearings.[26]

The right to face-to-face confrontation with a witness at trial is explicit in the confrontation clause: ". . .the accused shall enjoy the right . . . to be confronted with the witnesses against him."[27] Recently, the United States Supreme Court acknowledged the historical significance of the literal right to face-to-face confrontation guaranteed by the sixth amendment.[28] In its decision, the Court analyzed the historical perspective, traveling through time from the Roman tribunals to the American wild west, and noted that societies have viewed justice as being best served when the accused is confronted by the accuser.[29] The Court further noted that the legal significance of embracing societies' "vision" of justice has been to establish a criminal system wherein societies' perception, as well as the reality of fairness, prevail.[30]

The right to cross-examine is implicit in the confrontation clause.[31] "[T]he opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process."[32] Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested."[33]

When presented with an out-of-court statement the confrontation clause demands inquiry as to the statement's reliability or trustworthiness.[34] The United States Supreme Court has stated

22. *Id.* at 1016 (citing Ohio v. Roberts, 448 U.S. 56 (1980)).
23. Delaware v. Fensterer, 474 U.S. 15, 18 (1985).
24. Dutton v. Evans, 400 U.S. 74, 95 (1970)(Harlan, J., concurring).
25. *Roberts*, 448 U.S. at 64 n.6 (1980).
26. *See, e.g.*, Kentucky v. Stincer, 482 U.S. 730 (1987); Davis v. Alaska, 415 U.S. 308 (1969).
27. *Roberts*, 448 U.S. at 62-63.
28. Coy v. Iowa, 487 U.S. 1012, 1015-18 (1988).
29. *Id.* The Supreme Court noted that the phrase, "Look me in the eye and say that," persists in usage today. *Id.* at 1018.
30. *Id.* at 1018-19 (*quoting* Lee v. Illinois, 476 U.S. 530, 540 (1986)).
31. *Coy*, 487 U.S. at 1020.
32. *Stincer*, 482 U.S. at 736.
33. *Id.* at 736 (citing Davis v. Alaska, 415 U.S. 308, 316 (1974)).
34. *Roberts*, 448 U.S. at 66.

that, for confrontation clause purposes, the reliability of a statement may be inferred when the statement falls within a "firmly rooted hearsay exception" or "has particularized guarantees of trustworthiness."[35]

II. CONFRONTATION CLAUSE CASES

The United States Supreme Court has a long history of analyzing the confrontation clause. In 1895, the landmark case of *Mattox v. United States*[36] held that some forms of hearsay are admissible despite lack of confrontation.[37] In *Mattox*, two of the state's witnesses died before trial; the trial court therefore admitted reporter notes of the witnesses' testimony admitted at a former trial.[38] The defendant asserted that the admission of the testimony violated his sixth amendment rights.[39]

In arriving at the conclusion to admit the testimony, the Court found that ". . .[t]here is doubtless reason for saying that the accuser should never lose the benefit of these safeguards [b]ut general rules of law must occasionally give way to considerations of public policy and the necessities of the case."[40]

Seventy-five years after *Mattox*, in *California v. Green*,[41] the United States Supreme Court considered as substantive evidence the application of the confrontation clause to the admissibility of prior inconsistent statements.[42] In *Green*, a sixteen-year-old youth, Porter, was arrested for selling marijuana to an undercover agent.[43] While in custody at Green's preliminary hearing, Porter, subject to extensive cross-examination, named Green as his supplier.[44] At Green's trial, Porter, the state's chief witness, claimed he was unable to remember who supplied him with the mari-

---

35. *Id.*
36. 156 U.S. 237 (1895).
37. Mattox v. United States, 156 U.S. 237, 250 (1895).
38. *Id.* at 238-39.
39. *Id.* at 240. In reviewing the impact of the confrontation clause on the hearsay testimony the Supreme Court noted the following:

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives testimony whether he is worthy of belief.

Id. at 242-43.
40. *Id.* at 243.
41. 399 U.S. 149 (1970).
42. California v. Green, 399 U.S. 149, 153 (1970).
43. *Id.* at 151.
44. *Id.*

juana.[45] Throughout the direct examination of Porter, the prosecution read excerpts from Porter's preliminary hearing testimony, in which Porter testified he had received marijuana from Green. Green was subsequently convicted.[46]

In upholding Green's conviction, the United States Supreme Court listed the following purposes of the confrontation clause: 1) to insure that the witness will give his statements under oath; 2) to force the witness to submit to cross-examination; and 3) to permit the jury to observe the demeanor of the witness and assess his credibility.[47] The *Green* Court concluded that had Porter been unavailable, despite good-faith efforts of the state to produce him, his statements would still have been admissible at trial.[48]

The Court in *Davis v. Alaska*,[49] decided in 1973, held that a defendant in a criminal case was allowed to impeach a juvenile witness by cross-examination as to the juvenile's past record of delinquency and that his impeachment may occur even though it conflicted with the state's interest in preserving the confidentiality of juvenile adjudications of delinquency.[50] In allowing the use of the juvenile record to impeach, the Court balanced the state's interest in protecting the anonymity of juvenile offenders with the defendant's right of confrontation and ruled that the confrontational right was paramount.[51]

The Supreme Court delivered several opinions in the early 1980s which held in accordance with the rationale of these past decisions. For instance, in *Ohio v. Roberts*[52] the preliminary hearing testimony of an unavailable witness was held admissible at trial after an initial finding of necessity and the presence of adequate indicia of reliability.[53] In *Roberts*, the Court noted that a *literal* reading of the language of the confrontation clause would require, on objection, the exclusion of any statement made by a declarant not present at trial.[54] The *Roberts* Court reiterated that the con-

45. *Id.* at 151-52.
46. *Id.* at 152-53.
47. *Green*, 399 U.S. at 158.
48. *Id.* at 165.
49. 415 U.S. 308 (1974).
50. Davis v. Alaska, 415 U.S. 308, 320 (1974). The Court found, subject to the broad discretion of the trial judge, that cross-examination was the principal means by which to test the believability of a witness and the truth of the witness' testimony. *Id.* at 316.
51. *Id.* at 319-20.
52. 448 U.S. 56 (1980).
53. Ohio v. Roberts, 448 U.S. 56, 73 (1980).
54. *Id.* at 63 (emphasis added). To read the confrontation clause literally "would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Id.* Rather, the confrontation clause operated in two separate ways to restrict the admission of hearsay. *Id.* at 65. First, the rule of necessity dictated that the prosecution

frontation clause reflected a *preference* for face-to-face confrontation at trial and that cross-examination was a primary interest secured by the clause,[55] but nonetheless the Court emphasized that the right to confront and cross-examine was not absolute and may give way to accommodate competing interests.[56]

The Supreme Court in *United States v. Inadi*[57] examined the use of the out-of-court statements of a co-conspirator at trial.[58] The Court held that, in the context of the "admission of the out-of-court statements of a non-testifying co-conspirator," the confrontation clause did not require a showing of unavailability by the prosecutor.[59] The Court found that the electronically recorded co-conspirator statements could be introduced against the defendant, even though the prosecutor had made little effort to produce the co-conspirator at trial.[60] The Court determined that co-conspirator statements "derive much of their value from the fact that they were made in a context very different from trial" and that it was unlikely that in-court testimony would recapture the evidentiary significance of statements made during the course of the conspiracy.[61] Consequently, the prosecutor may offer the out-of-court statements of the co-conspirator whether the declarant is available at trial or not, and the state has no obligation to produce the declarant.[62]

In *Delaware v. Fensterer*[63] the Supreme Court was presented with a further opportunity to clarify the protections extended by the right of confrontation.[64] In *Fensterer*, the prosecution relied in part on expert testimony that two hairs found on the murder

---

must either produce, or demonstrate the unavailability of the hearsay declarant. *Id.* And, second, once the declarant was shown to be unavailable, the statement was admissible only if it bears adequate indicia of reliability. *Id.* at 65-66.

55. *Id.* at 63 (emphasis added).

56. *See id.* at 66.

57. 475 U.S. 387 (1986).

58. United States v. Inadi, 475 U.S. 387, 388 (1986).

59. *Id.* at 399-400.

60. *Id.*

61. *Id.* at 395-96.

62. *Inadi*, 475 U.S. at 399-400. The *Inadi* court also noted that the rule of *Roberts* required the prosecution to establish that a witness was unavailable before it may admit the witness's testimony from a prior proceeding in the place of live testimony at trial. *Id.* at 392-94.

Roberts and *Inadi* produced two divergent rules: First, in the case of prior statements, the state is required to establish unavailability; second, in the case of out-of-court statements by co-conspirators, there is no such requirement. The prosecution of cases involving child witnesses often involves questions about the admissibility of prior testimony, and this type of admissibility question is controlled by *Roberts*. The prosecution of these cases will seldom involve determinations as to the admissibility of co-conspirator testimony, so the precise rule set forth by *Inadi* will not often apply.

63. 474 U.S. 15 (1985).

64. Delaware v. Fensterer, 474 U.S. 15, 16 (1985).

weapon were similar to those of the victim and that one of the hairs had been forcibly removed from the victim.[65] The expert described three methods of determining that a hair was forcibly removed, but during cross-examination the expert was unable to recall which method he had relied on for his conclusion.[66]

In allowing the testimony, the Court concluded that the "Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish."[67] The Court stated that the expert testimony carried the necessary assurance of reliability, notwithstanding the witness' inability to recall the basis of the testimony, because the witness had testified under oath and in the presence of the defendant and the factfinder.[68]

In 1987 the Court decided two cases involving confrontation clause questions in child sexual abuse litigation, *Pennsylvania v. Ritchie*[69] and *Kentucky v. Stincer*.[70] In *Ritchie* the defendant was charged with committing various sexual crimes against his thirteen-year-old daughter.[71] In preparation for his defense, the defendant attempted to subpoena child protection service records concerning his daughter, asserting the records contained exculpatory evidence and that the confrontation clause required their disclosure.[72] The plurality opinion held that failure to disclose the information did not violate the confrontation clause, because the right to confrontation is a trial right and "does not compel the pretrial production of information that might be useful in preparing for trial."[73]

In *Stincer*, the Court held that there was no violation of the confrontation clause when a defendant was excluded from a hearing to determine the testimonial competency of two child witnesses.[74] In *Stincer*, the defendant was charged with the sexual

65. *Id.* at 16-17.
66. *Id.*
67. *Id.* at 20 (emphasis in original).
68. *Id.* at 21-22.
69. 480 U.S. 39 (1987).
70. 482 U.S. 730 (1987).
71. Pennsylvania v. Ritchie, 480 U.S. 39, 43 (1987).
72. *Id.* at 43-44.
73. *Id.* at 53 n.9. Reaffirming prior decisions, the Supreme Court noted that a confrontation clause infringement claim will only be upheld when there is "a specific statutory or court-imposed restriction at trial on the scope of the question." *Id.* at 53-54. While four of the Justices found that the confrontation clause did not afford a right to pretrial discovery, a majority of the Court concluded that the due process clause mandated discovery in some cases. *Id.* at 61.
74. Kentucky v. Stincer, 482 U.S. 730, 744 (1987).

abuse of three children.[75] At trial, but before the presentation of evidence, the trial court conducted competency hearings in chambers.[76] Over defendant's objection, the defendant was excluded from the examinations.[77] His attorney was permitted to attend the examinations and to question the children regarding their competence to testify.[78]

The Court held in *Stincer* that because the alleged violation of the defendant's right of confrontation occurred at a pretrial hearing in which the girls were not asked about the substantive issues, the exclusion of the defendant did not violate his rights.[79] Further, the Court held that the defendant's right to confront the witnesses was not violated because his exclusion from the competency hearing did not interfere with his opportunity for full and complete cross-examination.[80]

Finally, in 1988, the Supreme Court decided *Coy v. Iowa*.[81] The *Coy* decision is remarkable in that it is a substantial departure from prior confrontation analysis. It may, in fact, foreshadow decisions by the Court[82] that impact and change the emerging body of

---

75. *Id.* at 732. The Court explained that immediately prior to the competency hearing, the prosecutor dismissed the charge regarding one of the children because the child was not believed to be competent to testify. *Id.* at 732 n.1.

76. *Id.* at 732.

77. *Id.* at 732-33.

78. *Id.* at 733.

79. *Stincer*, 482 U.S. at 740-44.

80. *Id.* After the trial court found the two witnesses competent to testify, they appeared and testified at trial. *Id.* The defendant was present throughout cross-examination and could assist his counsel. *Id.*

81. 487 U.S. 1012 (1988).

82. For an in-depth analysis of these cases, refer to the case notes in this issue. Editor. The Supreme Court accepted certiorari in *Maryland v. Craig*, 316 Md. 551, 560 A.2d 1120 (1989), No. 89-478, *cert. granted*, 110 S. Ct. 834 (U.S. Jan. 16, 1990)(No. 89-478), and in *Idaho v. Wright*, 116 Idaho 382, 775 P.2d 1224 (1989), No. 89-260, *cert. granted*, 110 S. Ct. 833 (U.S. Jan. 16, 1990)(No. 89-260). Both of these cases present confrontation questions and involve children witnesses or victims.

In *Craig*, four children, ages four to seven, testified via one-way closed-circuit television. *Craig*, 316 Md. at __, 560 A.2d at 1122. At a pre-trial hearing, expert testimony showed that each child would be unable to testify in the presence of the defendant. *Id.* at __, 560 A.2d at 1122. The state moved to allow the children to testify through closed-circuit television pursuant to a Maryland statute. *Id. See* MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989), which provides that, in a case of child abuse, the court:

> [M]ay order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed circuit television if;
>
> (i) The testimony is taken during the proceedings; and
>
> (ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

Id. Notwithstanding express findings by the trial court, Maryland's appellate court reversed, holding that *Coy* required a face-to-face meeting between the defendant and each child prior to the invocation of the televised procedure. *Craig*, 316 Md. at __, 560 A.2d at 1127.

The question presented to the Court is as follows:

law addressing the special needs of children as witnesses.[83]

In *Coy*, the Court found that the defendant's right to confrontation was violated by the presence of a screen which enabled the child witnesses to avoid a visual encounter with the accused.[84]

> Where individualized findings regarding the need to protect the child witnesses are made and the witnesses, ages four to seven, are subjected to cross-examination at trial, does the Sixth Amendment's Confrontation Clause require a face-to-face meeting between the witnesses and the accused before a one-way closed-circuit television procedure may be invoked?" Brief of the Amici Curiae in Support of Petitioner, State of Florida, at i, Maryland v. Craig, 316 Md. 551, 560 A.2d 1120 (1989), No. 89-478, *cert. granted*, 110 S. Ct. 834 (U.S. Jan. 16, 1990)(No. 89-478).

In *Wright*, the trial court held that the two and one-half year-old witness was not capable of communicating with the jury. Idaho v. Wright, 116 Idaho 382, __, 775 P.2d 1222, 1225 (1989), *cert. granted*, 110 S. Ct. 833 (U.S. Jan. 16, 1990)(No. 89-478). Pursuant to Rule 803(24) of the Idaho Rules of Evidence, the pediatrician who examined the child testified as to statements made by the child to the pediatrician at the time of the child's examination. *Id.* IDAHO R. EVID 803(24) provides the following:

> 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
>
> . . .
>
> (24) 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 evident. 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, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id. The defendant was convicted and the conviction was overturned by the Idaho Supreme Court, holding that the testimony was inadmissible because it violated the confrontation clause. *Wright*, 116 Idaho at __, 775 P.2d at 1231.

The question presented to the United States Supreme Court on appeal is:

> Whether the "indicia of reliability" and "particularized guarantees of trustworthiness" mandated by the Sixth Amendment Confrontation Clause require that the hearsay statement of a very young victim of sexual abuse to an examining pediatrician be excluded unless the prosecution establishes that (a) the interview was either audio or videotaped; (b) leading questions were not used; and (c) the examining pediatrician conducting the interview did not have any preconceived idea of what the child should be disclosing."

Petition for Writ of Certiorari, Idaho v. Wright, 116 Idaho 382, 775 P.2d 1224 (1989), No. 89-260, *cert. granted*, 110 S. Ct. 833 (U.S. Jan. 16, 1990)(No. 89-260).

83. S. Res. 1923, 101st Cong., 1st Sess. (1989) is a further example of emerging law. Introduced on November 19, 1989, this bill is commonly called the "Child Victim's Bill of Rights." This bill legislates alternatives to in-court testimony for child victims and witnesses involved with proceedings in the federal system. *Id.* It includes, for example, provisions for testimony via two-way closed circuit television if the court finds that such a means of providing testimony would be in the child's best interest. *Id.* It also provides for the use of anatomically correct dolls, puppets and other testimonial aids to facilitate the child's testimony. *Id.*

84. Coy v. Iowa, 487 U.S. at 1012, 1022 (1988). The criminal act took place in August 1985, when two thirteen-year-old girls were camping overnight in their backyard. *Id.* at 1014. During the early morning hours a masked assailant crawled into their tent, and while shining a flashlight in their faces, warned them not to look at his face. *Id.* The defendant then sexually assaulted the girls. *Id.* Since the girls never had an opportunity to see the

Pursuant to Iowa law, and over the objection of the defendant, the trial court granted the state's request that a screen be placed between the witness and the defendant during the testimony of the child witnesses.[85] The screening device allowed the judge, jury, counsel and defendant to view the witnesses, however, the device did not allow the witnesses to see the defendant.[86] The defendant was found guilty on two counts of engaging in lascivious acts with a child[87] and appealed, contending, in part, that the courtroom procedures had violated his constitutional right of confrontation because the use of the screen allowed him to see and hear the victims testify but prevented them from seeing him.[88]

The Iowa Supreme Court upheld the conviction and found that the defendant's constitutional rights were not violated by the use of the screen.[89] The court noted that both children were under oath and subject to full cross-examination by counsel, in view of the jury, judge, and defendant.[90]

The United States Supreme Court reversed the Iowa Supreme Court, ruling that the screen did violate the defendant's right to confrontation under the sixth amendment.[91] The Court ruled that

---

face of their assailant there was not an issue of identification. *Id.* at 1026 (Blackmun, J., dissenting).

85. State v. Coy, 397 N.W.2d 730, 733 (Iowa 1986), *rev'd*, Coy v. Iowa, 487 U.S. 1012 (1988).

86. *Coy*, 487 U.S. at 1026-27 (Blackmun, J., dissenting).

87. *Id.* at 1015.

88. *Id.* On appeal to the Iowa Supreme Court, the defendant asserted that his constitutional right to confront the witnesses against him was violated. State v. Coy, 397 N.W.2d 730, 730-31 (Iowa 1986). He also claimed his right to due process was infringed in that the use of the screen created a strong inference of guilt. *Id.* at 733. Further, in challenging the trial court's authorization of the screening device, he did not argue that the trial court had failed to comply with the statutory requirements, but that the court must make a finding of necessity prior to implementing the statutory protections. *Id.*

89. *Id.* at 734.

90. *Coy*, 397 N.W.2d at 734. The Iowa Supreme Court concluded that the trial court was not required to make an individualized finding of necessity. *Id.* The court also rejected the assertion that the defendant's right to due process was violated, noting that the use of the screen was not inherently prejudicial. *Id.* at 734-35.

91. *Coy*, 487 U.S. at 1022. Justice Scalia, writing for the plurality, traced the history of the sixth amendment, noting that references to a face-to-face meeting between the accused and the accuser can be found in ancient Roman law, in the writings of Shakespeare, the speeches of President Eisenhower, and the Supreme Court's past decisions. *Id.* at 1015-19. The plurality concluded:

> The Sixth Amendment guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality. This opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' . . .Given these human feelings of what is necessary for fairness, the right of confrontation 'contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.' . . .The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very

the screening procedure was an "obvious and damaging violation of the defendant's right to a face-to-face encounter."[92] While leaving "for another day" the question as to whether any exceptions do exist to the right to face-to-face confrontation, the Supreme Court noted that there certainly was no exception available for the Iowa procedure.[93] The Court also strongly hinted that exceptions will be rare if at all, and must be "firmly . . . rooted in our jurisprudence," and would only be allowed upon an "individualized" showing that it was necessary in a particular case.[94] Because the 1985 Iowa statutory exception was not "firmly rooted," and the state had not made a showing that the children needed special protection, "the judgment could not be sustained by any conceivable exception."[95]

> phenomenon it relies upon to establish the potential 'trauma' that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

Id. at 1017-20. Justice Scalia attributed most of the Court's prior encounters with the confrontation clause to the existence of "room for doubt" as to what extent the clause included the implicit rights of either admissibility of out-of-court statements or restrictions on the scope of cross-examination. *Id.* at 1022. In other words, these two elements have been the most frequently litigated confrontation questions, not because these elements are the essence of the clause's protection, but because there is some doubt that the protections exist at all. *Id.* The Court determined that reasonably implicit rights conferred by the confrontation clause may at times give way to competing and important interests. *Id.* However, as to the right narrowly and *explicitly* set forth in the clause — the right to meet face-to-face all those who appear and give evidence at trial — the Court left for another day, the question as to whether any exceptions exist. *Id.* at 1021.

92. *Coy*, 487 U.S. at 1020.

93. *Id.* at 1021.

94. *Id.* The state maintained that the showing of necessity was established by the Iowa statute in that the statute created a legislative presumption of trauma. *Id.* at 1020. The Court responded by finding that even as to the weaker implicit element of the clause, something more than the generalized findings underlying this type of statute is needed when the exception was not "firmly . . . rooted in our jurisprudence." *Id.* at 1021 (citations omitted).

95. *Id.* The Supreme Court concluded that the right of face-to-face confrontation was subject to a harmless error analysis and reversed and remanded the case to the Iowa Supreme Court for consideration as to whether the error was harmless beyond a reasonable doubt. *Id.* at 1022. Justice O'Connor wrote a concurring opinion, joined by Justice White, agreeing that exceptions should be allowed only upon a "case-specific finding of necessity," and cannot be based upon the "generalized legislative finding" of necessity in the present case. *Id.* at 1025 (O'Connor, J., concurring). She noted that the concurrence was authored to make clear that the rights protected by the confrontation clause are not absolute. *Id.* Rather, the confrontation clause "reflects a preference for face-to-face confrontation at trial" but may give way in an appropriate case to competing interests and thus permit the use of procedural devices designed to shield a child witness from the trauma of courtroom testimony. *Id.* at 1022-24.

The dissenting justices, in an opinion written by Justice Blackmun and joined by the Chief Justice, were not persuaded by the plurality's version of the historical or legal justification for the preeminent protection of a literal right to face-to-face confrontation. *Id.* at 1025 (Blackmun, J., dissenting). At most, the dissent concluded, the clause demonstrated a "preference" for face-to-face confrontation, and certainly not an absolute right. *Id.* at 1028. Further, the dissent noted a fear that the majority's focus on the witness' ability to

Both the concurrence and the dissent rejected any suggestion in the plurality opinion that the right to face-to-face confrontation was absolute.[96] Concurring in the result, Justice O'Connor wrote separately to make clear that a "literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable," and that "this Court has rejected that view as unintended and too extreme."[97]

The dissent concluded that the procedures employed at trial did not offend the confrontation clause and noted that, for example, the exceptions to the rule against hearsay demonstrate that physical confrontation is not an "essential part of the protections afforded by the Confrontation Clause."[98] The dissent cited *Dutton v. Evans*,[99] wherein the Supreme Court held that the admission of an out-of-court co-conspirator's statement did not violate the confrontation clause.[100] In *Dutton*, the Court focused on the reliability of the statement and the potential effect of cross-examination,[101] never mentioning the fact that the declarant could not see the defendant at the time he made his accusatory statement.[102] Further, the dissent noted that hearsay statements are often made outside the presence of the defendant, yet the focus of the Court's past decisions as to the admissibility of these statements has not been whether there was physical confrontation.[103]

Although the *Coy* decision has sparked debate, scholars who have attempted to reconcile it with past decisions[104] have found

---

see the defendant will lead the states that are attempting to adopt protective measures for children-victims of sexual abuse to "sacrifice" the more central confrontation concerns, such as the right of cross-examination or the right to have the trier of fact observe the witness' demeanor. *Id.* The dissent also concluded that there was no reason why every exception to the right to face-to-face confrontation must be justified by a case-specific finding of necessity. *Id.* at 1034-35. Rather, the narrow constitutional preference at issue in this case was outweighed by the "important public policy, embodied in the Iowa statute." *Id.* at 1032.

96. *Id.* at 1022 (O'Connor, J., concurring); *Id.* at 1026 (Blackmun, J., dissenting).

97. *Id.* at 1022 (O'Connor, J., concurring); *Id.* at 1026 (Blackmun, J., dissenting).

98. *Id.* at 1030 (Blackmun, J., dissenting).

99. 400 U.S. 74 (1970).

100. Dutton v. Evans, 400 U.S. 74, 83 (1970).

101. *Id.*

102. *See id.* at 97 (Harlan, J., concurring)(the question is whether there has been adequate "confrontation" to satisfy the requirement of the Confrontation Clause).

103. *Coy*, 487 U.S. at 1026 (Blackmun, J., dissenting).

104. Mayer, *Protecting the Child Sexual Abuse Victim from Courtroom Trauma after Coy v. Iowa*, 67 N.C. L. REV. 711, 721 (1989)(concluded that *Coy* fails to provide a complete analysis of its exception test, but by looking to the standards for the admission of hearsay evidence this can be, in part, corrected). The plurality concluded that the long-recognized constitutional safeguards did not provide the defendant with sufficient protection in the absence of physical confrontation. *Coy*, 487 U.S. at 1022. Looking to the safeguards set by prior decisions, it would seem difficult to reconcile *Coy*. There was no dispute that the

that there are some common threads from which to analyze the confrontation law in light of *Coy*.[105] It is apparent that the Court's failure to finalize the question as to the constitutionality of visual confrontation exceptions[106] gives little guidance to state courts, leaving them to struggle unaided with the constitutionality of their recently enacted statutes.[107]

Analysis of confrontation questions centers on whether a witness is available to testify and to be cross-examined. Traditionally, the hearsay rule and its exceptions have generated the body of law wherein the unavailability or availability of a witness is scrutinized. An examination of hearsay questions will give a good basis for the concept and parameters of witness availability.

---

screen did not obstruct the jury's, judge's, or defendant's view of the witnesses, nor the witnesses' view of the jury or the judge. *Id.* at 1015. The witnesses were told that the defendant could see and hear them. *Id.* The defendant's ability to confer with his counsel was at no time interrupted or restricted. *Id.* The witnesses' testimony was given under oath and subject to unrestricted cross-examination. *Id.* There was no issue as to the admissibility of an out-of-court statement. *See generally id.* at 1016 (the confrontation clause confers a right to meet face-to-face with those who would give evidence at trial). Notwithstanding that these potential confrontation roadblocks, from prior caselaw, were not present the plurality reversed the decision. *Id.* at 1022.

105. *See* Mayer, *supra* note 104, at 721. Forman, *To Keep the Balance True: The Case of Coy v. Iowa*, 40 HASTINGS L.J. 437, 455 (1989)(*Coy* will most likely only bar those statutes that do not provide for two-way viewing and a necessity prone); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 600 (1978) ("[t]he State fully exhausts its obligation under the confrontation clause once it produces its evidence in best available form. . . . [T]he only remaining hurdle is . . . that all evidence . . . be sufficiently reliable for rational assessment by the trier of fact.").

106. *See* note 95 and accompanying text.

107. Forman, *supra* note 105, at 454. Forman speculated that the *Coy* decision may foretell the invalidation of statutes and rules aimed at shielding child victims. *Id.* The potential invalidation of these statutes and rules is illustrated by reference to *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), which invalidated mandatory court closure statutes:

> After the *Globe* case invalidated mandatory closure statutes, only three reported appellate court decisions upheld closure of the courtroom during the testimony of a child sexual assault victim. The *Globe* decision could have been an opening for trial judges to assess each individual case and protect the minor victim when necessary. Instead, the decision served to reduce actual closures.

Forman, *supra* note 105, at 454.

In *State v. Klem*, 438 N.W.2d 798 (N.D. 1989) the North Dakota Supreme Court, examined the issue of court closure. In *Klem*, the defendant appealed from a verdict finding him guilty of two counts of gross sexual imposition, from the judgment conviction and from an order denying his motion for a new trial. *Id.* at 799. Immediately before the child victim testified, the prosecution asked for and was granted a closed courtroom. *Id.* The defendant contended that the trial court's exclusion of the public deprived him of his right to a public trial under the sixth amendment. *Id.* The court, in arriving at its decision to reverse and remand for a new trial, cited *Globe* and noted that a trial court must make a particularized determination that a child witness is in need of the court's protection. *Id.* at 801. *Klem* was reversed and remanded for a new trial, leaving the prosecution the opportunity to again request exclusion of the general public during the victim's testimony, but directing the trial judge to conduct a hearing and make specific findings. *Id.* at 803. *But see id.* at 813 (Erickstad, J., dissenting).

III. THE RULE: HEARSAY EXCEPTIONS

Hearsay is defined as an "[out-of-court] statement offered in evidence to prove the truth of the matter asserted."[108] The prohibition against the admission of hearsay statements is predicated on the belief that placing a witness under oath and subjecting the witness to effective cross-examination is the best way to get at the truth.[109]

A. OUT-OF-COURT STATEMENT

A statement is considered to have been made out-of-court unless it was made while the declarant was testifying under oath, before the trier of fact, and subject to effective cross-examination.[110] Nonverbal conduct may be a statement and, therefore, hearsay, if it was intended to be an assertion.[111] Because nonverbal and verbal assertions may be statements for the purpose of their admissibility under the hearsay rule, the form of the statement must be carefully considered. A statement for the purpose of hearsay analysis may be made when a person speaks, writes, acts, or does not act (if the failure to act is intended by the actor to be an assertion).[112]

Most commonly, the statement at issue in a child sexual abuse case will be the child's verbal assertion as to what occurred.[113]

---

108. N.D.R. EVID. 801(c).
109. N.D.R. EVID. 801 (explanatory note).
110. *Id.*
111. *Id.*
112. *Id.*
113. *See In re* Penelope B, 104 Wash. 2d 643, __, 709 P.2d 1185, 1192 (1985). It is important to realize that a child's nonassertive verbal utterances and nonverbal conduct may not be hearsay. For instance, the Washington Supreme Court, upon reviewing the question of hearsay evidence in conjunction with the activities of a five-year-old victim of sexual abuse, noted the following:

> [I]f in a child abuse case someone walks into a place where the child is, or that person's name is mentioned, and the child involuntarily reacts by trembling, running and hiding, screaming, crying, shouting "I hate you" or the like, then such would be nonassertive utterances or nonverbal conduct and not hearsay.
>
> * * *
>
> Another example is the testimony of a therapist. The therapist testified that Penelope was playing with an anatomically correct male doll and on her own, as she was playing, "pushed the doll toward [the other therapist], within maybe one or two feet [of the therapist's] face and said something like either 'put this in your mouth' or 'suck me.' And at that point she was holding the penis of the doll in her hand." This was a combination of nonassertive verbal and nonverbal conduct; it was not hearsay and was admissible.
>
> Other examples of nonassertive conduct by the child, as testified to by others, included the following: Penelope's moods fluctuated between openness and evasiveness; her uncomfortableness in handling the anatomically correct dolls and not wanting to undress the male doll; her fearfulness and anxiety in different contexts; her defensiveness when asked about "her secret"; her barricading herself behind furniture or stuffed toys when talked to; and when, at

Such a statement would be hearsay if offered to prove that the defendant committed the act and, therefore, inadmissible unless it falls under an exception.[114]

A child's nonverbal conduct intended as an assertion may also be hearsay. For instance, a child may respond to questioning by nodding or pointing to an area of her body.[115] Any question of the admissibility of a child's out-of-court utterance or conduct must be analyzed as to the intent of the child when speaking, making the gesture, or engaging in the conduct.[116]

B. UNAVAILABILITY

An analysis of hearsay statements demands an examination of the declarant's status to determine if the declarant is available to appear at trial or is an unavailable witness.[117] If a hearsay declarant is available to testify in court and is subject to effective cross-examination regarding the out-of-court statement, the statement may be admitted into evidence without confrontation concerns.[118] Confrontation questions arise when the declarant is unavailable to testify at trial or is not subject to full and effective cross-examination.

---

not seeing her father someplace where she had expected to see him, her fear that he was in jail. None of this was hearsay testimony and it was admissible.

In re Penelope B, 104 Wash. 2d 643, __, 709 P.2d 1185, 1192 (1985) (en banc). Similarly, a child's statement about the act may not be hearsay but may be relevant for purposes other than to prove that the defendant committed the act. Drumbarger v. State, 716 P.2d 6, 10 (Alaska Ct. App. 1986)(child's statements to a police officer were admitted to show the child had knowledge of what a penis was and were not admitted to prove that sexual abuse occurred); State v. Iverson, 187 N.W.2d 1, 43 (N.D. 1971)(out-of-court statement was not subject to the hearsay rule because it was not offered for the purpose of establishing the truth of the matter asserted but for the purpose of establishing the fact that the statement was made).

114. Drumbarger v. State, 716 P.2d 6, 9-10 (Alaska Ct. App. 1986)(child's statement of sexual abuse as reported to her mother, immediately after mother discovered defendant dressing and child in bed, was held admissible under excited utterance exception); Perez v. State, 536 So.2d 206, 209-10 (Fla. 1988)(statements made by a child to police officer and mother were hearsay but admissible under the child hearsay exception); *But see* Alston v. United States, 462 A.2d 1122, 1127-28 (D.C. 1983)(four-year-old's statement of sexual abuse was hearsay and did not fall within any exceptions).

115. State v. Bawdon, 386 N.W.2d 484, 487 (S.D. 1986)(six-year-old child nodded her head affirmatively in response to physician who asked, "Did anyone touch you down there in the genital area?" and the court held that it was nonverbal conduct intended as an assertion and thus hearsay, but admissible under the medical diagnosis exception).

116. *See supra* notes 113-15.

117. *See* N.D.R. EVID. 804 (defines unavailability of a declarant to include situations wherein the declarant is physically unavailable, as well as situations in which the declarant's testimony cannot be obtained).

118. *See* Chambers v. Mississippi, 410 U.S. 284, 301 (1973); California v. Green, 399 U.S. 149, 158 (1970). The out-of-court statement is not subject to contemporaneous cross-examination, but this is not a requirement to satisfy the confrontation clause. *Id. See also Roberts*, 448 U.S. at 70 (concluded that it was permissible to admit at trial the preliminary hearing testimony of a witness who was not available at trial).

The primary factor when determining unavailability is not the declarant's physical presence in court but whether the declarant's testimony is available.[119] The three most common categories of questions regarding the availability of a child witness arise in the following areas: 1) the competency of the child; 2) the grounds for unavailability defined by the rules of evidence; and 3) the unwillingness or inability to testify.[120]

1. *Testimonial Competence*

Rule 601 of the North Dakota Rules of Evidence states that every person is competent to be a witness, unless otherwise provided in the rules.[121] Rule 602 requires that witnesses may not testify to a matter unless they have personal knowledge of the

---

119. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 524 (1988)(citing *Roberts*, 448 U.S. at 66).

120. N.D.R. EVID. 603. In recent years courts have encountered a fourth category of dispute as to potentially unavailable children witnesses and victims. This category, referred to a "psychological unavailability" seems to have developed in response to the criminal justice system's desire to utilize legally permissible means to protect children from psychological trauma induced by the courtroom setting.

Testifying at trial can be a terrifying experience for a child. Psychiatrists have identified the following components of legal proceedings that may place a child victim under prolonged mental stress and endanger the child's emotional equilibrium: repeated interrogations and cross-examination; facing the accused again; the official atmosphere in court; the acquittal of the accused for lack of corroborating evidence to the child's trustworthy testimony; and the conviction of a molester who is the child's parent or relative. *See generally* Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 1006-09 (1969). In some cases fear of testifying or of facing the defendant can render the child unavailable. *Id.*

Psychological inquiry which renders a child unavailable differs from unavailability because of mental illness or infirmity pursuant to Rule 804(a)(4) of the North Dakota Rules of Evidence. Mental illness or infirmity results from a mental illness, mental retardation, or brain disorder. *Id.* Contrarily, psychological injury resulting in unavailability is caused by the psychological trauma induced by the courtroom setting. *Id.*

Courts have wrestled with courtroom-induced trauma and the resultant unavailability. *See* People v. Williams, 93 Cal. App. 3d 40, __, 155 Cal. Rptr. 414, 421 (1979)(sexual assault victim was not found to be psychologically unavailable); Warren v. United States, 436 A.2d 821, 828 (D.C. 1981)(psychiatrist testified that this victim would suffer far more mental anguish than normally accompanies court appearances of sexual assault victims and that she would be likely to suffer severe psychosis, even possibly become suicidal); State v. Drusch, 139 Wis.2d 312, 407 N.W.2d 328 (Ct. App. 1987)(child was called to testify, began to cry, and soon became unable to proceed. The court interviewed the child outside the jury's presence and determined she was unavailable as a witness).

The threshold question as to whether or not a child is psychologically unavailable is whether a child's fear of the courtroom setting rises to the level of rendering the child psychologically unavailable. It has been determined that psychological unavailability requires more than a mere showing of the possibility of emotional distress or trauma, even more than showing a likelihood that the emotional distress or trauma will be substantial or severe. Graham, *supra* note 119, at 560. Rather, to establish psychological unavailability there must be "a showing of a substantial likelihood of severe emotional or mental harm. . . ." *Id.*

121. Rule 601 of the North Dakota Rules of Evidence states: "Every person is competent to be a witness except as otherwise provided in these rules." N.D.R. EVID. 601.

matter.[122] Rule 603 requires that all witnesses declare that they will testify truthfully, by oath or affirmation.[123] Together these rules establish that every person must be competent to testify, is required to have been properly sworn, and have personal knowledge of the matter at issue.

Because the rules declare that "every person is competent to be a witness," any examination on competency is unnecessary[124] and may be prohibited.[125] Rather, the trier of fact will evaluate the weight and credibility of the witness' testimony.[126]

The rules of evidence give the trial judge broad discretion to exclude some witnesses from the stand. For example, the trial judge may look to a standard of minimal credibility, determining that a witness so lacks credibility that her testimony is not relevant.[127] Likewise, with a very young child or a child who is intellectually-handicapped, the trial judge may conclude that the child so lacks basic cognitive ability as to not understand what she observed and therefore lacks personal knowledge.[128]

Rule 603 requires that a witness understand the difference between the truth and a lie, and appreciate the duty to tell the truth.[129] A child who demonstrates an inability to understand and demonstrate either or both of these concepts may be excluded. Pursuant to Rule 611(a), the court has discretion to control the presentation of evidence.[130] For instance, if the child is one of several witnesses, the trial judge may determine that the child's testimony is cumulative and exclude it.

Although the language of Rule 601 is clear, that every person

122. Rule 602 of the North Dakota Rules of Evidence states: A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses. N.D.R. EVID. 602.

123. Rule 603 of the North Dakota Rules of Evidence states: "Before testifying, every witness must be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." N.D.R. EVID. 603.

124. N.D.R. EVID. 601 (explanatory note)(evaluation of a witness should be accomplished by the trier of fact); *see* State v. Schill, 406 N.W.2d 660, 662 (N.D. 1987)("the evaluation of a particular witness is best left to the trier of fact through the process of weighing the testimony and assessing its credibility, rather than by the prior imposition of standards of competence.").

125. State v. Dwyer, 143 Wis. 2d 448, __, 422 N.W.2d 121, 126 (Ct. App. 1988)(under Rule 601 judges may not determine the competency of a witness. Rather, questions of competence are credibility issues for the trier of fact).

126. *Schill*, 406 N.W.2d at 662.

127. N.D.R. EVID 401.

128. *See generally* N.D.R. EVID. 602.

129. N.D.R. EVID. 603.

130. N.D.R. EVID. 611(a).

is competent to be a witness, it is also clear from the rules of evidence that the trial judge has the authority to control the presentation of evidence and exclude witnesses.[131] As demonstrated above, the trial judge has many alternatives to bar the admission of testimony that the judge determines should be excluded.[132] In keeping with the intent of Rule 601, it would seem the scale should tip in favor of allowing the testimony to be heard, thus, enabling the trier of fact to determine the weight and credibility of the witness' testimony.[133]

2. *Provisions Under North Dakota Rules of Evidence 804*

Rule 804 of the North Dakota Rules of Evidence defines five grounds for the unavailability of a declarant's testimony: 1) privilege; 2) refusing to testify; 3) lack of memory; 4) death, physical illness, mental illness or infirmity; and 5) absence.[134]

A witness who successfully asserts a claim of privilege is unavailable to testify as to matters within the scope of the privilege.[135] Similarly, a witness who refuses to testify concerning the subject matter of a statement despite a court order to do so is unavailable.[136] Likewise, a witness who testifies to lack of memory

---

131. N.D.R. EVID. 611 (explanatory note). Interestingly, the explanatory note to Rule 611 includes the following language: "The trial judge may allow a child witness to use an anatomically correct doll if a proper foundation is laid. The doll may not be used in a suggestive manner and the nonverbal testimony must be relevant." *Id.*

132. *See, e.g.*, N.D.R. EVID. 401 (the definition of relevant evidence); N.D.R. EVID. 602 (lack of personal knowledge); N.D.R. EVID. 603 (oath or affirmation).

133. N.D.R. EVID. 601 (explanatory note).

134. N.D.R. EVID. 804(a)(1)-(5). Rules 804(a)(1)-(5) of the North Dakota Rules of Evidence provide:

> (a) DEFINITION OF UNAVAILABILITY. "Unavailability as a witness" includes situations in which the declarant —
> (1) *is exempted by ruling of the court* on the grounds of privilege from testifying concerning the subject matter of the declarant's statement;
> (2) *persists in refusing to testify* concerning the subject mattter of the declarant's statement despite an order of the court to do so;
> (3) *testifies to a lack of memory* of the subject matter of the declarant's statement;
> (4) *is unable to be present* or to testify at the hearing because of death or then existing physical or mental illness or infirmity; and
> (5) *is absent from the hearing* and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

Id.

135. N.D.R. EVID. 804(a)(1). See *supra* note 134 for the text of rule 804(a)(1). *Inadi*, 475 U.S. at 399-400 (witness unavailable because of claim of privilege against self-incrimination).

136. N.D.R. EVID. 804(a)(3). See *supra* note 134 for the text of rule 804(a)(3). Partial lack of memory does not necessarily render a witness unavailable. *See* State v. Marcum, 750 P.2d 599, 603 (Utah 1988)(child not unavailable because of failure to recollect the answer to one question).

as to the subject matter of the statement is unavailable.[137] The rule also provides that a witness who is unable to testify at the hearing because of death, physical or mental illness, or infirmity is unavailable.[138] Finally, a witness is unavailable when the witness is absent from the hearing and his presence cannot be secured by process or other reasonable means.[139]

3. *Unwilling or Unable to Testify*

Unavailability may be shown when a child is unwilling or unable to testify in court.[140] Such unavailability may occur when the child has gone beyond the jurisdiction of the court[141] or cannot be found.[142]

IV. TRADITIONAL METHODS FOR INTRODUCING OUT-OF-COURT STATEMENTS BY CHILDREN

Hearsay statements by children, when permitted into evidence, typically have fallen within one of three exceptions to the hearsay rule: 1) excited utterance;[143] 2) statements made for purposes of medical diagnosis or treatment;[144] or 3) statements not covered by traditional hearsay exceptions[145] that have equivalent

---

137. N.D.R. EVID. 804(a)(2). See *supra* note 134 for the text of rule 804(a)(2).

138. N.D.R. EVID. 804(a)(4). See *supra* note 134 for the text of rule 804(a)(4). *See also* State v. Drusch, 139 Wis. 2d 312, __, 407 N.W.2d 328, 332 (Ct. App. 1987)(eight-year-old child was found to be unavailable due to existing physical or mental illness or infirmity; the trial court determined that she was so frightened and emotionally upset by the presence of the jury, the trial setting and the offense itself, that she was unable to testify and would continue in that inability in the near future.").

139. N.D.R. EVID. 804(a)(5). See *supra* note 134 for the text of rule 804(a)(5). *See also* Ohio v. Roberts, 448 U.S. 56, 77 (1980)(witness was found to be constitutionally unavailable who could not be found and state's efforts to have her present for hearing included issuance of and unsuccessful delivery of five subpoenas).

140. Graham, *supra* note 119, at 562.

141. People v. Arguello, 737 P.2d 436, 437-38 (Colo. Ct. App. 1987)(child was found unavailable because she was out-of-state at the time of the third trial, after having testified twice, and her parents refused to bring her back).

142. *Roberts*, 448 U.S. at 77 (witness who prosecutor made good faith effort to find, including issuance of five subpoenas which were not successfully delivered, was constitutionally unavailable).

143. N.D.R. EVID. 803(2). Rule 803(2) of the North Dakota Rules of Evidence provides:

> EXCITED UTTERANCE. A statement relating to a startling event or condition made while the declarant was under the stress of excitement aused by the event or condition.

Id.

144. N.D.R. EVID. 803(4). Rule 803(4) of the North Dakota Rules of Evidence provides:

> 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.

Id.

145. Traditional hearsay exceptions are the first 23 exceptions in rule 803 of the

circumstantial guarantees of trustworthiness.[146]

A. EXCITED UTTERANCES

Both the Federal Rules of Evidence and the North Dakota Rules of Evidence provide a hearsay exception for statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[147]

As to the "startling event," most courts have little difficulty finding that an alleged sexual assault constitutes such an occurrence, especially for a young child.[148] This is so despite research indicating that most children do not view a sexual assault episode as shocking[149] and may not know that what has happened to them was wrong.[150]

Of greater concern to courts has been the delay between the event and the statement of the child.[151] Even if the child recognizes the nature of the abuse, a report may not be immediately forthcoming for any one of a variety of reasons. For instance, the child may have been threatened "not to tell,"[152] may fear no one

---

Federal Rules of Evidence and the first four exceptions in rule 804(b) of the Federal Rules of Evidence. FED. R. EVID. 803(24).

146. N.D.R. EVID. 803(25). Rule 803(25) of the North Dakota Rules of Evidence provides:

> A statement not specifically covered by any of the foregoing exceptions but having circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) 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 (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party and to the court in writing sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id. Before March 1, 1990, this residual exception provision was Rule 803(24).

147. FED. R. EVID. 803(2) and N.D.R. EVID. 803(2). See *supra* note 143 for the text of rule 803(2). The rationale for this exception to the hearsay rule is that the excitement of the event greatly reduces the likelihood that the statement will be contrived, and the spontaneity requirement reduces the possibility of reflection before the statement is made. *See* Lancaster v. People, 200 Colo. 448, __, 615 P.2d 720, 722 (1980)(defendant's conviction for assault was affirmed despite fact that there was a time interval of one-half hour between the alleged assault and the hearsay declaration).

148. People v. Miller, 58 Ill. App.3d 156, __, 373 N.E.2d 1077, 1080 (1978).

149. *See* D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 65 (1979) (only 26% of women assaulted as children surveyed experienced shock after being sexually assaulted; 20% felt surprised).

150. *Id.* at 31.

151. State v. Messamore, 2 Hawaii App. 643, __, 639 P.2d 413, 418-19 (1982).

152. Fitzgerald v. United States, 443 A.2d 1295, 1298 (D.C. 1982).

will believe her,[153] or may feel confusion and guilt.[154] Perhaps in recognition of these factors, courts have been liberal in admitting hearsay statements under the excited utterance exception.[155]

This "stretching" of the bounds of the excited utterance exception has been justified by various circumstantial guarantees of trustworthiness including spontaneity.[156] When admissible, the statement becomes substantive evidence.[157]

It is suggested that as more states adopt an exception specifically addressing statements by children in sexual abuse cases, the traditional bounds of the excited utterance exception will be more rigidly followed.[158]

---

153. The feminine gender is referred to in child sexual abuse cases because female children are victimized much more frequently than male children. J. BARKAS, VICTIMS 130 (1978). "For every ten girl victims (of sexual abuse) there is one boy victim." *Id.*

154. Stevens & Berliner, *Special Techniques for Child Witnesses*, in THE SEXUAL VICTIMOLOGY OF YOUTH 246, 251 (L. Schultz ed. 1980).

155. *See* State v. Ritchey, 107 Ariz. 552, __, 490 P.2d 558, 562 (1971)(although child witness did not exhibit shock or nervous excitement and was subdued in manner, statement admitted as excited utterance). Statements have been admitted even though they were made hours and even days after the startling event. *See* People v. Sandoval, 709 P.2d 90, 91 (Colo. Ct. App. 1985)(child's statement to neighbor 14 hours after assault admissible as excited utterance); State v. Noble, 342 So.2d 170, 172-73 (La. 1977)(court admitted statement of four-year-old victim made two days after rape); State v. Ramirez, 46 Wash. App. 223, __, 730 P.2d 98, 102 (1986) (statement made sometime after the event was admitted as an excited utterance); State v. Woodward, 32 Wash. App. 204, __, 646 P.2d 135, 137 (1982)(statement by five-year-old victim made 20 hours after event was admissible as an excited utterance).

Moreover, the fact that the child's statement was made in response to inquiry from another person does not automatically bar its admission under this exception. *See* State v. Bethune, 232 N.J. Super 532, __, 557 A.2d 1025, 1028 (1989); *but see* State v. Ryan, 103 Wash. 2d 165, __, 691 P.2d 197, 205 (1984).

156. *See, e.g.*, United States v. Barlow, 693 F.2d 954, 962 (6th Cir. 1982)(the motive, or lack thereof, to injure the accused is a factor affecting trustworthiness); State v. Myatt, 237 Kan. 17, __, 697 P.2d 836, 842 (1985)(the nature and duration of the sexual contact, as well as the description of a sexual act beyond a child's normal experience, are factors affecting trustworthiness).

157. *See* N.D.R. EVID. 803 (admitting as substantive evidence statements falling within accepted exceptions to the hearsay rule).

158. Twenty-three states have adopted, by statute or rule, hearsay exceptions for statements by children in sexual abuse cases: ALASKA STAT. § 12.40.110 (Supp. 1988); ARIZ. REV. STAT. ANN. § 13-1416 (Supp. 1988); ARK. R. EVID. 803 (25)(A)(1985); CAL. EVID. CODE § 1228 (West Supp. 1989); COLO. REV. STAT. § 13-25-129 (1987); FLA. STAT. § 90.803(23) (West Supp. 1989); ILL. ANN. STAT. ch. 38, ¶ 115-10 (Smith-Hurd 1984); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1989); IOWA CODE § 232.96(6) (1985); KAN. STAT. ANN. § 60-460(dd) (1983 & Supp. 1988); ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1988); MD. CTS. & JUD. PROC. CODE ANN. § 9-103.1 (1989); MINN. STAT. ANN. § 595.02(3) (West 1988); MO. REV. STAT. § 491.075 (Vernon Supp. 1989); N.Y. CRIM. PROC. LAW § 65.00-30 (McKinney 1985); N.D.R. EVID. 803(24) (1990); OKLA. STAT. ANN. tit. 12, § 2803.1 (West Supp. 1989); R.I. GEN. LAWS § 14-1-69 (Supp. 1988); S.D. CODIFIED LAWS ANN. § 19-16-38 (1987); TEX. CRIM. PROC. CODE ANN. § 38.072 (Vernon Supp. 1989); UTAH CODE ANN. § 76-5-411 (1990); VT. R. EVID. 804a (Supp. 1988); WASH. REV. CODE ANN. § 9A.44.120 (1988).

B. STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT

Under the rules of evidence, admissible are "(s)tatements 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."[159]

The medical examination after abuse serves several purposes, such as to ascertain if there is any medical evidence consistent with abuse; to determine what, if any treatment is needed; and to assure the child that she is physically okay.[160] The trend of authority is to admit statements identifying the perpetrator in child sexual abuse prosecutions.[161] Even if the statement identifying the perpetrator is made by the child while a nurse or social worker is recording the child's history, outside the presence of the physician, the statement is not necessarily rendered inadmissible under the medical diagnosis and treatment hearsay exception.[162]

Statements by the child to the physician, if relevant to diagno-

---

159. FED. R. EVID. 803(4); N.D.R. EVID. 803(4). The underlying rationale for the exception is the assumption that such statements are reliable because the declarant knows that proper medical care depends on telling the truth. United States v. Iron Shell, 633 F.2d 77, 83-84 (8th Cir. 1980).

160. Moore, *The Medical Diagnosis and Treatment Exception to Hearsay—The Use of the Child Protection Team in Child Sexual Abuse Prosecutions*, 13 N. KY. L. REV. 51, 55-56 (1986). A physician needs to know the type of object and the area of contact in order to take appropriate swabs and samples for venereal disease. *Id.* Even in cases where the abuse does not involve penetration, a physician cannot treat infection unless the physician knows where on the victim's body contact occurred and the type of object that contacted the victim. *Id.*

Questions about *who* inappropriately touched the child are arguably relevant because abuse by a parent or caretaker may be more chronic and the medical findings different than with an isolated instance of abuse. Because pediatricians generally take a holistic approach to a child's health, a complete medical history is also relevant so that children may be referred to a counselor. *See* Moore, *supra* at 55-56.

161. Graham, *supra* note 119, at 529. *See also* United States v. Renville, 779 F.2d 430, 436-37 (8th Cir. 1985)("[S]tatement by a child abuse victim that the abuser is a member of the victim's immediate household . . . *are* reasonably pertinent to treatment. . . . The exact nature and extent of the psychological problems which ensue from child abuse often depend on the identity of the abuser.")(emphasis in original); People v. Wilkins, 134 Mich. App. 38, __, 349 N.W.2d 815, 817-18 (1984)(upholding the admission of a sexually abused child's statement to her doctor identifying the child's stepfather as the perpetrator); Goldade v. State, 674 P.2d 721, 726 (Wyo. 1983) *cert. denied*, 467 U.S. 1253 (1984) ("[i]t is apparent from the testimony of the physician . . . that he was involved in attempting to diagnose and, if diagnosed, to then treat child abuse, not simply bruises on the little girl's face. The identity of the person causing those injuries is a pertinent fact in these circumstances.")

162. United States v. DeNoyer, 811 F.2d 436, 438-39 (8th Cir. 1987). However, a foundation for the statement must be laid by establishing that it is the physician's practice to have the staff take the child's history and that the physician uses the history for purposes of medical diagnosis and treatment. *Id.* The court in *DeNoyer* extended the residual exception to a child's out-of-court statement made to a social worker. *Id.*

sis or treatment, are admissible as substantive evidence at trial.[163]

C. STATEMENTS HAVING CIRCUMSTANTIAL GUARANTEES OF TRUSTWORTHINESS

Both federal and state rules of evidence permit the introduction of a statement not specifically covered by the first 23 exceptions to Rule 803, so long as the statement has "equivalent circumstantial guarantees of trustworthiness."[164] Additionally, before such a statement is admissible, the court must determine that "the statement is offered as evidence of a material fact," "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts," and "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."[165] The proponent of the statement must provide fair notice to the opposing party.[166] Courts generally enforce the notice requirement before trial but have admitted such statements if the need for admission arises during trial.[167]

The most significant requirement of this residual exception to the hearsay rule is that the statement must possess "circumstantial guarantees of trustworthiness" equivalent to those of statements admitted under one of the traditional exceptions.[168] Courts should determine trustworthiness on a case-by-case basis, considering such factors as the child's age; the child's physical and mental condition; the circumstances of the alleged event; the language used by the child;[169] the presence of corroborative physical evidence;

---

163. *See* FED. R. EVID. 803(4); N.D.R. EVID. 803(4). See *supra* note 144 for the text of N.D.R. Evid. 803(4).

164. FED. R. EVID. 803(24); N.D.R. EVID. 803(25). See *supra* note 146 for the text of N.D.R. Evid. 803(25). N.D.R. Evid. 803(25) was formerly Rule 803(24) and was amended effective March 1, 1990.

165. *Id.*

166. *Id.* The failure to provide notice has not been a recurring justification for exclusion. *See* Yasser, *Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule*, 11 TEX. TECH. L. REV. 587, 595 (1980).

167. *See generally* Yasser, *supra* note 166, at 595-97, 601-03; United States v. Bailey, 581 F.2d 341, 348 (2d Cir. 1978); State v. Gremillion, 542 So.2d 1074, 1078 (La. 1989).

168. *See* Graham, *supra* note 119, at 531 (statements must possess "circumstantial gurantees of trustiworthiness" to be admissible).

169. Testifying in favor of the Washington hearsay statute, Mary Kay Barbieri, chief of the criminal division of the King County Prosecutor's Office and co-author of the statute, explained the need to admit hearsay statements of child victims of sexual abuse. Joint Hearings on S. 4461 Before the Washington State Senate Judiciary Comm. and the House Ethics, Law & Justice Comm., 47th Leg., 23d Sess. 8-9 (1982)[hereinafter Joint Hearings](statement of Mary Kay Barbieri, chief of the Criminal Division of the King County Prosecutor's Office). In her testimony, Barbieri drew from the facts of State v. Johnson, 96 Wash. 2d 926, __, 639 P.2d 1332, 1333 (1982):

> Dad's making spaghetti, just minding his own business cooking; and his little girl

the relationship of the accused to the child; the child's family, school, and peer relationships; and any motive to falsify or distort the event.[170]

Because of its flexibility, the residual exception to the hearsay rule is superior to the judicial approaches to child hearsay statements embodied in the excited utterance and medical diagnosis exceptions above-described. Moreover, unlike the excited utterance exception, the residual exception allows a court to examine indicia of reliability other than spontaneity, which by itself does not specifically address the nature of child sex abuse cases.[171]

V. MISCELLANEOUS METHODS OF INTRODUCING OUT-OF-COURT STATEMENTS BY CHILDREN IN SEXUAL ABUSE CASES

In a relatively small number of cases, out-of-court statements by children about sexual abuse have been introduced as present sense impressions;[172] then existing mental, emotional, or physical conditions;[173] former testimony;[174] and prior statements by wit-

---

says, "Does milk come out of your penis, Dad?" Dad says no; and the little girl says, "It comes out of Melody's dad's penis and tastes yukky." When (the little girl) comes to court, she doesn't say graphic things like that. She's scared. She sits there, and the prosecutor, who's trying to be nice, says . . ."Did Melody's dad do something to you didn't like?" and she goes, nodding. "What did he do?" — Long, painful silence — maybe the prosecutor shows a doll and says, "Can you point on this doll to what it was?" How does that look to the jury? It looks like there's a little girl who's coached or making it up or doesn't know what she's talking about. But if the jury also hears the statement that the little kid made while Dad was cooking spaghetti, can't we all agree that that statement was more reliable and better evidence about what happened(?)

Joint Hearings, *supra*.

170. State v. Myatt, 237 Kan. 17, __, 697 P.2d 836, 843 (1985).

171. *See* Yun, *A Comprehensive Approach To Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1762 (1983)(analysis of traditional hearsay exceptions and their unsuitability to address the statements of children about sexual abuse).

172. FED. R. EVID. 803(1); N.D.R. EVID. 803(1). FED. R. EVID. 803(1) provides: "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." FED. R. EVID. 803(1).

173. FED. R. EVID. 803(3); N.D.R. EVID. 803(3). FED. R. EVID. 803(3) provides:

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

FED. R. EVID. 803(1).

174. FED. R. EVID. 804(b)(1); N.D.R. EVID. 804(b)(1). FED. R. EVID. 804(b)(1) provides:

> 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

ness as non-hearsay.[175]

In addition, at least twenty-six states have enacted videotaping statutes, many enacted within the past six years.[176] These statutes provide for the admission of a child's videotaped statement as evidence in sexual abuse cases if certain conditions are met.[177] For example, in order to survive challenges based upon lack of confrontation, it is likely that cross-examination of the child must be allowed during videotaping or at trial.[178] While North Dakota has no statute or special rule addressing such videotaped statements, trial courts in at least two judicial districts of the state have permitted the introduction of such statements at trial.[179]

Expert testimony as to typical behavior patterns of victims of sexual abuse is generally held admissible, especially when the victim reacted in a manner unlike that which a community would

---

compliance with law in the course of the same or 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.

FED. R. EVID. 804(b)(1).

175. FED. R. EVID. 801(d)(1); N.D.R. EVID. 801(d)(1). This rule provides that a statement is not hearsay if the declarant "testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement [is consistent with the declarant's testimony and] . . . is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." *Id.* In many child sexual abuse cases, the focus of cross-examination is on the improper influence of a parent upon the child and/or the possibility of fabrication by the child. Once reference is made to improper influence, assuming the child testifies and is subject to cross-examination concerning the out-of-court statement, the statement is admissible as substantive evidence.

176. ALA. CODE § 15-25-2 (Supp. 1988); ALASKA STAT. § 12.45.047 (1984); ARIZ. REV. STAT. ANN. § 13-4253 (1985); ARK. STAT. ANN. §§ 43-2035 to -2037 (1985); CAL. PENAL CODE § 1346 (West 1985); COLO. REV. STAT. § 18-3-413 (1986); Act of July 8, 1985, Pub. Act. No. 85-587, 1985 Conn. Legis. Serv. 463 (West); DEL. CODE ANN. tit. 11, § 3511 (1987); FLA. STAT. § 92-53 (1989); IOWA CODE ANN. § 910.A3 (West Supp. 1985); KAN. STAT. ANN. § 22-3434 (1988); KY. REV. STAT. ANN. § 421.350 (Baldwin Supp. 1989); MASS. GEN. LAWS ANN. ch. 278, § 16D (West 1985); MO. ANN. STAT. §§ 491.680 to .687 (Vernon Supp. 1989); MONT. CODE ANN. §§ 46-15-401 to -403 (1987); NEV. REV. STAT. ANN. § 174.229 (Michie 1986); N.H. REV. STAT. ANN. § 517:13-a (1988); N.M. STAT. ANN. § 30-9-17 (1984); OKLA. STAT. ANN. tit. 22, § 753 (West 1984); R.I. GEN. LAWS § 11-37-13.1 (1988); S.D. CODIFIED LAWS ANN. § 23A-12-9 (1985); TENN. CODE ANN. § 24-7-116 (1988); TEX. CRIM. PROC. CODE ANN. art. 38.071 (Vernon 1989); UTAH CODE ANN. § 77-35-15.5 (1989); VT. R. EVID. 807 (Supp. 1988); WIS. STAT. § 967.04(7) (1988).

177. Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 814 (1985) [hereinafter *Testimony of Child Victims*].

178. *Id.* Although defendants argue that the admissibility of such testimony is unconstitutional, many defendants prefer videotaped testimony over live testimony because videotaped testimony has less impact on the jury. *See* Ginkowski, *The Abused Child: The Prosecutor's Terrifying Nightmare*, 1 CRIM. JUST. 30 (1986). The Supreme Court of Idaho recently addressed the admission of videotaped statements in the case of Idaho v. Wright, 116 Idaho 382, 775 P.2d 1224 (1989), No. 89-260, *cert. granted*, 110 S. Ct. 833 (U.S. Jan. 16, 1990)(No. 89-260). See *supra* note 82 for a discussion on *Wright*.

179. An informal survey of prosecutors conducted by the authors of this article on February 1, 1990, revealed that since 1980 district court judges in two of North Dakota's eight judicial districts, the South Central and Southeast Districts, have accepted into evidence videotaped statements of children in sexual abuse cases. Prosecutors in the remaining six judicial districts have not attempted to introduce such videotaped statements.

commonly expect.[180] Where the cross-examiner questions the basis of an expert's opinion, hearsay statements made to the expert witness by the victim are admissible if the expert relied upon the statements and the statements are reasonably relied upon by experts in the field.[181]

Finally, even when the substance of the hearsay statement may not be admissible under any exception to the hearsay rule, the fact that the statement was made at all may be introduced under the common law "fresh complaint" theory.[182]

VI. NORTH DAKOTA'S NEW EXCEPTION TO THE HEARSAY RULE: CHILD'S STATEMENT ABOUT SEXUAL ABUSE

Twenty-three states, including North Dakota, have adopted by rule or statute a specific exception to the hearsay rule admitting out-of-court statements by children in sexual abuse cases.[183] Rule 803(24) of the North Dakota Rules of Evidence provides:

> 24. CHILD'S STATEMENT ABOUT SEXUAL ABUSE. An out-of-court statement by a child under the age of 12 years about sexual abuse of that child or witnessed by that child is admissible as evidence (when not otherwise admissible under another hearsay exception) if:
>
> (a) The trial court finds, after hearing upon notice in advance of the trial of the sexual abuse issue, that the time, content, and circumstances of the statement provide sufficient guarantess [sic] of trustworthiness; and
>
> (b) The child either:
>
> (i) Testifies at the proceeding; or
>
> (ii) Is unavailable as a witness and there is corroborative evidence of the act which is the act which is the subject of the statement.

The requirement that the matter of a hearsay statement be decided before trial prevents prejudice to the defendant[184] that

---

180. *See* Stout v. State, 528 N.E.2d 476, 479 (Ind. 1988)(psychiatric social worker allowed to testify that "there was nothing unusual in the victim's rather factual and unemotional rendition").

181. State v. Recor, 150 Vt. 40, __, 549 A.2d 1382, 1388 (1988).

182. Commonwealth v. Legacy, 23 Mass. App. 622, __, 504 N.E.2d 674, 678 (1987); People v. Meacham, 152 Cal. App. 3d 142, __, 199 Cal. Rptr. 586, 596 (1984).

183. See *supra* note 158 for a list of state rules and statutes regarding hearsay exceptions in child sex abuse cases.

184. The use of the word "defendant" connotes the context of a criminal case, however, Rule 803(24) is not limited to criminal cases.

might otherwise arise from the impact of foundational testimony heard by the jury.[185] The notice requirement is similar to that of the residual exception[186] in that the content of the proposed statement must be provided to the opposing party so that he may prepare to contest admission.[187]

A. SUFFICIENT GUARANTEES OF TRUSTWORTHINESS

The new North Dakota hearsay rule mandates the court examine the "time, content, and circumstances of the statement" in order to determine whether they provide sufficient guarantees of trustworthiness to permit admission.[188]

1. *Time*

Courts are more likely to admit statements made soon after the event than those made much later, hence, courts are more likely to admit initial statements than subsequent statements.[189] Although time and sequence are important, they are not dispositive because delay in reporting and vacillation are commonly associated with complaints of child sexual abuse.[190]

Children often do not know that what happened to them is wrong. "For some it represents the first time they experience what they perceive to be recognition or special attention from the parent or parent figure."[191] Since children may not view the incident of sexual abuse as threatening it is not surprising that they may not see the need to report it promptly to parents or others in authority.

Until 1987, by statute in North Dakota, no prosecution for

185. It has been frequently observed that it is impossible to "unring the bell," that is, to erase from the minds of the jury an impression made by the statement.

186. *See* N.D.R. EVID. 803(25) and FED. R. EVID. 803(24). See *supra* note 146 for the text of North Dakota Rule of Evidence 803(25).

187. *Compare* N.D.R. EVID. 803(25) and N.D.R. EVID. 803 (24).

188. *See* N.D.R. EVID. 803(24). In *Ohio v. Roberts*, the Supreme Court held that hearsay statements by an unavailable declarant were inadmissible unless the statements bore adequate "indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 66 (1980). The proponent of admitting the hearsay can demonstrate reliability by showing either that the evidence falls within a "firmly rooted" hearsay exception or that it bears "particularized guarantees of trustworthiness." *Id.* It is this second prong of the reliability test that is addressed by the "time, content, and circumstances" language of Rule 803(24) of the North Dakota Rules of Evidence. As to the first prong, statements of children in sexual abuse cases have frequently been admitted under traditional or "firmly rooted" exceptions to the hearsay rule. *Id.*

189. *See* FED. R. EVID. 803(1) (present sense impression), 803(2) (excited utterance); N.D.R. EVID. 803(1), (2).

190. *See supra* notes 157-169 and accompanying text.

191. MACFARLANE, *Sexual Abuse of Children*, in THE SEXUAL VICTIMIZATION OF WOMEN 86, 88-89 (1978).

child sexual abuse could be instituted unless the alleged offense was brought to the attention of a public authority within three months after a parent, guardian, or other competent person specifically interested in the victim learned of the offense.[192] In the context of a criminal case, a 90-day delay by an adult in reporting an offense was the maximum allowable.[193] In 1987, the 90-day restriction was removed from the statute.[194] Arguably, children should not be held to a stricter punctuality standard than adults in the reporting of sexual abuse.

2. *Content*

In considering the content of the child's statement, courts examine the exact language used. Approving the admission of a statement by a seven-year-old, the Ninth Circuit Court of Appeals ruled, "The childish terminology has the ring of verity and is entirely appropriate to a child of his tender years."[195]

A court may also consider whether the statement describes an embarrassing fact that a child would not normally convey unless true and whether it describes a sexual act beyond a child's normal experience.[196]

3. *Circumstances*

Traditional circumstantial guarantees of trustworthiness are the oath and the opportunity for cross-examination.[197] In the vast majority of child sexual abuse cases, these guarantees are absent.[198] Accordingly, courts may consider a variety of factors, loosely described as "circumstances," including: the nature and duration of the sexual contact,[199] "whether the statement was made while the child was still upset or in pain because of the incident,"[200] "whether any event that occurred between the time of

192. N.D. CENT. CODE § 12.1-20-01(4) (1985).
193. *Id.*
194. N.D. CENT. CODE § 12.1-20-01 (Supp. 1989).
195. United States v. Nick, 604 F.2d 1199, 1204 (9th Cir. 1979).
196. State v. Myatt, 237 Kan. 17, __, 697 P.2d 836, 843 (1985). See *supra* note 169 for a prosecutor's testimony at a legislative hearing regarding admissibility of a child's statement.
197. Ohio v. Roberts, 448 U.S. 56, 63-64 & n.6. *See also* Wise, *The Constitutionality of Admitting the Videotape Testimony at Trial of Sexually Abused Children*, 7 WHITTIER L. REV. 639, 650 (1985).
198. *Id. But see* Campbell, *LB 90 and the Confrontation Clause: The Use of Videotaped and In Camera Testimony in Criminal Trials to Accommodate Child Witnesses*, 68 NEB. L. REV. 372, 395 (1989) (statutes providing for the use of videotaped statements or closed-circuit televised testimony typically provide for cross-examination by the accused).
199. *Myatt*, 237 Kan. at __, 697 P.2d at 843.
200. Note, *Sexual Abuse of Children—Washington's New Hearsay Exception*, 58 WASH. L. REV. 813, 827 (1983).

the alleged act and the time the statement was made could have accounted for the contents of the statement,"[201] the suggestiveness created by leading questions,[202] whether the child was a deprived child or a child in need of care,[203] and the reliability of the testifying victim.[204]

B. CORROBORATIVE EVIDENCE

If the child testifies at the proceeding, and the court has previously determined that the time, content, and circumstances provide sufficient indicia of reliability, the hearsay statement is admissible under Rule 803(24) of the North Dakota Rules of Evidence. However, if the child is unavailable[205] to testify, there must be corroborative evidence of the act allegedly perpetrated by the accused.[206]

This may be accomplished by physical evidence[207] or eyewitness testimony, though these forms of corroboration are rarely possible.[208] The proponent may also offer admissions or a confession from the accused, evidence that the accused had the opportunity to abuse the child, or verification of the child's description of clothing worn by the accused and of personal property at the scene of the incident as corroborative evidence.[209]

Psychiatrists may be useful in providing corroborative evidence that a child has been the victim of sexual abuse.[210] While

---

201. *Id.*

202. *Id.* Jurors in *California v. McMartin*, where operators of a preschool charged with multiple counts of sexual abuse endured the longest criminal trial in state history, acquitted the defendants and criticized the suggestiveness of the questions put to the alleged victims by interviewers. N.Y. TIMES, Jan. 19, 1990, at p. 3, col. 5. *But see Myatt*, 237 Kan. at __, 697 P.2d at 841 ("[I]t is highly unlikely that a child will persist in lying to his or her parents, or other figures of authority about sexual abuse.").

203. KAN. STAT. ANN. § 60.460(dd) (1983 & Supp. 1989).

204. *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). Commentators also suggest a need for judicial scrutiny of the relationship of the child to the accused; the child's family, school, and peer relationships; the child's age, physical and mental condition; and whether the child has a motive to injure the accused. Yun, *supra* note 171, at 1758.

205. See *supra* notes 116-120 and accompanying text for a discussion of availability.

206. N.D.R. EVID. 803(24). *See also Testimony of Child Victims*, *supra* note 177, at 821.

207. Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES, no. 2, at 125, 129 (1984).

208. *Id.*

209. *See Testimony of Child Victims*, *supra* note 177, at 821.

210. Myers, Bays, Becker, Berliner, Corwin & Saywitz, *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 82-83 (1989). In discussing the utility of expert testimony in child sexual abuse cases, the authors, who include a social worker, two psychologists, a pediatrician, a child psychiatrist, and an attorney, state:

> [Some court decisions] underestimate the complexity and the degree of expertise required for evaluation of suspected child sexual abuse. The evaluator

there is a split of authority over the admissibility at trial of expert testimony that the child displayed behavioral symptoms of having been sexually abused,[211] such testimony is less objectionable in the context of the pre-trial hearing contemplated by Rule 803(24) of the North Dakota Rules of Evidence.[212]

Corroboration of the act is not a separate prerequisite to admissibility when the child testifies in the proceedings, but certain corroborative evidence may be considered by the court in its examination of the "circumstances" surrounding the child's statement.[213]

Once the court determines that a child's statement about sexual abuse has the requisite indicia of reliability and the child testifies at the proceeding, the statement is admissible.[214] If the statement is reliable but the child is unavailable, the child's statement may be admitted under Rule 803(24) if there is sufficient corroboration of the abusive act.[215]

VI. CONCLUSION

Because of the dramatic increase in the number of reported

---

must possess specialized knowledge of child development, individual and family dynamics, patterns of child sexual victimization, signs and symptoms of abuse, and the uses and limits of various psychological tests. The competent evaluator is familiar with the literature on child abuse, and understands the significance of age-inappropriate sexualization and preoccupation.

The specialized skill and knowledge required for competent evaluation of suspected child abuse is beyond the ken of most physicians and mental health professionals. It seems clear that lay jurors are in no position to evaluate suspected abuse. Properly qualified experts can assist jurors in sifting through the mountain of complex and sometimes conflicting and counter intuitive information presented in many child sexual abuse cases.

Id. at 82-83.

211. The following courts have allowed psychiatrists or other experts to testify that sexual abuse occurred: Seering v. Department of Social Services, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987); Glendenning v. State, 536 So.2d 212 (Fla. 1988); State v. Kim, 64 Hawaii 598, 645 P.2d 1330 (1982); Townsend v. State, 103 Nev. 113, 734 P.2d 705 (1987); State v. Middleton, 294 Ore. 427, 657 P.2d 1215 (1983); Commonwealth v. Baldwin, 348 Pa. Super. 368, 502 A.2d 253 (1985).

But see Johnson v. State, 292 Ark. 632, 732 S.W.2d 817 (1987); Russell v. State, 289 Ark. 533, 712 S.W.2d 916 (1986); People v. Roscoe, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (1985); Allison v. State, 256 Ga. 851, 353 S.E.2d 805 (1987); State v. Lamb, 145 Wis. 2d 454, 427 N.W.2d 142 (Ct. App. 1988); State v. Hazeltine, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984).

212. N.D.R. EVID. 803(24). Courts disallowing expert testimony as to whether sexual abuse occurred frequently cite rule 403 of the Federal Rules of Evidence, which calls for the exclusion of testimony likely to confuse jurors or unduly prejudice a party. At a rule 803(24) pre-trial hearing, no jury is presented and, presumably, the court will be less susceptible to prejudice than would jurors who have never heard such testimony before.

213. See *supra* notes 203-210 and accompanying text for a discussion of the circumstances considered by courts when ruling on the admissibility of children's statements about sexual abuse.

214. N.D.R. EVID. 803(24).

215. *Id.*

cases of child sexual abuse, state courts and legislatures will likely continue to experiment with methods of protecting society's most vulnerable citizens. Adoption of an exception to the hearsay rule, as was done recently in North Dakota,[216] is but one of many approaches taken to address the issue. However, these approaches must be carefully tailored so as not to infringe upon the accused's right of confrontation protected by the sixth amendment and state statute.[217] Rule 803(24) of the North Dakota Rules of Evidence will likely survive constitutional scrutiny because it predicates admissibility of a child's hearsay statement upon a finding that the statement is sufficiently trustworthy and requires that the child testify if available.

216. N.D.R. EVID. 803(24).

217. See *supra* note 13-35 and accompanying text for a discussion of the confrontation clause.