University of Miami Law Review

Volume 46 | Number 1 Article 5

9-1-1991

Idaho v. Wright: The Defenestration of Corroborating Evidence

John Clairborne Koski

Follow this and additional works at: https://repository.law.miami.edu/umlr

Part of the Evidence Commons

Recommended Citation

John Clairborne Koski, *Idaho v. Wright: The Defenestration of Corroborating Evidence*, 46 U. Miami L. Rev. 205 (1991)
Available at: https://repository.law.miami.edu/umlr/vol46/iss1/5

This Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

CASE COMMENT

Idaho v. Wright: The Defenestration of Corroborating Evidence

I. INTRODUCTION 205
II. GENERAL THEMES AND PERSPECTIVE 209
 A. *Child Sexual Abuse and the Law's Response* 209
 B. *The Residual Hearsay Exception* 215
III. *IDAHO V. WRIGHT*: DISSECTION 220
IV. CORROBORATION OR CONSEQUENCES 224
 A. *An Overview of Corroboration* 224
  1. CASES ANALYZING CORROBORATING EVIDENCE 224
  2. CIRCUMSTANCES AT THE TIME THE STATEMENT WAS MADE 226
  3. CORROBORATION AND THE CHILD SEXUAL ABUSE HEARSAY EXCEPTIONS 227
 B. *Putting Corroboration to Work* 229
V. CONCLUSION 233

I. INTRODUCTION

Child sexual abuse "is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."[1] A successful prosecution often depends in large part upon accusations made by the child victim. Many times a trial turns solely on a child's out-of-court statements.[2] The unique nature of a child sexual abuse prosecution presents courts, lawmakers, prosecutors, and defense attorneys with a variety of complex and challenging legal questions.[3] State and federal courts have become increasingly familiar with these problems, and a growing body of case law has emerged. The United States Supreme Court, however, has only infrequently and tangentially passed on child sexual abuse

1. Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987).

2. Brief of Amici Curiae American Professional Society on the Abuse of Children, American Academy of Pediatrics, American Medical Association, National Organization for Women, National Association of Counsel for Children, State of Rhode Island Office of the Child Advocate, and Support Center for Child Advocates at 4, Idaho v. Wright, 110 S. Ct. 3139 (1990) (No. 89-260) [hereinafter Brief of APSAC].

3. *See* Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1745-46 (1983); *see also* sources cited *infra* notes 31-53.

issues.[4] In *Idaho v. Wright*,[5] the Court spoke directly to a number of these issues.

Laura and Louis Wright had separated. As part of their arrangement, they made an informal agreement to share custody of their five and one-half year-old daughter (the "older daughter"), in which each parent would have custody for six consecutive months.[6] In November of 1986, the older daughter told her father that her mother and her mother's boyfriend, Robert Giles, had abused her.[7] A physical examination, disclosing symptoms consistent with chronic sexual abuse, corroborated her allegations.[8] The older daughter then revealed that her half-sister (the "younger daughter"), the biological child of Laura Wright and Robert Giles, had been subjected to the same type of abuse.[9]

Doctor John Jambura, a pediatrician with extensive experience in child sexual abuse cases,[10] performed a physical examination on the younger daughter, then two and one-half years old, which revealed conditions "strongly suggestive of sexual abuse with vaginal contact."[11] After the examination, Dr. Jambura interviewed the younger daughter in his office.[12]

Although the doctor did not record the interview on audio or video tape, later he did dictate some general notes to summarize the conversation.[13] On direct examination, Dr. Jambura testified that he began the interview with the younger daughter by asking some general questions about her relationship with her father, before turning to more sensitive issues:

> Q. [W]hat was her response to the question "Do you play with daddy?"
> A. Yes, we play—I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.
> Q. And "Does daddy play with you?" Was there any response?
> A. She responded to that as well, that they played together in a

---

4. *See, e.g.*, Maryland v. Craig, 110 S. Ct. 3157 (1990); Coy v. Iowa, 487 U.S. 1012 (1988); *Ritchie*, 480 U.S. 39.

5. 110 S. Ct. 3139 (1990).

6. *Id.* at 3143.

7. Brief for Petitioner at 4, Idaho v. Wright, 110 S. Ct. 3139 (1990) (No. 89-260). At trial, "Wright was found to have held [both] her daughters down to permit . . . Giles . . . to have sexual intercourse with each." State v. Wright, 775 P.2d 1224, 1225 (Idaho 1989).

8. Brief for Petitioner at 5, *Wright* (No. 89-260).

9. *Id.*

10. *Wright*, 110 S. Ct. at 3143.

11. *Id.*

12. *Id.* at 3143-44.

13. *Id.* at 3144.

variety of circumstances and, you know, seemed very unaffected by the question.

Q. And then what did you say and her response?

A. When I asked her "Does daddy touch you with his pee-pee," she did admit to that. When I asked, "Do you touch his pee-pee," she did not have any response.

Q. Excuse me. Did you notice any change in her affect or attitude in that line of questioning?

A. Yes.

Q. What did you observe?

A. She would not—oh, she did not talk any further about that. She would not elucidate exactly—what kind of touching was taking place, or how it was happening. She did, however, say that daddy does do this with me, but he does it a lot more with my sister than with me.

Q. And how did she offer that last statement? Was that in response to a question or was that just a volunteered statement?

A. That was a volunteered statement as I sat and waited for her to respond, again after she sort of clammed-up, and that was the next statement that she made after just allowing some silence to occur.[14]

Wright and Giles were each charged with two counts of lewd conduct with a minor.[15] At trial, after a voir dire examination of the younger daughter, the court and the parties agreed that she was "not capable of communicating to the jury"; accordingly, the Court prohibited her from testifying.[16] Over objections from Wright and Giles, the trial court permitted Dr. Jambura to testify to the content of his interview with the younger daughter.[17] The court admitted the younger daughter's out-of-court statements under Idaho's residual

14. *Id.*

15. IDAHO CODE § 18-1508 (1987) provides:

> Lewd conduct with minor or child under sixteen. Any person who shall willfully and lewdly commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor or child under the age of sixteen (16) years, including but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact, whether between persons of the same or opposite sex, or who shall involve a minor or child in any act of bestiality or sado-masochistic abuse or lewd exhibition as any of such acts are defined in section 18-1507, Idaho Code, when any of such acts are done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such minor or child, shall be guilty of a felony and shall be imprisoned in the state prison for a term of not more than life.

16. *Wright*, 110 S. Ct. at 3143 (quoting Joint Appendix at 39, Idaho v. Wright, 110 S. Ct. 3139 (1990) (No. 89-260)).

17. *Id.*

hearsay exception.[18] Both defendants were convicted and sentenced to twenty years imprisonment.[19]

Wright appealed from the conviction of the count involving the younger daughter, asserting that the admission of the hearsay statements violated her rights under the Confrontation Clause.[20] The Supreme Court of Idaho agreed and reversed her conviction, finding Dr. Jambura's testimony untrustworthy because his interview technique lacked the "particularized guarantees of trustworthiness" required by the Clause.[21] The court emphasized that the session was not videotaped, the questions were "blatantly leading," and the "interrogation was performed by someone with a preconceived idea of what the child should be disclosing."[22] Without additional guarantees of trustworthiness, the court intimated that it would admit such statements only if they qualified under the "excited utterance" exception to the hearsay rule.[23]

On certiorari, the United States Supreme Court affirmed the Idaho decision reversing Wright's conviction.[24] Although it agreed that the younger daughter's hearsay statement did not have the particularized guarantees of trustworthiness required for admission

18. The Idaho hearsay exception is identical to that in the Federal Rules of Evidence:

> 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. 803(24); FED. R. EVID. 803(24). The Uniform Rules of Evidence are also congruent. UNIF. R. EVID. 803(24).

19. *Wright*, 110 S. Ct. at 3145.

20. Giles also appealed from the conviction on the count involving the younger daughter, contending that the trial court erred in admitting Dr. Jambura's testimony under the residual hearsay exception. The Idaho Supreme Court disagreed and affirmed his conviction. State v. Giles, 772 P.2d 191 (Idaho 1989).

21. State v. Wright, 775 P.2d 1224, 1231 (Idaho 1989). The Idaho Supreme Court was "not convinced, beyond a reasonable doubt, that the jury would have reached the same result had the error not occurred." *Id.*

22. *Id.* at 1227.

23. *Id.* at 1230. The excited utterance exception, IDAHO R. EVID. 803(2) and FED. R. EVID. 803(2), excludes from the hearsay rule "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *See Wright*, 775 P.2d at 1232 (Bakes, C.J., dissenting) ("The opinion seems wrongly to conclude that a child's words are reliable when uttered excitedly.").

24. Idaho v. Wright, 110 S. Ct. 3139 (1990).

under the Confrontation Clause, the Court refused to adopt the state court's mechanical rationale.[25] Instead, the Court required that the party seeking to admit evidence show particularized guarantees of trustworthiness "from the totality of the circumstances, [with] . . . the relevant circumstances includ[ing] only those that surround the making of the statement and that render the declarant particularly worthy of belief."[26] "To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."[27]

This Comment examines the Court's attempt to grapple with the problems inherent in a child sexual abuse prosecution. It argues that the Supreme Court's rationale in *Wright* is unnecessarily restrictive, and that an analysis of corroborating evidence often aids in evaluating the truthfulness of a child's hearsay statement without endangering the defendant's Confrontation Clause rights. Part II reviews general themes in the development of the law of child sexual abuse cases and the residual hearsay exception. Part III analyzes the Idaho state court's restrictive test, the Supreme Court's rationale, and the alternative test proposed by the dissent. Part IV examines the approaches courts, legislatures, and commentators have taken with respect to corroborating evidence and argues that a more realistic approach is needed. This Comment concludes that *Wright*'s unnecessary limitations on the residual hearsay exception ignore pressing issues in child sexual abuse cases.

II. General Themes and Perspective

A. *Child Sexual Abuse and the Law's Response*

Sexual abuse of children is as wide spread as it is tragic. In a landmark poll conducted in 1985 by the *Los Angeles Times*, twenty-seven percent of the women and sixteen percent of the men surveyed revealed that they had been victims of sexual abuse.[28] "The annual number of new sexual abuse cases in children under the age of 18 years is in the range of 150,000 to 200,000."[29] As reports of abuse

25. *Id.* at 3150.

26. *Id.* at 3148.

27. *Id.* at 3150.

28. Lois Timnick, *The Times Poll; 22% in Survey Were Child Abuse Victim*, L.A. TIMES, August 25, 1985, at 1; *see also* JOHN CREWDSON, BY SILENCE BETRAYED: SEXUAL ABUSE OF CHILDREN IN AMERICA 29 (1988) (noting that the Los Angeles Times' survey "provid[ed] by far the clearest picture yet of of the magnitude child sexual abuse in America").

29. Melvin Lewis, *Foreward* to DIANE H. SCHETKY & ARTHUR H. GREEN, CHILD SEXUAL ABUSE: A HANDBOOK FOR HEALTH CARE AND LEGAL PROFESSIONALS at v (1988).

become more common and cases work their way through the courts, new and challenging issues arise for both courts and litigants.[30]

Child sexual abuse is a crime of secrecy.[31] As there is often little or no corroborating evidence, a case may turn solely upon the child's accusations.[32] A child may make these allegations of abuse in a variety of ways, to a variety of people, and in a variety of circumstances, not all lending themselves to credibility.[33] Repeated interviewing and leading questions further damage the credibility of the child's story, which originally may have been quite trustworthy. Any inconsistent testimony allows the defendant to attack the child's credibility.[34] In securing a conviction, the prosecution must overcome juror bias against the child's credibility[35] and perhaps a bias in favor of the accused, who may be a respected member of the community.[36]

Issues of suggestibility and accuracy of children's memories further complicate child sexual abuse cases.[37] Recent empirical studies have largely disproven traditional scientific assumptions doubting the reliability of child witnesses.[38] Some commentators take the extreme position that a child's allegations must be true simply because "[c]hildren don't lie, and don't imagine the sexually explicit acts that they are describing."[39] The weight of authority, however, suggests that false accusations are rare, but may occur under several specific

---

30. *See, e.g.*, Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523 (1988); Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257 (1989); Yun, *supra* note 3; Katrin E. Frank, Note, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception*, 7 U. PUGET SOUND L. REV. 387 (1984).

31. *See* JOHN E.B. MYERS, CHILD WITNESS LAW AND PRACTICE § 5.32, at 329 (1987); C.J. Flammang, *Interviewing Child Victims of Sex Offenders*, *in* THE SEXUAL VICTIMOLOGY OF YOUTH 175, 177 (Leroy G. Schultz ed., 1980).

32. Leroy G. Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives*, 52 CHILD WELFARE 147, 148 (1973).

33. Brief of APSAC, *supra* note 2, at 6-7 (noting that children may reveal allegations to parents, teachers, pediatricians, family doctors, emergency room physicians, police officers, therapists, or other trusted adults).

34. *See* FED. R. EVID. 613.

35. *See* Gail S. Goodman et al., *When a Child Takes the Stand: Jurors Perceptions of Children's Eyewitness Testimony*, 11 LAW & HUM. BEHAV. 27 (1987).

36. *See* Dirk Lorenzen, Note, *The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child*, 42 U. MIAMI L. REV. 1033, 1038 & n.34 (1988).

37. On children's ability to testify accurately, see Gail S. Goodman & Rebecca S. Reed, *Age Differences in Eyewitness Testimony*, 10 LAW & HUM. BEHAV. 317 (1986); Barbara V. Marin et al., *The Potential of Children as Eyewitnesses*, 3 LAW & HUM. BEHAV. 295 (1979); Dominic J. Foté, Note, *Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform*, 13 PEPP. L. REV. 157 (1985).

38. Foté, *supra* note 37, at 158 (citing Marin et al., *supra* note 37, at 303-04).

39. Lada I. Tamarack, *Fifty Myths and Facts About Incest*, *in* SEXUAL ABUSE OF CHILDREN IN THE 1980'S at 3 (Benjamin Schlesinger ed., 1986).

circumstances.[40] For example, although a child's ability to recount events is generally comparable to adult ability, children tend to be more susceptible to suggestion than adults.[41] Another study revealed that five- to six-year-old children may provide eyewitness accounts that exceed the accuracy of adult accounts, if the children are questioned in a nonsuggestive manner.[42]

Information regarding the true extent of a child's capacities cannot be considered fully without examining how a layperson, as juror, will evaluate the child's testimony. While empirical studies of this issue are still new, early work suggests a distinct bias against children's credibility.[43] Although a child's accusation was once considered quite damaging and caused many defense lawyers to advise clients to plead guilty in the face of a child's accusation, now, as a result of the publicity over the Jordan and McMartin cases,[44] "many lawyers have reached the conclusion that child sexual abuse cases are 'defensible,' by which they mean that children can be intimidated and confused into withholding information, giving incorrect answers, or seeming untruthful when in fact they are not."[45] Jurors, and perhaps even judges, also may share a disbelief that "the young victims's injuries were willfully caused or risked or that they were results of insensitive indifference to an order justifying punishment."[46] This disbelief may stem from a suspicion that a parent may initiate charges of child sexual abuse for ulterior motives such as a concurrent divorce proceeding, custody battle, or other reasons of personal vengeance.[47] Although empirical evidence of children's capacities and jurors' perceptions reveal a cross-current of attitudes, the data is far from com-

---

40. *See* DIANE H. SCHETKY & ARTHUR H. GREEN, *True and False Allegations of Child Sexual Abuse, in* CHILD SEXUAL ABUSE: A HANDBOOK FOR HEALTH CARE AND LEGAL PROFESSIONALS 108-09 (1988). The authors describe seven situations in which false allegations are made: (1) where a parent brainwashes the child in order to punish the other spouse; (2) where a parent influences the child by projecting unconscious sexual fantasies onto the child; (3) where the child's allegations are based upon fantasies; (4) where the child makes false allegations for revenge; (5) where third parties initiate the allegations; (6) where exposure to other sexual abuse cases causes the child to make allegations; and (7) where a child's unrelated medical problems give rise to suspicion of sexual abuse. *Id.*; *see also id.* at 113-16 (discussing relevant case studies).

41. Goodman & Reed, *supra* note 37, at 328.

42. *See* Marin et al., *supra* note 37, at 304.

43. Goodman et al., *supra* note 35, at 36.

44. *See, e.g.*, Thomas L. Feher, *The Alleged Molestation Victim, the Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard*, 14 AM. J. CRIM. L. 227, 239-41; Debra C. Moss, *Are the Children Lying*, A.B.A. J., May 1, 1987, at 59.

45. CREWDSON, *supra* note 28, at 166.

46. B.M. Dickens, *Child Abuse and Criminal Process: Dilemmas in Punishment and Protection, in* CHILD ABUSE 80 (A. Carmi & H. Zimm eds., 1984).

47. *Id.*

plete, leaving many undetermined variables for prosecutors and defense attorneys to consider.[48]

Most child sexual abuse cases never reach trial.[49] The difficulties inherent in a child physically taking the stand and testifying—a syndrome Professor David Libai characterizes as "legal process trauma"—complicate the cases that do go to trial.[50] Libai describes several aspects of a legal proceeding that traumatize a child: repeated questioning, facing the accused, the courtroom's imposing atmosphere, and the ultimate conviction of a molester who is the victim's parent, relative, or friend.[51] Although the Supreme Court has recognized the impact of this phenomenon once before,[52] Libai's article has not provoked discussion in other federal courts.[53]

The United States Supreme Court took a dramatic step towards recognizing the state's interest in protecting children from potential trauma in *Maryland v. Craig*.[54] A Maryland statute allowed for an alleged child victim of sexual abuse to testify via closed circuit television, out of the presence of the defendant.[55] Although the child could not see the accused, both attorneys were with the child, and the judge, jury, and defendant viewed the testimony in the courtroom via closed circuit television.[56] The State asserted that the legislature

---

48. Perhaps one of the most unexpected complications in reaching a deserved guilty verdict is presented where a pedophile serves on the jury. While conceding that "most jurors are not child molesters," one author notes that, with the prevalence of child sexual abuse, "a jury may contain at least one member who shares the defendant's sexual attraction to children." CREWDSON, *supra* note 28, at 168. The author reports a case where, after the jury had reached an 11-1 deadlock, the foreman sent a note to the trial judge inquiring: " 'Is it misconduct that one of the people on the jury says he feels that what the defendant did was no big deal because he regularly has sex with eleven- and twelve-year-old-girls?' " *Id.*

49. *See id.* at 102-08.

50. David Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 983 (1969).

51. *Id.* at 984; *see also* RUTH S. KEMPE & C. HENRY KEMPE, THE COMMON SECRET: SEXUAL ABUSE OF CHILDREN AND ADOLESCENTS 85 (Richard C. Atkinson et al. eds., 1984) ("Being required to appear as a witness in both the juvenile and criminal court cases may be traumatic to the child victim . . . . This is especially true in a criminal court case where cross examination of the victim by a hostile attorney is allowed by the adversary court process.").

52. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 618 & n.7 (1987).

53. Search of WESTLAW, ALLFEDS database (August 20, 1991). In contract, among commentators Libai's article has provoked substantial discussion. It is cited 41 times in other periodicals. Search of WESTLAW, TP-ALL database (August 20, 1991). Yet, the federal courts have only cited Libai's article once, in *Globe Newspaper*, 457 U.S. at 618 n.7.

54. Maryland v. Craig, 110 S. Ct. 3157 (1990). For a thoughtful critique of *Craig*, see Brian L. Schwalb, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" to Protect both Children and Defendants*, 26 HARV. C.R.-C.L. L. REV. 185 (1991).

55. *Craig*, 110 S. Ct. at 3160-61 (citing MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (1989)).

56. *Id.* at 3161.

designed the statute to protect the child victim from the trauma of testifying in court in the presence of the accused.[57] In addressing the defendant's Confrontation Clause rights, the Court held that

> where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.[58]

After *Craig*, parents may be more willing to allow their children to testify if the courtroom environment is less traumatic and less likely to cause the child great emotional harm.[59] Further, now that courts can prevent a defendant accused with child sexual abuse from communicating with the alleged victim once the allegation is made, prosecutors must be extremely careful in relying on the statements of the child victim.[60] The Court's recognition of this trauma and its usurpation of the right to "physical" confrontation shows the need for prosecutors to exercise extreme care in determining whether to bring a case.[61]

---

57. *Id.*

58. *Id.* at 3170. In dissent, Justice Scalia accused the majority of ignoring the plain language of the Confrontation Clause. *Id.* at 3172 (Scalia, J., dissenting). Addressing the strength of the State's interest, Scalia wrote:

> The State's interest here is in fact no more and no less than what the State's interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one.

Id. at 1375 (footnote omitted). Scalia intimated that if the State wished to protect the child from the trauma of the legal proceedings, the State should not call the child as a witness. *Id.*

59. *See* Libai, *supra* note 50, at 1014-25 (discussing the "child courtroom").

60. Justice Scalia presented the following scenario:

> A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?"

Craig, 110 S. Ct. at 3172 (Scalia, J., dissenting).

61. *See, e.g.*, Libai, *supra* note 50, at 983 (coining and discussing "legal process trauma"); Gary B. Melton, *Psycholegal Issues in Child Victim's Interaction with the Legal System*, 5 VICTIMOLOGY 274 (1980); *see also Craig*, 110 S. Ct. at 3175-76 (Scalia, J., dissenting) (discussing the debacle of the Jordan, Minnesota investigation).

Ultimately, the goal of a child sexual abuse prosecution is to punish the truly guilty:

> There are historic doctrines teaching that an acquittal is never a failure, since society rejoices in public demonstration that the law has not been violated; more recent perceptions are that acquittal shows only injustice, in that either an innocent person has been put to the trouble and expense of defending a prosecution, or a guilty person has gone free.[62]

Beyond these concerns, prosecutors must be aware of the tremendous stigma the mere allegation of such a crime entails.

Because of the singular problems of child sexual abuse cases, the hearsay rule and its exceptions play a significant part in determining their outcome.[63] As Professor Myers has noted, "Nowhere is the need for out-of-court statements greater than in child abuse litigation."[64] Moreover, the Supreme Court has recognized that the goal of "society to protect the welfare of children . . . is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent . . . citizens."[65] Society's ability to protect children ultimately turns on the success of deserved prosecutions.

Toward this end, the rules of evidence, especially the exceptions to the hearsay rule, play a crucial role. Of the many hearsay exceptions, only a handful are used frequently in child sexual abuse prosecutions.[66] The excited utterance exception—perhaps the most frequently used[67]—allows for the admissibility of hearsay statements "relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition."[68] The common law "state of mind" exception, codified as Federal Rule of Evidence 803(3), allows for the admission of statements "of the declarant's then existing state of mind, emotion, sensation, or physical condition."[69] The exception for statements made for the pur-

---

62. Dickens, *supra* note 46, at 83.

63. *See* Randy Curry & Carrol Crow, *Liberalization in the Admissibility of Evidence in Child Abuse and Child Molestation Cases*, 7 J. JUV. L. 205 (1983).

64. Brief of APSAC, *supra* note 2, at 5.

65. Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

66. MYERS, *supra* note 31, § 5.31, at 326.

67. *Id.* § 5.33, at 329.

68. FED. R. EVID. 803(2); *see also* MYERS, *supra* note 31, § 5.33, at 329-44; Yun, *supra* note 3, at 1753-59.

69. FED. R. EVID. 803(3). Rule 803(3) allows the admission of:

> 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

poses of medical diagnosis or treatment also is significant in child sexual abuse cases.[70] Although the Federal Rules of Evidence do not recognize a specific exception for statements related to child sexual abuse,[71] many states have developed such exceptions.[72] Finally, the residual hearsay exception features prominently in litigation involving child sexual abuse.

Before *Wright*, the Supreme Court had not led in the development of child sexual abuse law. Although the Court has addressed specific issues concerning the accused's right to face-to-face confrontation with the witness,[73] *Wright* was the first case to inquire into the other side of the Court's Confrontation Clause jurisprudence in child sexual abuse cases—the particularized guarantees of trustworthiness required for the admission of a hearsay statement. The Court's opinion in *Wright* is therefore important in three respects: (1) in developing of the Court's voice in child sex abuse cases, (2) in providing guidelines for the residual hearsay exception, and (3) in continuing the development of Confrontation Clause doctrine.

B. *The Residual Hearsay Exception*

The residual hearsay exception has had unexpected significance in the area of child sexual abuse cases.[74] One court has noted that "[t]he residual hearsay exception appears to find its greatest use in trials where children are the victims of alleged sexual abuse."[75] Given the controversial nature of the residual hearsay exception and child sexual abuse cases, *Idaho v. Wright* will not be the last word in the debate, but it will frame future discussion and argument.

Evaluating the trustworthiness of a witness's testimony involves

---

> 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.

Id.

70. FED. R. EVID. 803(4); *see also* Mosteller, *supra* note 30. Prosecutors in *Wright* did not argue that the younger daughter's statements to Dr. Jambura would qualify under Idaho's equivalent of Rule 803(4).

71. *But see* UNIF. R. EVID. 807 (concerning child victims and witnesses).

72. *See* MYERS, *supra* note 31, § 5.38, at 372-77; Graham, *supra* note 30, at 534-37; Yun, *supra* note 3, at 1763-66; Frank, *supra* note 30, at 387.

73. *See* Maryland v. Craig, 110 S. Ct. 3157 (1990); Coy v. Iowa, 487 U.S. 1012, 1021 (1988); *see also The Supreme Court, 1989 Term, Leading Cases*, 104 HARV. L. REV. 129, 132-39 (1990).

74. *See* Michael S. Child, *Effective Use of Residual Hearsay*, ARMY LAW., July, 1985, at 24; Graham, *supra* note 30, at 530-33; Frank M. Tuerkheimer, *Convictions Through Hearsay in Child Sex Abuse Cases: A Logical Progression Back to Square One*, 72 MARQ. L. REV. 47 (1988); Yun, *supra* note 3, at 1761-63.

75. United States v. Barror, 20 M.J. 501, 503 (A.F.C.M.R. 1985) (applying MIL. R. EVID. 804(b)(5), which is identical to FED. R. EVID. 804(b)(5)), *rev'd*, 23 M.J. 370 (C.M.A. 1987).

four risks: perception, memory, narration, and sincerity.[76] Analyzing the trustworthiness of an out-of-court statement presents the same risks. This is especially true for out-of-court statements offered into evidence to prove the truth of the matter asserted—"hearsay" statements.[77]

The general rule against the admission of hearsay statements[78] evolved from the defendant's inability to cross-examine the declarant, which prohibited the jury from examining the trustworthiness of the witness's testimony.[79] Courts developed exceptions to the rule against hearsay for certain statements that were considered inherently trustworthy, such as excited utterances,[80] recorded recollection,[81] business records,[82] dying declarations,[83] and statements against interest.[84] The Federal Rules of Evidence have codified twenty-seven specific hearsay exceptions.[85]

In addition to the specific hearsay exceptions, the Federal Rules of Evidence include two other enumerated hearsay exceptions, rules 803(24) and 804(b)(5).[86] These exceptions—commonly referred to as

---

76. FED. R. EVID. 801 advisory committee introductory note; Edward M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 218 (1948).

77. Rule 801 defines "hearsay":

> (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> (b) Declarant. A "declarant" is a person who makes a statement.
>
> (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

FED. R. EVID. 801.

78. FED. R. EVID. 802.

79. Anderson v. United States, 417 U.S. 211, 290 (1974).

80. EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 297, at 855 (3d ed. 1984) (discussing FED. R. EVID. 803(2)).

81. The recorded recollection exception has "long been favored by the federal and practically all the state courts that have had occasion to decide the question." United States v. Kelly, 349 F.2d 720, 770 (2d Cir. 1965) (discussing exception now codified as FED. R. EVID. 803(5)).

82. CLEARY, *supra* note 80, at 873-75 (discussing exception now recognized as FED. R. EVID. 803(6)).

83. The King v. Woodcock, 168 Eng. Rep. 352, 353 (K.B. 1789) (discussing exception now recognized as FED. R. EVID. 804(b)(2)).

84. Higham v. Ridgway, 103 Eng. Rep. 717, 721 (K.B. 1808) (discussing exception now recognized as FED. R. EVID. 804(b)(3)).

85. FED R. EVID. 803(1)-(23), 804(b)(1)-(4).

86. Rules 803(24) and 804(b)(5) are identical, except the latter applies only when the declarant is "unavailable" as determined by FED. R. EVID. 804(a). *See* Huff v. White Motor Corp., 609 F.2d 286, 291 n.4 (7th Cir. 1979) ("The two provisions are identical, and Rule 804(b)(5) is therefore redundant, since 803(24) applies whether or not the declarant is a witness."); United States v. Kim, 595 F.2d 755, 764-66 (D.C. Cir. 1979). Accordingly, cases

the "residual" or "catchall"[87] exceptions—have proved to be "one of the most controversial features of the Federal Rules."[88] Wigmore's early work on the law of evidence was the impetus for the residual hearsay exceptions.[89] Wigmore's analysis denoted two common characteristics shared by the established hearsay exceptions: necessity of use and circumstantial probability of trustworthiness.[90] In the same year Wigmore's work was published, a federal court first used Wigmore's analysis to admit hearsay evidence solely "upon principle," rather than stretching the definition of an existing exception, or inventing a new class to accommodate the exception.[91] State courts also began to admit hearsay evidence not in existing common law categories if the evidence proved to be both necessary and trustworthy.[92]

The drafters of the Federal Rules of Evidence recognized *Dallas County v. Commercial Assurance Co.*[93] as the leading case on the residual hearsay exception. In *Dallas County*, the county sued its insurer to recover damages for the collapse of the clock tower on the county courthouse. The insurance company denied liability, claiming that structural weakness, not covered under the county's policy, caused the collapse.[94] An examination of the wreckage revealed charcoal and charred timbers that, according to the county's expert witness at trial, had been caused by a lightening strike.[95]

At trial, the parties presented more conflicting evidence on the cause of the collapse of the clock tower. The county's witnesses testi-

---

decided under 803(24) provide authority for 804(b)(5) cases, and vice versa. 1 MICHAEL H. GRAHAM, MODERN STATE AND FEDERAL EVIDENCE 253 (1989).

87. "The rules have also been called the 'open-ended exceptions,' the 'federal common law exceptions,' and, simply, the 'other' hearsay exceptions." Lizbeth A. Turner, Comment, *Admission of Grand Jury Testimony Under the Residual Hearsay Exception*, 59 TUL. L. REV. 1033, 1033 n.3 (1985).

88. Edward J. Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 SAN DIEGO L. REV. 239, 240 (1978).

89. G. & C. Merriam Co. v. Syndicate Publishing Co., 207 F. 515, 518 (2d Cir. 1913) (citing JOHN H. WIGMORE, EVIDENCE (1st ed. 1913)) (affirming and reprinting Judge Learned Hand's unpublished district court decision), *appeal dismissed for want of jurisdiction*, 237 U.S. 618 (1915). .

90. *Id.* (citing JOHN H. WIGMORE, EVIDENCE §§ 1421, 1422, 1690 (1st ed. 1913)).

91. *Id.*

92. *See* Gary W. Majors, Comment, *Admitting "Near Misses" Under the Residual Hearsay Exception*, 66 OREGON L. REV. 599, 602 & nn.18-22 (citing Perry v. Parker, 141 A.2d 883 (N.H. 1958) and Goodale v. Murray, 289 N.W. 450 (Iowa 1940) as seminal state cases).

93. 286 F.2d 388 (5th Cir. 1961). The Advisory Committee cites *Dallas County* on the Federal Rules of Evidence as an illustrative case. FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 162 (West 1990); *see also* SENATE COMM. ON JUDICIARY, FED. R. EVID., S. REP. NO. 1227, 93d Cong., 2d Sess. 20 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7065.

94. SENATE COMM. ON JUDICIARY, *supra* note 93, at 7065.

95. *Dallas County*, 286 F.2d at 390.

fied that they saw lightening strike the tower.[96] The insurance company's experts testified that lightening could not have struck the tower without causing the collapse.[97] To support its contention that lightening did not cause the charcoal residue, the insurer sought to introduce a fifty-eight year-old unsigned newspaper account of a fire at the courthouse.[98] The trial judge admitted the evidence on the theory that the account qualified under the business records exception.[99] The court of appeals upheld the admission of the newspaper account not because it qualified under a traditional exception, but because the statement was "necessary and trustworthy, relevant and material, and its admission [was] within the trial judge's exercise of discretion."[100] The success of *Dallas County* and its progeny set the stage for the battle over a residual exception during the adoption of the Federal Rules of Evidence.[101]

In 1965, Chief Justice Warren appointed an advisory committee to draft rules of evidence for use in the federal courts.[102] Ten years later, after much debate and compromise, Congress ratified the final draft of the Federal Rules of Evidence.[103] Professor Imwinkelreid, in a review of the enactment of the residual hearsay exception, concluded that "the legislative history materials are self-contradictory."[104] Cases involving the residual hearsay exception also present analytical difficulty, and as one commentator noted, "precedent is of limited value, and any attempt to distill from the decisions very

96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 391.
100. *Id.* at 398 (citing G. & C. Merriam Co. v. Syndicate Publishing Co., 207 F. 515, 518 (2d Cir. 1913), as precedent).
101. *See, e.g.*, Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir.), *cert. denied* 419 U.S. 1096 (1974); Butler v. Southern Pac. Co., 431 F.2d 77 (5th Cir. 1970) *cert. denied*, 401 U.S. 975 (1971); Sabatino v. Curtiss Nat'l Bank of Miami Springs, 415 F.2d 632 (5th Cir. 1969), *cert. denied*, 396 U.S. 1057 (1970); United States v. Brown, 411 F.2d 1134 (10th Cir. 1969); United States v. Kearney, 420 F.2d 170 (D.C. Cir. 1969); United States v. Castellana, 349 F.2d 264 (2d Cir. 1965), *cert. denied*, 383 U.S. 928 (1966); Price v. United States, 335 F.2d 671 (5th Cir. 1964); United States v. Barbati, 284 F. Supp. 409 (E.D.N.Y. 1968). For a summary of the Fifth Circuit post-*Dallas County* cases mentioned above, see Scott M. Lewis, *The Residual Hearsay Exceptions to the Federal Hearsay Rule: Shuffling the Wild Cards*, 15 RUTGERS L.J. 101, 105-09 (1983).
102. FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES at III (West 1990).
103. *Id.*
104. Imwinkelried, *supra* note 89, at 258; *see also* 4 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE 923 (1980) ("[T]he meaning of Rule 803(24) is suffused in the gray light of ambivalence, by virtue of its legislative history."). Indeed, in *Wright*, neither the majority nor dissent paid attention to legislative history in construing the residual exception.

much in the way of particularity would be not only futile, but counterproductive."[105]

The language of the residual hearsay exception rule imposes five requirements to justify the admission of a statement.[106] Four of these requirements are not extraordinary and have not resulted in significant litigation. The hearsay statement must be necessary to the case,[107] offered as evidence of a material fact,[108] must satisfy the general purposes of the rules,[109] and notice must be given to the opposing party.[110] The fifth and most significant requirement is that the statement must possess "circumstantial guarantees of trustworthiness" that are "equivalent" to the other enumerated exceptions.[111] The factors that courts have used to determine the trustworthiness of a child's statement in child sexual abuse cases include: whether the child made the statement under oath; the child's availability for cross-

105. LOUISELL & MUELLER, *supra* note 104, at 924.

106. Beyond the language of the rule, the hearsay exception must meet the requirements of the Confrontation Clause. The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Sixth Amendment applies to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1965). To meet this requirement, the Supreme Court has stated that to be admissible a hearsay statement must fall in a traditional exception, or present "particularized guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66 (1980). Because this language tracks the wording of FED. R. EVID. 803(24), the Confrontation Clause does not place an additional burden on the admission of a residual hearsay exception. "If it's good enough for the Federal Rules of Evidence, it's good enough for the confrontation clause." GRAHAM, *supra* note 86, at 313.

The legislative history states that Congress intended 803(24) to be used "very rarely and only in exceptional circumstances." SENATE COMM. ON THE JUDICIARY, FED. RULES OF EVIDENCE, S. REP. NO. 1227, 93d Cong., 2d Sess. 20 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7065-66. In large part, district courts have used their wide discretion to ignore this language. United States v. American Cynamid Co., 427 F. Supp. 859, 865-66 (S.D.N.Y. 1977). Further, the need for a child's testimony in a child sexual abuse prosecution often qualifies as an "exceptional circumstance." *See, e.g.*, United States v. Shaw, 824 F.2d 601 (8th Cir. 1987), *aff'd*, 484 U.S. 10687 (1988); United States v. DeNoyer, 811 F.2d 436 (8th Cir. 1987); United States v. Dorian, 803 F.2d 1439, 1444 (8th Cir. 1986); United States v. Cree, 778 F.2d 474 (8th Cir. 1985).

107. A statement is necessary if it is "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." FED. R. EVID. 803(24)(B); *see also* GRAHAM, *supra* note 86, at 256 n.392.

108. FED. R. EVID. 803(24)(A).

109. FED. R. EVID. 803(24)(C). This requirement appears to be no more than a restatement of Rule 102, which provides:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

FED. R. EVID. 102.

110. *See* CLEARY, *supra* note 80, at 909; GRAHAM, *supra* note 86, at 257-58.

111. FED. R. EVID. 803(24).

examination at trial; procedural regularity; out-of-court reliance by others; the child's motivation to speak truthfully; the child's competence to testify; the child's bias or partiality; the number of persons who overheard the statement; whether the statement was written or oral; the level of certainty of the facts described; whether the child uttered the statement spontaneously; whether more than one child made the same statement; the child's age and maturity; the nature and duration of abuse; the adult incentive to invent or shape allegations; admission by the defendant; abnormal behavior following contact with the defendant; opportunity for personal knowledge; time lapse between the event and the statement; whether the statement tends to be against the declarant's interest; the influence of leading questions; and, in some instances, the presence or absence of corroborating or inconsistent facts.[112]

III. *Idaho v. Wright*: Dissection

In *Idaho v. Wright*, the Supreme Court addressed problems raised by the intersection of a child sexual abuse case and the hearsay rule.[113] In an opinion written by Justice O'Connor, the Court held that the hearsay statements by an alleged child sexual abuse victim to her examining pediatrician concerning her own abuse, made in response to the pediatrician's questions, did not have the particularized guarantees of trustworthiness required for admission under the Confrontation Clause of the Sixth Amendment.[114] The significance of *Wright* lies in the factors the Court considered in determining whether the child's statement contained particularized guarantees of trustworthiness.

In reversing Wright's conviction, the Idaho Supreme Court laid down a rigid formula for protecting the defendant's Confrontation Clause rights. The Idaho court ruled that out-of-court statements made by an alleged child victim of sexual abuse would be admissible only if the child made the declarations either with several specific procedural safeguards,[115] or the child's statements otherwise amounted to

---

112. *See, e.g.*, CLEARY, *supra* note 80, at 908-09; GRAHAM, *supra* note 86, at 254-55; LOUISELL & MUELLER, *supra* note 104, at 926-33; MYERS, *supra* note 31, § 5.37, at 362-72. Of course, some of these requirements overlap, and many of them could fall in a broad category of "corroboration." The commentators and courts disagree how to group these factors. The issue of corroboration will be discussed in more detail, *infra* Part IV.

113. 110 S. Ct. 3139 (1990).

114. *Id.* at 3145.

115. State v. Wright, 775 P.2d 1224, 1231 (Idaho 1989) (Bakes, C.J., dissenting):

> As I deduce from the opinion's analysis, from now on all hearsay statements by very young children are inadmissible unless they are either (1) uttered spontaneously and excitedly, or (2) made in response to "open-ended" questions

"excited utterances . . . or part of the res gestae."[116] In dissent, Chief Justice Bakes noted the practical difficulty in applying the majority's test: trustworthy revelations of child sexual abuse may, and frequently do, arise outside of the clinical conditions required by the majority.[117] Instead, the dissent would require the court to determine "particularized guarantees of trustworthiness" and "indicia of reliability" from all of the facts and circumstances surrounding the making of the statement.[118] Applying this test to the facts, the dissent concluded that the signs of physical abuse and the older daughter's statements constituted sufficient indicia of reliability to admit the younger daughter's out-of-court statements.[119]

The Supreme Court's decision in *Wright* affirmed the Idaho Supreme Court in result, but declined to follow its rationale.[120] The Court used a two-step process laid out in *Ohio v. Roberts*[121] to determine when hearsay statements comport with the Confrontation Clause. First, the prosecution must show the unavailability of the declarant.[122] As the younger daughter's unavailability was not at issue,[123] the Court proceeded to the second step, which allows admission of an out-of-court statement "only if it bears adequate 'indicia of reliability.' "[124] These indicia are present if: (1) the statement comes within a traditionally rooted hearsay exception,[125] or (2) the statement is supplemented by "a showing of particularized guarantees of trustworthiness."[126]

The Supreme Court agreed with the Idaho court that the Confrontation Clause prohibited the admission of the younger daughter's out-of-court statements, but not because of a "preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant."[127]

---

from a specially trained professional during a videotaped interview and the evidence establishes that the child's memory was not "confabulated" by previous improper interviews.

116. *Id.* at 1230. Note that "[t]he term res gestae is carefully avoided in the Federal Rules of Evidence. . . . [It] is improper and should be avoided." MICHAEL H. GRAHAM, FEDERAL RULES OF EVIDENCE IN A NUTSHELL 308 (2d ed. 1988).

117. *Wright*, 775 P.2d at 1232; *see also supra* note 33 and accompanying text.

118. *Id.* at 1231.

119. *Id.*

120. Idaho v. Wright, 110 S. Ct. 3139, 3148 (1990).

121. 448 U.S. 56 (1980).

122. *Id.* at 65.

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

124. *Roberts*, 448 U.S. at 66 (quotations omitted).

125. *See* FED. R. EVID. 803(1)-(23), 804(b)(1)-(4).

126. *Roberts*, 448 U.S. at 66.

127. *Wright*, 110 S. Ct. at 3148. The *Wright* opinion noted that while the Idaho court's procedural safeguards may add to the reliability of some statements, they also may "in many

It instead stated that the particularized guarantees of trustworthiness must "be drawn from the totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief."[128] The Court noted several appropriate factors in this evaluation: a child's "spontaneity and consistent repetition,"[129] the child's mental state at the time of the declaration,[130] the "use of terminology unexpected of a child of similar age,"[131] and a "lack of motive to fabricate."[132]

Wright's test of an out-of-court statement's trustworthiness ends here: a court must judge the reliability of the out-of-court statement solely by its inherent trustworthiness.[133] *Wright* failed to recognize the State's argument that "evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness.' "[134] Indeed, *Wright* states that such evidence would "permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial."[135] According to *Wright*, the presence of corroborating evidence is relevant only to the issue of whether the error was harmless.[136]

The Idaho trial judge relied on several factors in admitting the younger daughter's testimony: (1) she had no motive to fabricate, (2) it was unlikely that her story was made up, (3) the injuries occurred while she was in the defendant's custody, (4) the older daughter had testified as to the identification of the abusers, and (5) the medical evidence documented physical abuse.[137] The Supreme Court, however, found only the first two factors related to "circumstances surrounding the making of the statements."[138] Weighing these factors along with the "suggestive manner in which Dr. Jambura conducted

---

instances be inappropriate or unnecessary to a determination whether a given statement is sufficiently trustworthy for Confrontation Clause purposes." *Id.*

128. *Id.* at 3149. In dissent, Justice Kennedy agreed with the majority's analysis up to this point: "My disagreement is with the rule the Court invents to control this inquiry, and with the Court's ultimate determination that the statements in question here must be inadmissible as violative of the Confrontation Clause." *Id.* at 3153 (Kennedy, J., dissenting).

129. *Wright*, 110 S. Ct. at 3150 (citing State v. Robinson, 735 P.2d 801, 811 (Ariz. 1987)).

130. *Id.* (citing Morgan v. Foretich, 846 F.2d 941, 948 (4th Cir. 1988)).

131. *Id.* (citing State v. Sorenson, 421 N.W.2d 77, 85 (Wis. 1988)).

132. *Id.* (citing State v. Kuone, 757 P.2d 289, 292-93 (Kan. 1988)).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 3150-51, 3151 n.*.

137. *Id.* at 3152.

138. *Id.*

the interview,"[139] the Court found that there was "no special reason for supposing that the incriminating statements were particularly trustworthy."[140] Ultimately, "[g]iven the presumption of inadmissibility accorded accusatory hearsay statements not admitted pursuant to a firmly rooted hearsay exception,"[141] the Court concluded that the state had failed to meet its burden of showing that the daughter's statement contained particularized guarantees "so trustworthy that adversarial testing would add little to its reliability."[142] Accordingly, the statement did not satisfy the Confrontation Clause.

Justice Kennedy, in a brief dissenting opinion joined by Chief Justice Rehnquist and Justices White and Blackmun, argued that the Court should consider corroborating evidence when analyzing the trustworthiness of a hearsay statement.[143] Kennedy agreed with the foundation of the Court's opinion; however, Kennedy would expand the test to look beyond the circumstances surrounding the making of the statement and examine the presence of corroborating evidence. Kennedy asserted that "[i]t is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence."[144] Not only did the dissent find the inquiry relevant, but it could find no justification for prohibiting such analysis. Kennedy noted that courts frequently use corroborating evidence to evaluate the trustworthiness of out-of-court statements made by co-defendants,[145] in determining whether the police may act on the basis of an informant's tip,[146] and indeed, in supporting a finding that a child's statements are reliable.[147] Justice Kennedy's test would look beyond "the narrow circumstances in which the statement was made,"[148] and would provide evidence that "can be assessed by the defendant and addressed by the trial court in an objective and critical way."[149] Kennedy would have remanded the case to consider whether the corroborating factors evidenced particularized guarantees of trustworthiness.[150]

---

139. *Id.*
140. *Id.*
141. *Id.* (citing Lee v. Illinois, 476 U.S. 530, 543 (1986)).
142. *Id.* at 3149, 3152-53.
143. *Id.* at 3153 (Kennedy, J., dissenting).
144. *Id.*
145. *Id.* at 3155; *see also* Bourjaily v. United States, 483 U.S. 171, 180 (1987).
146. *Id.* at 3156.
147. *Id.* at 3154 n.2.
148. *Id.* at 3156.
149. *Id.*
150. *Id.* at 3156-57.

IV. CORROBORATION OR CONSEQUENCES

A. *An Overview of Corroboration*

Many courts have passed on residual hearsay cases.[151] "Not surprisingly, these decisions have . . . been analytically inconsistent."[152] Although there is no exhaustive list of factors that courts consult to determine the "trustworthiness" of a hearsay statement, certain factors continue to reappear in child sexual abuse cases.[153] The most significant disagreement among the cases is whether a court can consider corroborating evidence in determining whether to admit a hearsay statement under the residual exception.[154] In a child sexual abuse case, one court defined corroborative evidence as "evidence, direct or circumstantial, that is independent of and supplementary to the child's hearsay statement and that tends to confirm that the act described in the child's statement actually occurred."[155] Some courts have refused to examine anything beyond the circumstances surrounding the making of the out-of-court statement,[156] while other courts have considered corroborating evidence in their determination of trustworthiness.[157] Finally, several state legislatures have adopted child abuse hearsay exception statutes that require courts to consider corroborating evidence.[158]

1. CASES ANALYZING CORROBORATING EVIDENCE

Courts of Appeals for the First,[159] Second,[160] Third,[161] Fourth,[162]

---

151. *See*, John L. Ross, *Confrontation and Residual Hearsay: A Critical Examination, and a Proposal for Military Courts*, 118 MIL. L. REV. 31, 31 n.6 (1987) (listing cases).

152. *Id.* at 31-33.

153. *See supra* text accompanying note 112.

154. *See* Jonathan E. Grant, *The Equivalent Circumstantial Guarantees of Trustworthiness Standard for Federal Rule of Evidence 803(24)*, 90 DICK. L. REV. 75, 94-95 (1985); Ross, *supra* note 151, at 71; David A. Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867, 876-84 (1982); Ray Yasser, *Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule*, 11 TEX. TECH L. REV. 587, 603-05 (1980).

155. People v. Bowers, 801 P.2d 511, 525 (Colo. 1990); *see also infra* notes 200-08 and accompanying text.

156. *See infra* notes 179-91 and accompanying text.

157. *See infra* notes 159-78 and accompanying text.

158. *See infra* notes 192-207 and accompanying text.

159. *See, e.g.*, Furtado v. Bishop, 604 F.2d 80, 91 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).

160. *See, e.g.*, United States v. Iaconetti, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

161. *See, e.g.*, United States v. Bailey, 581 F.2d 341, 349 (3d Cir. 1978).

162. *See, e.g.*, United States v. Hinkson, 632 F.2d 382, 386 (4th Cir. 1980).

Fifth,[163] Seventh,[164] Eighth,[165] and Ninth[166] Circuits and the Court of Military Appeals[167] have considered corroborating evidence in their analysis of the trustworthiness of out-of-court statements. Likewise, several commentators have noted the importance of looking beyond the circumstances surrounding the statement itself.[168] In an article written soon after the adoption of the Federal Rules of Evidence, Professor Yasser noted that the legislative history of the hearsay rule mandated that courts construe the exceptions liberally.[169] Some courts have gone so far as to require the presence of corroborating evidence before admitting a statement under the residual exception.[170] In *United States v. Thevis*,[171] the court constructed a two-tier test to analyze the trustworthiness of an out-of-court statement. Under the *Thevis* test, a court should first examine circumstances surrounding the making of the statement and then determine whether there is corroborating extrinsic evidence.[172] The statement can be admitted only if both prongs are satisfied.[173] Commentators have properly criticized this rigid formulation as inconsistent with the drafters' intentions.[174]

---

163. *See, e.g.*, United States v. Hitsman, 604 F.2d 443, 447 (5th Cir. 1979).

164. *See, e.g.*, United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1978), *cert. denied*, 444 U.S. 833 (1979). *But see* Huff v. White Motor Corp., 609 F.2d 286, 293 (7th Cir. 1979) (considering only circumstances surrounding the making of the statement).

165. *See, e.g.*, United States v. Van Lufkins, 676 F.2d 1189, 1192 (8th Cir. 1982).

166. *See, e.g.*, Calhoun v. Bailar, 626 F.2d 145, 149 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981). *But see* Karme v. Commissioner, 673 F.2d 1062 (9th Cir. 1982) (considering only circumstances surrounding the making of the statement).

167. *See, e.g.*, United States v. Powell, 22 M.J. 141, 145 (C.M.A. 1986).

168. *See, e.g.*, MYERS, *supra* note 31, § 5.38; Graham, *supra* note 30, at 532; Yun, *supra* note 3, at 1758; Jeff R. Hanrahan, Note, *Rules 803(24) and 804(B)(5)—The Residual Exceptions to the Hearsay Rule*, 32 OKLA. L. REV. 516, 519 (1979) ("Corroborating circumstances [are] . . . important . . . in determining trustworthiness.").

169. Yasser, *supra* note 154, at 608. Professor Yasser noted that "the 'equivalency' requirement would not be difficult to meet, given the well-recognized fact of the unreliability of much of the traditionally admitted hearsay." *Id.* While not specifically advocating corroboration as the determining factor in an analysis of trustworthiness, Yasser saw no harm in its use. *Id.* at 604-05.

170. *See* United States v. Thevis, 84 F.R.D. 57 (N.D. Ga. 1979), *aff'd on other grounds*, 665 F.2d 616 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982).

Although the common law did not require the corroboration of the testimony of an alleged rape victim, 7 JOHN H. WIGMORE, EVIDENCE § 2061, at 451 (James H. Chadbourn rev. ed. 1978), many jurisdictions adopted such a requirement "based palusibly on the laudable purpose of protecting against false accusations," *id.* § 2061, at 457. *See, e.g.*, United States v. Huff, 442 F.2d 885, 888 (D.C. Cir. 1971). *See generally* Laura Lane, Note, *The Effects of the Abolition of the Corroboration Requirement in Child Sexual Assault Cases*, 36 CATH. U. L. REV. 793 (1987) (discussing the corroboration requirement). On corroboration and child sexual abuse hearsay exception statutes, see *infra* notes 192-207.

171. 84 F.R.D. at 63.

172. *Id.* at 63.

173. *Id.* at 66-68; *see also* United States v. Turner, 475 F. Supp. 194 (E.D. Mich. 1978).

174. Sonenshein, *supra* note 154, at 883 ("[N]o requirement of corroboration exists as a

The majority of courts that do examine corroborating evidence, however, consider the presence or absence of corroboration as only one factor in their overall analysis of a statement's trustworthiness. For example, in *United States v. Cree*,[175] the defendant challenged her assault conviction on the grounds that the child's hearsay statement lacked the necessary guarantees of trustworthiness.[176] At trial, the judge allowed a clinical social worker to testify to the content of interviews she had conducted with the child victims, in which they described specific instances of abuse.[177] The Eighth Circuit Court of Appeals upheld the admission of the statements for several reasons. First, it noted that the statements were trustworthy because they were "substantiated by extensive, objective medical evidence of injuries that easily could have resulted from the abusive acts [of the defendant] stated by [the child] to have occurred."[178] The court also recognized several other factors suggesting the trustworthiness of the child's statement: the child had previously claimed that Cree had hit him with a belt; at trial, the child became excited when shown the items that he claimed had been used to beat him; and the child's young age suggested no motive to fabricate such an accusation.[179]

2. CIRCUMSTANCES AT THE TIME THE STATEMENT WAS MADE

Huff v. White Motor Corp.[180] is the leading case that prohibits inquiry into the presence or absence of corroborating evidence to determine the trustworthiness of an out-of-court statement. Jesse Huff was driving a truck designed by the defendant when it jackknifed and caught fire.[181] Huff was burned in the fire and died nine days later.[182] While in the hospital, Huff told some visitors that his pant leg had caught on fire, and he had lost control of his truck while trying to extinguish the fire.[183] Huff's widow sought to introduce her husband's statement at trial under the residual hearsay exception. On appeal, the Seventh Circuit refused to consider Huff's statement:

precondition to the admissibility of evidence under one of the enumerated exceptions."). For criticism of the analysis of corroborating evidence in general, see *infra* notes 186-91 and accompanying text.

175. 778 F.2d 474 (8th Cir. 1985).

176. *Id.* at 477.

177. *Id.* at 476. The interviews were videotaped and made available to the defense well ahead of trial. *Id.* at 476 n.4.

178. *Id.* at 477.

179. *Id.* at 477-78.

180. 609 F.2d 286 (7th Cir. 1979).

181. *Id.* at 289.

182. *Id.*

183. *Id.* at 290.

"Because the presence or absence of corroborative evidence is irrelevant in the case of a specific exception, it is irrelevant here, where the guarantees of trustworthiness must be equivalent to those supporting specific exceptions."[184] The court limited inquiry to only those circumstances "that existed when the statement was made."[185]

Although only a minority of the courts have adopted this approach,[186] some commentators consider it as "the view most consistent with the 'trustworthiness' language of the residual exceptions."[187] Proponents of this approach argue that "the presumed reliability of hearsay exceptions focused on the circumstances under which the statement [is] made," so it would be inappropriate to look beyond those circumstances in analyzing the admissibility of a statement under the residual hearsay exception.[188] Simply stated, "[c]orroboration does not insure trustworthiness."[189] Another problem in considering corroborating circumstances is the "necessity" standard imposed by the residual exceptions.[190] The necessity standard often results in an evidentiary paradox: "The more 'trustworthy' a statement becomes because of corroboration, the less necessary would be its admission."[191] Finally, proponents argue that "consideration of extrinsic factors . . . is inconsistent with the implicit assumptions made by Congress in adopting the federal rules."[192]

3. CORROBORATION AND CHILD SEXUAL ABUSE HEARSAY EXCEPTIONS

By 1982, at least six states had adopted statutes that require a

184. *Id.* at 293. The court recognized that some circuits did examine corroborating evidence, citing United States v. Bailey, 581 F.2d 341, 349 (3d Cir. 1978).

185. *Huff*, 609 F.2d at 292.

186. "[M]ost federal courts have looked to the existence of corroborating evidence or the lack thereof to determine the reliability of hearsay statements not coming within one of the traditional hearsay exceptions." Idaho v. Wright, 110 S. Ct. 3139, 3154 (1990) (Kennedy, J., dissenting). For those federal circuits that consider corroborating circumstances, see *supra* text accompanying notes 136-44.

187. Sonenshein, *supra* note 154, at 883; *see also* Grant, *supra* note 154, at 97-99; Ross, *supra* note 154, at 71-73.

188. Ross, *supra* note 154, at 71; *see also* Sonenshein, *supra* note 154, at 879. One commentator noted flatly, "Corroboration . . . does not insure trustworthiness." Frank, *supra* note 30, at 397. *But see infra* notes 215-17 (discussing the use of corroborating evidence in establishing res gestae exceptions).

189. Frank, *supra* note 30, at 397-98 & n.54.

190. *See supra* note 107 and accompanying text.

191. Ross, *supra* note 154, at 72; *see also* Frank, *supra* note 30, at 402 ("If the prosecution has strong corroboration of the abuse, there is little need for hearsay. If, however, the evidence is inconclusive, the state may need the hearsay to prove its case."); Sonenshein, *supra* note 154, at 879-80.

192. Ross, *supra* note 154, at 72. *But see infra* notes 214-17.

court to consider corroborating evidence in determining whether to admit hearsay statements made by child witnesses in child sexual abuse cases.[193] By 1990, as Justice Kennedy noted in his dissenting opinion in *Wright*, over eighteen states had adopted such statutes.[194] The Washington statute, which served as a model for other states,[195] provides for the admission of a child's statement, if (1) that statement describes "any act of sexual contact performed with or on the child by another," if the circumstances surrounding the making of the statement provide "sufficient indicia of reliability," and (2) the child-declarant testifies or the child is unavailable to testify and there is corroborating evidence of the crime.[196] These requirements are more stringent than the constitutional minimum, as the party seeking admission of the statement must show more than mere sufficient "indicia of reliability."[197] Although academics have disagreed over their constitutionality,[198] the statutes have rarely been challenged in the courts.[199] These statutes may be the best solution to the various evidentiary problems presented by child sexual abuse prosecutions.[200]

The Colorado Supreme Court examined the relationship between corroboration for a child sexual abuse hearsay exception statute and corroboration for Confrontation Clause purposes in *People v. Bowers*.[201] The defendant's three-year-old daughter made statements

193. Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 811-12 (1985) (noting that Colorado, Indiana, Minnesota, South Dakota, Utah, and Washington provided child hearsay statutes).

194. Idaho v. Wright, 110 S. Ct. 3139, 3154 n.2 (1990) (citing ARIZ. REV. STAT. ANN. § 13-1416 (1989); ARK. R. EVID. 803(25)(A); CAL. EVID. CODE ANN. § 1228 (West 1990); COLO. REV. STAT. § 13-25-29 (1987); FLA. STAT. § 90.803(23) (1989); IDAHO CODE § 19-3024 (1987); ILL. REV. STAT. ch. 38, ¶ 115-10 (1989); IND. CODE § 35-37-4-6 (1988); MD. CTS. & JUD. PROC. CODE ANN. § 9-103.1 (1989); MINN. STAT. § 595.02(3) (1988); MISS. CODE ANN. § 13-1-403 (Supp. 1989); N.J. R. EVID. 63 (1989); N.D. R. EVID. 803(24); OKLA. STAT. tit. 12, § 2803.1 (1989); OR. REV. STAT. § 40.460 (1989); 42 PA. CONS. STAT. § 5985.1 (1989); S.D. CODIFIED LAWS ANN. § 19-16-38 (1987); UTAH CODE ANN. § 76-5-411 (1990)); *see also* UNIF. R. EVID. 807 commentary to subdivision (a) (listing corroborative evidence "[a]mong the factors that the court should consider in determining whether sufficient circumstantial guarantees of trustworthiness exist to warrant admission of a recorded statement").

195. Note, *supra* note 193, at 811.

196. WASH. REV. CODE ANN. § 9A.44.120 (1988).

197. Frank, *supra* note 30, at 392.

198. *Compare* Note, *supra* note 193, at 811 ("[t]he language . . . reflects a genuine attentiveness to the guidelines established in *[Ohio v.] Roberts*") *with* Frank, *supra* note 30, at 401 (the statute "fails to meet the *Roberts* requirement[s]").

199. *But see* State v. Ryan, 691 P.2d 197 (Wash. 1984). *Ryan* has been properly criticized. *See* Note, *supra* note 193, at 821-22.

200. *See* Susan K. Datesman, Note, State v. Smith: *Facilitating the Admissibility of Hearsay Statements in Child Sexual Abuse Cases*, 64 N.C. L. REV. 1352, 1362-63 (1986); Note, *supra* note 193, at 817.

201. 801 P.2d 511 (Colo. 1990).

implicating her father in sexual abuse.[202] The prosecution sought to admit the child's statements under Colorado's child sexual abuse hearsay statute.[203] The court found that the statements met the reliability prong of the statute, based on the "time, content, and circumstances" surrounding the making of the statements.[204] To meet the corroboration prong, the prosecution sought to introduce evidence of the child's use of anatomically correct dolls.[205] The Colorado court found this showing insufficient, stating that evidence must be "independent of and supplementary to the child's hearsay statement"[206] to be corroborative. The court listed several examples:

> testimony from an eyewitness, other than the unavailable child-victim, whose statement is offered into evidence, that the offense occurred; statements of other children who were present when the act was committed against the victim; medical or scientific evidence indicating that the child was sexually assaulted; expert opinion evidence that the child-victim experienced post-traumatic stress consistent with the perpetration of the offense described by the child; evidence of other similar offenses committed by the defendant; the defendant's confession to the crime; or other independent evidence, including competent and relevant expert opinion testimony, tending to establish the commission of the act described in the child's statement.[207]

Although the court specifically limited its analysis of corroborating evidence to the statutory construction issue, it noted the common sense argument favoring corroboration.[208]

B. *Putting Corroboration to Work*

Idaho v. Wright follows the *Huff* line of precedent,[209] ending the debate over the role of corroboration by requiring that "hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."[210] The touchstone of the Supreme Court's analysis in *Wright* is that the Confrontation Clause only permits a court to admit

202. *Id.* at 514-15.

203. COLO. STAT. REV. § 13-25-129 (1987) is similar to the Washington statute discussed *supra* notes 195-200 and accompanying text.

204. *Bowers*, 801 P.2d at 521-22.

205. *Id.* at 522.

206. *Id.* at 525.

207. *Id.*; *cf.* Note, *supra* note 193, at 821.

208. *Bowers*, 801 P.2d at 255 (quoting Idaho v. Wright, 110 S. Ct. 3139, 3153-54 (1990) (Kennedy, J., dissenting)).

209. Idaho v. Wright, 110 S. Ct. 3139, 3149-50 (1990).

210. *Id.* at 3150.

hearsay evidence with such trustworthiness that " 'there is no material departure from the reason of the general rule.' "[211] The Court would argue that the private nature of child sexual abuse makes the child-victim's statements necessary.[212] *Wright* states, however, that a court must determine trustworthiness only from the circumstances surrounding the making of the statement. This reading is unsatisfyingly narrow.

The residual exception should allow courts to admit evidence if it is "necessary and trustworthy, relevant and material."[213] Although the Confrontation Clause and the enumerated hearsay exceptions require that an out-of-court statement be trustworthy, they do not mandate a single method of inquiry into trustworthiness. Thus, the Court's restraint in *Wright* is self-imposed and unnecessary. As Justice Kennedy notes throughout his dissent, the Supreme Court has frequently examined corroborating evidence in analyzing trustworthiness.[214]

One argument in favor of limiting analysis to the circumstances surrounding the making of the statement is that because the other hearsay exceptions consider only the surrounding circumstances, the residual exceptions must do so as well.[215] This argument is without merit. It is not clear that the specifically enumerated hearsay exceptions prohibit an inquiry into corroboration. Historically, courts have required corroborating evidence as part of the so-called res gestae exceptions.[216] The hearsay exception for records of regularly conducted business activity also requires an analysis beyond the circumstances surrounding the statement.[217] By the terms of the exception, a statement is admissible only "if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum."[218] To obey the rule, courts must look beyond the circumstances that existed when pen was put to

211. *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)).

212. *See supra* text accompanying notes 60-62.

213. Dallas County v. Commercial Assurance Co., 286 F.2d 388, 398 (5th Cir. 1961).

214. *Wright*, 110 S. Ct 3139, 3155-56 (citing Alabama v. White, 110 S. Ct. 2412 (1990); Cruz v. New York, 481 U.S. 186 (1987); New Mexico v. Earnest, 477 U.S. 648 (1986); Lee v. Illinois, 476 U.S. 530 (1986); Illinois v. Gates, 462 U.S. 213 (1983); Dutton v. Evans, 400 U.S. 74 (1970) (plurality opinion); Spinelli v. United States, 393 U.S. 410 (1969); Jones v. United States, 362 U.S. 257 (1960)).

215. *See supra* note 191 and accompanying text.

216. The res gestae exceptions are now codified in FED. R. EVID. 803(1)-(3). William G. Passannante, Note, Res Gestae, *The Present Sense Impression Exception and Extrinsic Corroboration under Federal Rule of Evidence 803(1) and its State Counterparts*, XVII FORDHAM URB. L.J. 89 (1989).

217. FED. R. EVID. 803(6).

218. *Id.*

paper, at the very least, to determine whether a log entry was of a kind regularly made.

Wright states that the examination of corroborating evidence "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial."[219] This concern is misplaced; the Court has already addressed this issue in *Bourjaily v. United States*.[220] There, the Court allowed the admission of a co-conspirator's statement after determining that the statement itself could be used in the examination of corroborating circumstances.[221] Writing for the Court, Chief Justice Rehnquist noted that "a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence."[222]

Moreover, the presence or absence of corroborating evidence has rarely been, and should not be, a "trump" in an analysis of trustworthiness. Rather, it is properly one of many relevant factors to evaluate,[223] as illustrated in *United States v. Dorian*.[224] In *Dorian*, the defendant challenged his conviction for assault to commit rape on the grounds that the child victim's out-of-court statements lacked sufficient trustworthiness.[225] The child appeared as a witness, but "because of her age and obvious fright, she was unable to testify meaningfully."[226] The trial judge allowed the child's foster mother to testify about an interview in which the child described her father's abusive conduct and acted out the contact with anatomically correct dolls. On appeal, the panel examined "the reliability of the declaration 'in light of the circumstances at the time of the declaration and the credibility of the declarant.' "[227] The court relied on several criteria in its finding of trustworthiness: the training of the interviewers and their testimony that they did not use leading questions; the defense's opportunity to cross-examine the interviewers extensively; and the "graphic but child-like description of the incident."[228] Finally, the court noted the substantial corroborating evidence:

> the descriptions of her fearful behavior around men; her terror when the physician's assistant prepared to conduct a vaginal exam-

219. Idaho v. Wright, 110 S. Ct. 3139, 3150 (1990).
220. 483 U.S. 171 (1987).
221. *Id.* at 182-84.
222. *Id.* at 180.
223. *See supra* text accompanying notes 170-74.
224. 803 F.2d 1439 (8th Cir. 1986).
225. *Id.* at 1444.
226. *Id.* at 1443.
227. *Id.* at 1444 (citing United States v. Renville, 779 F.2d 430, 440 (8th Cir. 1985)).
228. The child stated that her father " 'put his boy thing in the hole between my legs.' " *Id.* at 1445.

> ination; her disturbed behavior when told she was going home, which stopped when she learned her father would not be there; [the defendant's] unprecedented act of washing [the child's] underwear; and [the defendant's wife's] statements that [the defendant] was trying to rape her daughter. Furthermore, the medical evidence, although inconclusive, was certainly consistent with sexual abuse.[229]

The corroborating evidence in *Dorian*, such as the child's behavior and the medical examination findings, supported the factors surrounding the making of the statement. Thus, the presence of corroborating evidence strengthened the probability that the hearsay statement was trustworthy. Yet the Court stated in *Wright* that the Confrontation Clause demands that hearsay evidence, to be admissible, must be "so trustworthy that cross-examination of the declarant would be of marginal utility."[230] As one commentator has noted, "cross-examination tests more than the reliability of the witnesses testimony in light of the circumstances in which it was given. [It] also tests the consistency of that testimony with other known facts."[231] Using the specifically enumerated, or "firmly rooted,"[232] hearsay exceptions as a standard, equivalent guarantees of trustworthiness are not difficult to obtain.[233]

To further illustrate the practical implications of *Wright*, imagine a situation where, during a bitter divorce and custody battle, a five year-old child reveals that his father has sexually abused him. The child makes the allegations to his teacher and later to his mother. The child will not speak to therapists and is unable to testify at trial. If a court looks solely to the circumstances surrounding the making of the statement, it is unlikely that the statement would be admitted under the residual exception—or any other hearsay exception in the Federal Rules of Evidence. Imagine further that a medical examination reveals symptoms consistent with sexual abuse, and the child has recently begun to wet his bed, have nightmares, and becomes highly agitated when his father is present. The problem with *Wright* is that it does not allow a court to consider these crucial circumstances in evaluating the trustworthiness of the child's statement.[234]

---

229. *Id.* State courts have also examined corroborative evidence in the determination of credibility in child sexual abuse cases. *See, e.g.*, State v. Robinson, 735 P.2d 801 (Ariz. 1987).

230. *Wright*, 110 S. Ct. at 3150.

231. Note, *supra* note 193, at 822.

232. *See Wright*, 110 S. Ct. at 3147; *cf.* Stanley A. Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C. L. REV. 9, 12 (1987) (arguing that "firmly rooted should not be synonymous with longevity").

233. *See supra* text accompanying note 169.

234. For other examples, *see Wright*, 110 S. Ct. at 3153-54 (Kennedy, J., dissenting).

Although commentators disagree over the relationship between corroborating evidence and trustworthiness, the states that have adopted child sexual abuse hearsay statutes almost uniformly have added corroboration requirement.[235] Thus, the presence of the corroboration requirement in these state statutes indicates that legislatures value an inquiry into corroborating evidence, which may support the admissibility of a statement not otherwise admissible if the trustworthiness inquiry only focused on the circumstantial indicators.

Commentators have further noted that the requirement of corroborating evidence in the state stautes acts as a "necessary safeguard" against wrongful conviction.[236] Indeed, an examination into corroborating evidence for the admission of a statement under the residual exception may also help protect the defendant's Confrontation Clause rights. Although a lack of corroborating evidence should not automatically disqualify the admission of the statement, it should be a factor in the larger calculus of the statement's trustworthiness. If the child's statement and the fact pattern suggests that some kind of corroborating evidence should exist, the lack of such evidence should influence the court's decision to deny its admission. For example, if a child claims that the man who touched her had a scar on his stomach, and the defendant does not, this too should be a factor in considering whether to admit the child's statement if it does not otherwise appear to be trustworthy from the circumstantial guarantees.

V. CONCLUSION

Contrary to the majority's assertion in *Wright*, corroboration is certainly a *relevant* factor in an evaluation of trustworthiness; after *Wright* it is only an inappropriate one. In rejecting the restrictive test proposed by the Idaho Supreme Court, both the majority and dissent in *Wright* correctly recognized that real-world considerations frequently prevent a hearsay statement from being made under conditions that support trustworthiness. Unfortunately, *Wright* also ignores the practices of a majority of states and federal courts of appeals, and prohibits consideration of corroborating evidence that would compensate for these practical difficulties while remaining within the spirit of the rule.

The Federal Rules of Evidence includes the residual hearsay exception to allow courts to admit necessary and trustworthy statements into evidence, regardless of their label. Even under the strictest

235. Note, *supra* note 193, at 812.
236. *Id.* at 820.

reading of the drafters' intention that the residual exception be used in unusual and extraordinary circumstances, the circumstances surrounding child sexual abuse cases are sufficiently compelling to warrant consideration of corroborating evidence.

Near the end of the 1990 Term, the Supreme Court made broad hints that stare decisis will not prevent it from reconsidering recent cases. Writing for the Court, Chief Justice Rehnquist stated that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights; . . . the opposite is true in cases . . . involving procedural and evidentiary rules."[237] The Court noted that in the last twenty years, it had overruled thirty-three constitutional decisions,[238] and the dissent suggeted that more may follow.[239] Rehnquist described three characteristics of cases that will be frequently re-examined: (1) cases decided "by the narrowest of margins," (2) cases where the "basic underpinnings" of the decision have been questioned by the Court, and (3) cases which the lower courts have had difficulty in applying.[240] Considering the dynamic state of child sexual abuse laws, *Idaho v. Wright* may prove to fall in all three categories. Moreover, given that Justices Brennan and Marshall were both in the five-to-four *Wright* majority and have since left the bench, the Court is likely to reconsider whether corroboration should be in the courtroom or out the window.

JOHN CLAIBORNE KOSKI

237. Payne v. Tennessee, 111 S. Ct. 2597, 2610 (1991).

238. *Id.*

239. See *id.* at 2619 (Marshall, J., dissenting) ("[T]oday's majority ominously suggests that an even more extensive upheaval of this Court's precedents may be in store.").

240. *Id.* at 2611.