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**CRIMINAL LAW: ADMISSION OF CHILD SEXUAL ABUSE
VICTIM'S HEARSAY STATEMENTS VIOLATED
DEFENDANT'S CONFRONTATION RIGHTS AS
STATEMENTS LACKED "PARTICULARIZED
GUARANTEES OF TRUSTWORTHINESS"**

Laura Lee Wright and Robert L. Giles were alleged to have sexually abused Wright's two daughters.¹ Wright and Giles were charged and jointly tried on two counts of "lewd conduct with a minor under [sixteen], . . ." a felony under Idaho law.² The trial court determined that Kathy, the younger child, who was only three years of age, would not be a competent witness as she would not be able to communicate to the jury.³ Over the defendants' objection, the trial judge allowed a pediatrician, Dr. John Jambura, to testify as to statements made to him by Kathy.⁴ Kathy's statements were made in response to certain leading questions asked of the girl by Dr. Jambura, during an examination for possible sexual abuse.⁵ At trial, the jury convicted both Wright and Giles.⁶ Wright appealed.⁷ The Idaho Supreme Court held that the admis-

1. *Idaho v. Wright*, 110 S. Ct. 3139, 3143 (1990). Wright allegedly restrained her daughters while Giles had sexual intercourse with them. *Id.*

2. *Id.*

3. *Id.* at 3143. At the time Wright and Giles were charged, the older daughter was 5-1/2 years of age, and Kathy was 2-1/2. *Id.*

4. *Wright*, 110 S. Ct. at 3143. Kathy's statements to Dr. Jambura were admitted under Idaho's residual hearsay exception. *Id.* at 3144. The exception provides in relevant part:

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 evidence. . . .

IDAHO R. EVID. 308.

5. *Wright*, 110 S. Ct. at 3143-44. Dr. John Jambura, a pediatrician, conducted medical examinations of the two girls which indicated the existence of sexual abuse. *Id.* Dr. Jambura asked Kathy several questions during his examination of her: "Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?" *Id.* at 3144. Kathy answered affirmatively to the first three questions. *Id.* at 3144. Kathy did not respond to the last question. *Id.* at 3144. However, after Dr. Jambura asked the last question, and after a period of silence, Kathy volunteered to Dr. Jambura that "daddy does do this with me, but he does it a lot more with my sister than with me." *Id.* at 3144.

6. *Wright*, 110 S. Ct. at 3145. Both Wright and Giles were "convicted of two counts of lewd conduct with a minor under 16. . . ." *Id.*

7. *Id.* Wright and Giles separately appealed their convictions only involving the younger child, Kathy. *Id.* See *State v. Giles*, 115 Idaho 984, 772 P.2d 191 (1989)(Giles' appeal).

sion of Kathy's statements violated Wright's sixth amendment confrontation clause rights, and reversed and remanded.⁸ The United States Supreme Court affirmed the judgment of the Supreme Court of Idaho and *held* that the admission of Kathy's hearsay statements violated Wright's confrontation clause rights as the state failed to show that the statements contained the "particularized guarantees of trustworthiness" necessary to satisfy the requirements of the confrontation clause.⁹ *Idaho v. Wright*, 110 S. Ct. 3139 (1990).

The sixth amendment's confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."¹⁰ A strict reading of the confrontation clause would prohibit the admission of any statements made by a declarant who does not testify at trial.¹¹ The Court, however, has consistently rejected such a strict interpretation as "unintended and too extreme."¹² Rather, the Court has held that in limited situations, the admission of certain hearsay statements does not violate a defendant's confrontation clause rights.¹³

The United States Supreme Court, in *Ohio v. Roberts*,¹⁴ articulated two general requirements that should be met in order for the admission of a nontestifying declarant's statement to satisfy the confrontation clause.¹⁵ The first requirement is that of "necessity."¹⁶ The state must show that the declarant is not available to testify.¹⁷ The second requirement is that the unavailable declarant's statement must contain ample "indicia of reliability."¹⁸ If

8. *State v. Wright*, 116 Idaho 382, 775 P.2d 1224 (1989).

9. *Wright*, 110 S. Ct. at 3152-53.

10. *Id.* at 3145 (quoting U.S. CONST. amend VI).

11. *Id.*

12. *Id.* at 3145-46 (citations omitted).

13. *Id.* Not all hearsay that is admissible under a state's evidence rules satisfies the requirements of the confrontation clause. *Id.* at 3146. To satisfy the confrontation clause, the State must produce the declarant at trial, if possible. *Id.* (quoting *Ohio v. Roberts*, 448 U.S. 56, 65 (1980)). If the declarant is unavailable, the declarant's statements must be very reliable to be admissible under the clause. *Id.* (quoting *Roberts*, 448 U.S. at 66).

14. 448 U.S. 56 (1980).

15. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), *applied in Wright*, 110 S. Ct. at 3146-49.

16. *Wright*, 110 S. Ct. at 3146 (quoting *Roberts*, 448 U.S. at 65). The confrontation clause has traditionally been interpreted to reflect a "preference for face-to-face accusation. . . ." *Id.* Therefore, to satisfy this preference, the declarant must be produced at trial to testify, if possible. *Id.*

17. *Id.* *But see* *United States v. Inadi*, 475 U.S. 387 (1986) (unavailability requirement not applied to nontestifying co-conspirator).

18. *Wright*, 110 S. Ct. at 3146 (quoting *Roberts*, 448 U.S. at 66). In order to satisfy the requirements of the confrontation clause, a statement of an unavailable declarant must be "so trustworthy that cross-examination of the declarant would be of marginal utility." *Id.* at 3150.

these two requirements are satisfied, admission of the hearsay statement does not violate the defendant's rights under the confrontation clause.¹⁹

In *Idaho v. Wright*,²⁰ the United States Supreme Court addressed the issue of whether the admission of Kathy's statements to Dr. Jambura violated Laura Lee Wright's confrontation clause rights.²¹ Under the *Roberts* test, in order for the admission of Kathy's statements to satisfy the requirements of the confrontation clause, Kathy must have been unavailable to testify.²² In *Wright*, the Court did not determine the precise requirements for a showing of unavailability sufficient to satisfy the *Roberts* test.²³ Instead, the Court merely assumed that for a determination of the case, Kathy "was an unavailable witness within the meaning of the Confrontation Clause."²⁴

The second requirement under *Roberts* is that the statement must contain ample "indicia of reliability."²⁵ A hearsay statement meets the reliability requirement when the statement is so reliable that cross-examination of the declarant is unnecessary to determine the truthfulness of the statements.²⁶ The requirement of sufficient trustworthiness can be satisfied in one of two ways: "where the hearsay statement 'falls within a firmly rooted hearsay exception' or where it is supported by 'a showing of particularized guarantees of trustworthiness.'"²⁷

Statements that are admissible under "a firmly rooted hearsay exception" automatically meet the reliability requirement.²⁸ These statements have been traditionally accepted as trustworthy,

19. *Id.* at 3146.

20. 110 S. Ct. 3139 (1990).

21. *Idaho v. Wright*, 110 S. Ct. 3139, 3147 (1990).

22. *Id.* In *Wright*, the Court did not address the issue of whether, prior to the admission of a child's hearsay statements, the prosecution is required by the confrontation clause to show that the child is an unavailable witness. *Id.* at 3147. The trial judge had determined that Kathy was not a competent witness. *Id.* at 3143. Therefore, for the Court's determination of the case, the Court merely assumed any unavailability requirement under the clause was satisfied. *Id.* at 3147.

23. *Id.*

24. *Id.*

25. *Id.* at 3146-47.

26. *Id.* at 3150. The main purpose of the confrontation clause is to guarantee the trustworthiness "of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of adversary proceeding before the trier of fact." *Maryland v. Craig*, 110 S. Ct. 3157, 3163 (1990). If the evidence is sufficiently trustworthy, "rigorous testing in the context of an adversarial proceeding" serves little purpose in guaranteeing the reliability of the evidence. *Wright*, 110 S. Ct. at 3149.

27. *Wright*, 110 S. Ct. at 3147 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

28. *Id.* Hearsay statements of a declarant, admissible under a "firmly rooted" exception are considered to be "so trustworthy that adversarial testing would add little to their reliability." *Id.* at 3149.

generally due to the circumstances under which they are made.²⁹ Hearsay statements that are admissible under "firmly rooted" exceptions are made under circumstances where the declarant has little opportunity or desire to lie.³⁰ Thus, such statements are considered trustworthy, and cross examination of the declarant is unnecessary.³¹

In *Wright*, the trial court had admitted Kathy's statement under Idaho's "residual hearsay exception."³² Statements admitted under a "residual hearsay exception" are those that do not fall "within a recognized hearsay exception [but] might nevertheless be sufficiently reliable to be admissible at trial."³³ As the "residual hearsay exception" permits the admission of statements not falling within a traditionally recognized hearsay exception, the Court reasoned that the exception is not a "firmly rooted" one.³⁴ Therefore, as Kathy's statements to Dr. Jambura were not admitted under a "firmly rooted" exception, the statements were not automatically sufficiently reliable to satisfy the clause.³⁵ Therefore, admission of the statements violated Wright's confrontation clause rights unless the statements were shown to bear "particularized guarantees of trustworthiness."³⁶

As with hearsay statements falling under a "firmly rooted" exception, in order for their admission to be consistent with the confrontation clause, statements having "particularized guarantees of trustworthiness" need to be so reliable that cross examination of the declarant is unnecessary.³⁷ In *Wright*, the Court

29. *Id.* Statements that are admissible under a "firmly rooted" hearsay exception are made in circumstances that guarantee the reliability of the statement. *Id.* The Court, in *Wright*, noted that

"[t]he basis for the 'excited utterance' exception, . . . is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore, the circumstances surrounding the making of the statement provide sufficient assurances that the statement is trustworthy and that cross-examination would be superfluous."

Id.

30. *Id.* The Court noted that declarant's excited utterances, dying declarations, and statements made for the purpose of medical treatment, are all made under circumstances in which the declarant either has no opportunity, or no desire to be untruthful. *Id.*

31. *Id.*

32. *Id.* at 3147. See *supra* note 4 (partial text of relevant rule).

33. *Wright*, 110 S. Ct. at 3147.

34. *Id.*

35. *Id.* at 3147-48.

36. *Id.* at 3148. The Court, in *Wright*, stated that hearsay statements that are not admissible under a "firmly rooted" exception are presumed to be unreliable, and therefore, must be excluded at trial, unless the state shows that the statements contain "particularized guarantees of trustworthiness." *Id.* (quoting *Lee v. Illinois*, 476 U.S. 530, 543 (1986); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

37. *Id.* at 3149.

limited the circumstances under which a determination of the requisite trustworthiness could be made.³⁸ The Court limited the circumstances to "those that *surround the making of the statement* and that render the declarant particularly worthy of belief."³⁹ The Court reasoned that the basis for allowing the admission of any hearsay is that the circumstances under which the statement was made assures the reliability of the statement.⁴⁰ Therefore, a determination of sufficient trustworthiness must be made without resort to other evidence that helps to corroborate the possible trustworthiness of the statement.⁴¹

The trial court had found that Kathy's statements to Dr. Jambura were adequately trustworthy, thus satisfying the requirements of the confrontation clause.⁴² In making its determination, the trial court considered that the medical examination of Kathy indicated the probability of sexual abuse; that Kathy was in Wright's care; and that Kathy's sister identified Wright as the culprit.⁴³ The factors considered by the trial court were not connected with the circumstances under which Kathy's statements were made.⁴⁴ Instead, the factors tended to support the truthfulness of the statements.⁴⁵ As corroborating evidence is inapplicable to a determination of reliability sufficient to satisfy the confrontation clause, the United States Supreme Court reasoned that the factors should not have been considered in determining the admissibility of Kathy's statements.⁴⁶

38. *Id.* at 3148-50.

39. *Id.* at 3148 (emphasis added). A court must look at all of the circumstances that result in the statement being made to determine if the statement contains sufficient reliability to satisfy the confrontation clause. *Id.*

40. *Id.* at 3149. See *supra* note 30 (circumstances under which excited utterances are made assure the statement's reliability).

41. *Wright*, 110 S. Ct. at 3150. But see *Idaho v. Wright*, 110 S. Ct. 3139 (1990) (Kennedy, J., dissenting). In his dissent, Justice Kennedy argued that corroborating evidence should not be categorically excluded in determining the trustworthiness of hearsay statements for confrontation clause purposes. *Id.* at 3153-56. In determining the trustworthiness of hearsay statements, courts have consistently preferred the presence of evidence that corroborates the statement. *Id.* at 3154-55. Justice Kennedy noted that evidence that confirms the truth of a statement is often the most reliable way to determine whether the statement is worthy of belief. *Id.* at 3153. In *Wright*, Kathy's statements were corroborated by several factors. *Id.* at 3156. Justice Kennedy would have had the corroborating factors considered in the determination of whether Kathy's statements contained the "particularized guarantees of trustworthiness" necessary for admission under the confrontation clause. *Id.* at 3157. The Idaho Supreme Court, in its determination of the trustworthiness of Kathy's hearsay statements, did not consider the corroborating evidence. *Id.* at 3157. Therefore, Justice Kennedy would have reversed the judgment of the Idaho Supreme Court, and remanded. *Id.* at 3157.

42. *Wright*, 110 S. Ct. at 3152.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

The trial court had determined that there existed no reason for Kathy to fabricate the allegation, and that it was unlikely that a child of Kathy's age would do so.⁴⁷ As these factors "surround the making of the statement," they were properly considered by the trial court when a determination of sufficient trustworthiness was made.⁴⁸ However, all of the circumstances under which the statements were made must be considered in determining the trustworthiness of the statements.⁴⁹ The Court reasoned that under a "totality of the circumstances" analysis, the state had not met its burden of showing the necessary "particularized guarantees of trustworthiness" of Kathy's statements.⁵⁰ Because sufficient trustworthiness is required before hearsay statements can be admitted without violation of the confrontation clause, admission of the statements violated Laura Lee Wright's confrontation clause rights.⁵¹ Therefore, the United States Supreme Court affirmed the judgment of the Idaho Supreme Court.⁵²

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47. *Id.*

48. *Id.* The Court noted several factors that are properly considered in determining the trustworthiness of hearsay statements made by child sexual abuse victims: "spontaneity and constant repetition"; "mental state of the declarant"; "use of terminology unexpected in a child of similar age"; and "lack of motive to fabricate." *Id.* at 3150 (citations omitted).

49. *Id.* at 3152. *See supra* note 5 (the circumstances under which Kathy's statements were made included leading questions asked of Kathy by Dr. Jambura). *See also* State v. Wright, 116 Idaho 382, ___, 775 P.2d 1224, 1227-30 (1989)(discussing the development of the cognitive abilities of a child and problems in obtaining accurate data from children).

50. *Wright*, 110 S. Ct. at 3152-53.

51. *Id.* at 3153.

52. *Id.*