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Has Florida Won or Lost the Battle by Eliminating Section 90.803(4) as an Alternative Tool in Prosecuting Child Sexual Abuse?

Celina E. Contreras

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SECTION I: IS THE FLORIDA SUPREME COURT UP TO THE TASK OF BEING AMERICA'S CRIMINAL EVIDENCE COURT?

Has Florida Won or Lost the Battle by Eliminating Section 90.803(4) as an Alternative Tool in Prosecuting Child Sexual Abuse?

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I. INTRODUCTION

In 1998, an estimated 984,000 children in the United States were victims of some form of abuse.¹ Approximately 103,845 of these children were sexually abused.² Five to fifteen percent of all males and fifteen to thirty percent of all females report some type of exposure to child sexual abuse.³ Based on reports to law enforcement, children under twelve constituted roughly fifty percent of all victims of forcible sodomy, sexual assault with an object, or forcible fondling.⁴

Child sexual abuse cases are difficult to prosecute because the

1. *United States Department of Health and Human Services, Children's Bureau* (2000), http://www.nvc.org/stats/ca_csa.htm (last visited Jan. 14, 2001).

2. *Id.*

3. *Id.*

4. *Id.*

young child and the abuser are usually the only witnesses to the crime. Physical evidence of child sexual abuse is problematic to collect because, for example, fondling does not leave physical proof behind like sexual intercourse may.⁵ In some cases, the child cannot testify because the child is found to be incompetent, or the child is too frightened to testify because the person being accused is a family member. Consequently, the evidence available to prosecutors in these cases is usually statements made by the child to family members, law enforcement, or medical personnel. Because these out-of-court statements made by the child are considered hearsay, they must be admitted under an exception to the hearsay rule. The reason for admitting hearsay under an exception is that a statement may be so inherently reliable that it can be accepted as true.⁶

Many state and federal courts admit statements made to medical personnel by sexually abused children detailing the sexual abuse and identifying the abuser under a medical diagnosis hearsay exception.⁷ These courts have found that statements made by children to medical personnel are reasonably pertinent to diagnosis and treatment because knowing the identity of the abuser and the nature of the abuse allows the doctor to diagnose and treat the child physically, mentally, and emotionally.⁸ This diagnosis and treatment is critical in child sexual abuse cases because the abuser may be living in the same household and/or may be a family member. Because the child is helpless against this abuse, the immediate concern of medical personnel is to remove the child from this environment to prevent future abuse. For example, in *United States v. Renville* the Eighth Circuit determined that the treating physician has the immediate obligation of removing the child from the abusive environment.⁹

Florida does not permit hearsay statements identifying the abuser in child sexual abuse cases to be admitted under Florida's medical diagnosis hearsay exception,¹⁰ section 90.803(4), *Florida Statutes*.¹¹ In 1993,

5. See *Corpus v. State*, 718 So. 2d 1266, 1268 (Fla. 2d DCA 1998).

6. See FED. R. EVID. 803(4) advisory committee note.

7. See *State v. Crumbley*, 519 S.E.2d 94, 97 (N.C. Ct. App. 1999); *People v. Meeboer*, 484 N.W.2d 621, 626 (Mich. 1992); *United States v. Pacheco*, 154 F.3d 1236, 1240 (10th Cir. 1998).

8. See *United States v. Renville*, 779 F.2d 430, 438 (8th Cir. 1985).

9. *Id.*

10. *State v. Jones*, 625 So. 2d 821, 824 (Fla. 1993).

11. FLA. STAT. § 90.803(4) (2000) states:

Statements made for the purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe the medical history, past or present symptoms, pain, or sensations, or the inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

the Florida Supreme Court in *State v. Jones* tried to resolve a conflict in Florida law regarding admissibility of statements of the identity of the abuser in child sexual abuse cases under the medical diagnosis hearsay exception. Refusing to follow other states, the Florida Supreme Court announced that out-of-court statements made by sexually abused children to a doctor identifying their abuser would be controlled by Florida's child abuse exception to the hearsay rule,¹² section 90.803(23), *Florida Statutes*.¹³

This Comment discusses whether the Florida Supreme Court succeeded in balancing the rights of the accused against the need to protect sexually abused children by only allowing identity statements to be admitted under the child abuse hearsay exception. Section II of this comment will discuss the admission of identity statements made by child sexual abuse victims under section 90.803(4), the medical diagnosis hearsay exception, before the adoption of section 90.803(23), the child abuse hearsay exception, and how other states admit a child's statement of identity through their medical diagnosis hearsay exception. Section III will discuss the admission of children's statements under section 90.803(23) and how other states not only admit a child's statement through their child abuse hearsay exception, but also through their medical diagnosis hearsay exception. Section IV will examine how federal courts admit identity statements made by sexually abused children. Finally, this Comment concludes that the Florida Supreme Court eliminated a valuable alternative in child sexual abuse prosecutions when it declared that a child's statement to a physician as to the identity of a perpetrator of sexual abuse is not admissible under section 90.803(4), the medical diagnosis hearsay exception.

II. FLORIDA'S MEDICAL DIAGNOSIS HEARSAY EXCEPTION

According to the Florida Evidence Code, "'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."¹⁴ The Sixth Amendment of the United States Constitution grants an accused the right to confront and cross-examine "the witnesses against him."¹⁵ Therefore, hearsay statements are inadmissible because there is no way to test the reliability of these statements if the declarant cannot be cross-examined.

Id.

12. *Jones*, 625 So. 2d at 824.

13. FLA. STAT. § 90.803(23).

14. FLA. STAT. § 90.801(1)(c)

15. U.S. CONST. amend. VI.

In order for a declarant's out-of-court statements to be admitted in court, the declarant must be under oath, in the presence of the trier of fact so that credibility may be examined, and subject to cross-examination. Nevertheless, a hearsay statement may be admitted if it falls within a designated exception to the hearsay rule. Exceptions to the hearsay rule ensure and provide necessary guarantees of trustworthiness. Therefore, an examination under the Confrontation Clause is no longer required if the statement falls within an exception.¹⁶

In Florida, in order for hearsay statements to fall under the medical diagnosis hearsay exception, it must be shown that: (1) the statements were made for the purpose of diagnosis or treatment; and (2) the declarant knew that the statements were made for a medical purpose.¹⁷ The rationale behind the medical diagnosis hearsay exception in Florida is that a patient seeking treatment is motivated to make truthful statements disclosing to the doctor what the patient believes is pertinent to diagnosis.¹⁸ Because the patient knows that the doctor will rely on her statements in formulating a treatment, these statements are inherently trustworthy as a patient is less apt to lie to the doctor who she believes is going to restore her back to health. As Judge Learned Hand wrote,

A man goes to his physician expecting to recount all that he feels, and often has with some care searched his consciousness to be sure that he will leave out nothing. If his narrative of present symptoms is to be received as evidence of the facts, as distinguished from mere support for the physician's opinion, these parts if it can only rest upon his motive to disclose the truth because his treatment will in part depend on what he says.¹⁹

A. *United States v. Renville*

The federal counterpart to Florida's section 90.803(4) is Federal Rule of Evidence 803(4).²⁰ *United States v. Renville*, the leading federal case, adopted by most state courts, found that the identification by an

16. See Robert R. Rugani, Jr., *The Gradual Decline of a Hearsay Exception: The Misapplication of Federal Rule of Evidence 803(4), The Medical Diagnosis Hearsay Exception*, 39 SANTA CLARA L. REV. 867, 875-78 (1999).

17. *Begley v. State*, 483 So. 2d 70, 73 (Fla. 4th DCA 1986).

18. *Otis Elevator Co. v. Youngerrman*, 636 So. 2d 166, 167 (Fla. 4th DCA 1994).

19. *Meaney v. United States*, 112 F.2d 538, 539-40 (W.D.N.Y. 1940).

20. Federal Rule of Evidence 803(4) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (4) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonable pertinent to diagnosis or treatment.

FED. R. EVID. 803(4).

eleven-year-old child of the stepfather as the abuser admissible under Rule 803(4) because it was reasonably pertinent to the medical diagnosis or treatment of the emotional and psychological injuries of a child and to prevent reoccurrence of the injury.²¹ The *Renville* court emphasized that the case of a sexually abused child presents a special situation²² and premised its decision on the fact that when an abuser lives in the same household of the child, the child will never be safe until he is taken out of this environment.²³ *Renville* further noted that physicians have an obligation to prevent "an abused child from being returned to an environment in which he or she cannot be adequately protected from recurrent abuse."²⁴ Furthermore, to adequately treat these emotional and psychological injuries, the physician will often times need to ascertain the identity of the abuser. "Information that the abuser is a member of the household is therefore 'reasonably pertinent' to a course of treatment which includes removing the child from the home."²⁵ Many other federal courts have agreed.²⁶

The *Renville* court used a two-fold analysis established by the Eighth Circuit in *United States v. Iron Shell*, an earlier case, to analyze whether a statement made by a sexually abused child can be admitted under Rule 803(4). The court held: (1) the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and (2) the content of the statement must be the type reasonably relied upon by a physician in treatment or diagnosis.²⁷ In order to satisfy the *Iron Shell* analysis, the physician must make clear to the child victim that the identity of the abuser is important to the treatment of the victim and the victim must understand the purpose of the visit with the physician.²⁸

When dealing with sexually abused children, the nature and extent of the necessary emotional and psychological treatment, along with the physical treatment, will depend on the abuser's identity when he or she is a member of the child's immediate household.²⁹ If the abuser is part of the immediate household, then this information is reasonably pertinent to medical diagnosis because it will aid the doctor in identifying not

21. *United States v. Renville*, 779 F.2d 430, 438 (8th Cir. 1985).

22. *Id.* at 437.

23. *Id.* at 438.

24. *Id.*

25. *Id.*

26. *United States v. Joe*, 8 F.3d 1488, 1493-95 (10th Cir. 1993); *United States v. Belfany*, 965 F.2d 575, 579 (8th Cir. 1992); *Morgan v. Foretich*, 846 F. 2d 941, 949 (4th Cir. 1988).

27. *Renville*, 779 F.2d at 436 (quoting *United States v. Iron Shell*, 633 F.2d 77, 84 (8th Cir.1980)).

28. *Id.* at 438.

29. *Id.* at 437.

only what is wrong with the child and how to treat the child, but also identifying the type of psychological treatment the child must receive after the abuse and if removal of the child from the home environment is necessary in order to prevent future abuse. Once the *Renville/Iron Shell* test is met, the statements are admissible because the motive to tell the truth has been established.

B. *Flanagan v. State*

In 1991, the First District Court of Appeal of Florida in *Flanagan v. State*³⁰ followed the trend among state and federal courts in adopting *Renville* by affirming the admission of the identity of an abuser in a child sexual abuse case under the medical diagnosis hearsay exception where the abuser was an immediate member of the family or household.³¹ The defendant in *Flanagan* argued that testimony of fault and identity are inadmissible hearsay under section 90.803(4) because it is not reasonably pertinent to the diagnosis or treatment of the child when examined by the doctor.³² The court held the statement made by a nine-year-old child to a pediatrician with the Tallahassee Child Protection Team identifying her father as the abuser was admissible because, "the rationale for such admission is that, within the context of incidents of child sexual abuse occurring in the home, for treatment purposes statements of identification are inseparable from other statements regarding the incident."³³ The court found that since little difference existed between the federal medical diagnosis hearsay exception and the Florida medical diagnosis hearsay exception, this indicated that the Florida rule should be construed in accordance with federal cases interpreting the federal rule.³⁴

C. *State v. Jones*

Before *State v. Jones*, there had been controversy within the state district courts of appeal in Florida as to whether a child's out of court statement identifying the abuser in a sexual abuse case was admissible under the medical diagnosis hearsay exception. In the 1993 case of *State v. Jones*, the Florida Supreme Court examined the holding in *Flanagan v. State* and faced the question of whether to accept or reject the majority of state and federal courts, which had found that statements

30. *Flanagan v. State*, 586 So. 2d 108 (Fla. 1st DCA 1991).

31. *Id.* at 1093.

32. *Id.* at 1092.

33. *Id.* at 1093 (citing Michael C. Graham, *The Confrontation Clause, the Hearsay Rule and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 529 (1988)).

34. *Id.* at 1094.

of identity made to medical personnel by victims of child sexual abuse were admissible under statutes similar to section 90.803(4).³⁵ In *Jones*, the doctor examined the eight-year-old victim and found that she had gonorrhea. So he "asked her if anyone had 'messed with' her," and she answered that "Johnny" had.³⁶ Another member of the child protective team conducted an examination and found signs of sexual activity. When she asked the child about it, the child replied that Johnny Jones had sex with her.³⁷ The doctors' testimony was admitted by the trial court as statements made for the purpose of medical diagnosis under section 90.803(4). The Fifth District Court of Appeal reversed the trial court's decision because the court found the doctors' testimony inadmissible, due to the fact that the doctors were part of an investigative team and, as part of that team, they were investigating if sexual abuse had been committed and by whom, thus not helping to diagnose or treat the child.³⁸

The Florida Supreme Court affirmed the appellate court and held that the statements made by the child to the pediatrician identifying the sexual abuser are inadmissible under Florida's medical diagnosis hearsay exception.³⁹ The court discussed the *Renville* and *Flanagan* cases and rejected their reasoning because the rationale behind the medical diagnosis hearsay exception is that a patient has a motivation to tell the truth when visiting the doctor, and this motive is not present in cases dealing with children.⁴⁰ The court stated that when dealing with statements of fault in which severe consequences may come from the accusations, the ability to tell the truth may be influenced by a temptation to alter the result.⁴¹ Therefore, statements made by children are not inherently reliable.⁴²

Due to the problems perceived by the Florida Supreme Court in applying the medical diagnosis hearsay exception in child sexual abuse cases, the court announced that the proper examination of a child's out-of-court statement falls under section 90.803(23).⁴³ The *Jones* court stated that the child abuse hearsay exception is a superior procedure in which to test the reliability of a child's hearsay statement because it contains foundational requirements, such as conducting a hearing out of

35. *State v. Jones*, 625 So. 2d 821 (Fla. 1993).

36. *Id.* at 822.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 825.

41. *Id.* (quoting *Cassidy v. State*, 536 A.2d 666 (Md. 1988)).

42. *Id.*

43. *Id.*

the jury's presence, and a notice requirement to protect the accused's confrontation rights.⁴⁴ Moreover, the court stated that even under the *Renville* test, the child's statements would have been inadmissible because the doctors did not make clear to the child that the identity of the abuser would help with diagnosis or treatment, and the child showed no signs of understanding this to be true.⁴⁵ Despite these pronouncements, the court found that the physicians' statements were admissible because they were prior consistent statements made by the child used to rebut charges of recent fabrication and improper influence under section 90.801(2)(b), *Florida Statutes*.⁴⁶

D. Admissibility of Identification Statements in Child Sexual Abuse Cases Under Other States' Medical Diagnosis Hearsay Exceptions.

Most states admit statements of identity in child sexual abuse cases under their medical diagnosis hearsay exceptions. Some states have even fashioned rules to guide examination of these statements to determine if they are reliable. For example, North Carolina courts established factors to be considered when dealing with hearsay statements of identification in child sexual abuse cases under their medical diagnosis hearsay exception.⁴⁷ These factors are:

- (i) whether the examination was requested by persons involved in the prosecution of the case, (ii) the proximity of the examination to the victim's initial diagnosis, (iii) whether the victim received a diagnosis or treatment as a result of the examination, and (iv) the proximity of the examination to the trial date.⁴⁸

In *State v. Crumbley*, a seven-year-old child who was sexually abused by her mom's live-in boyfriend spoke with two investigators from Social Services after the incident.⁴⁹ The court found the statements made to the first investigator were admissible because the investigator did not interview the child at the request of prosecutors, but rather she interviewed the child according to her duty as an emergency investigator for Social Services.⁵⁰ The court also considered the following facts: (1) the interview took place twenty months before trial; (2) the interview was eight days before the child's initial diagnosis and treatment; and (3) the interview also allowed the child to be removed from the abusive

44. *Id.* at 826.

45. *Id.* at 826 n.12.

46. *Id.*; FLA. STAT. § 90.801(2)(b) (2000).

47. See N.C. GEN. STAT. § 8C-1 (1999).

48. *State v. Crumbley*, 519 S.E.2d 94, 97 (N.C. Ct. App. 1999) (citing *State v. Jones*, 367 S.E.2d 139, 144 (N.C. 1988)).

49. *Id.* at 94.

50. *Id.* at 96.

home which led to treatment.⁵¹ The first investigator, however, decided more investigation was needed and contacted another investigator, who was a social worker in the Child Protective Services Unit.⁵² As a result of that investigator's interview, seven days before diagnosis and treatment, the child received further medical assistance. The investigator also made an appointment for the child to see a sexual abuse specialist at a medical center and a pediatrician.⁵³

In *State v. Hinnant*, the North Carolina Supreme Court had to decide whether a statement made by a child sexual abuse victim to a clinical psychologist is admissible under its medical diagnosis hearsay exception.⁵⁴ Here, the clinical psychologist specialized in child sexual abuse cases and was aiding the examining physician in a follow-up examination.⁵⁵ Using an anatomically correct doll, the psychologist asked the child whether anyone had touched her vagina as well as other leading questions.⁵⁶ The court found that not only is the doctor's intent important, but the child declarant's intent is also important.⁵⁷ Therefore, a court needs to find that the declarant had a motive to tell the truth to the doctor where treatment depends on it; however, if a treatment motive is not present, then the statement of the declarant is not so reliable.⁵⁸ Therefore, it must be affirmatively established that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment.⁵⁹

Furthermore, the court found that a trial court should consider all objective circumstances in the record surrounding the declarant's statements in determining whether the declarant possessed the requisite intent.⁶⁰ Upon examining the record and the transcript, the court found no evidence that the child understood the psychologist was interviewing her for medical diagnosis or treatment.⁶¹ Because the record demonstrated that the interview was conducted in a child size playroom, and that the child received no explanation of the purpose of interview, the court could not conclude that the setting reinforced a need to give truthful answers.⁶²

51. *Id.* at 98.

52. *Id.* at 96.

53. *Id.*

54. *See State v. Hinnant*, 523 S.E.2d 663, 667 (N.C. 2000).

55. *Id.* at 666.

56. *Id.*

57. *Id.* at 669.

58. *Id.*

59. *Id.*

60. *Id.* at 670.

61. *Id.* at 671.

62. *Id.*

Michigan courts also admit hearsay statements regarding the identity of an abuser under their medical diagnosis exception to the hearsay rule.⁶³ Michigan courts hold that the trustworthiness of a child's statement must be more rigorously evaluated than an adult's statement because the court must be sure that the child understood the need to be truthful to the physician.⁶⁴ Michigan courts use a version of the *Idaho v. Wright* totality of circumstances test in determining the trustworthiness of a child's statement.⁶⁵ For example, the use of leading questions may undermine the trustworthiness of a statement, childlike terminology may be evidence of genuineness, prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis or treatment, the time of the examination in relation to the trial might indicate that the child is still suffering from pain and distress, the timing of the examination in relation to trial might involve the purpose of the examination, the relation of the child to the abuser would be evidence that the child did not mistake identity, and the existence or lack of a motive to fabricate.

Contrary to *Idaho v. Wright*, the Michigan court held that the reliability of a hearsay statement is strengthened when it is supported by other evidence, such as corroborating physical evidence of the assault, evidence that the person identified as the assailant had the opportunity to commit the assault, and resulting diagnosis and treatment.⁶⁶ Such corroborating evidence can support the trustworthiness of the child's statements regarding a sexual assault and aid in the determination of whether the statement was made for the purpose of receiving medical care.⁶⁷

The court also held that this corroborative evidence may aid in admitting the statement under the hearsay exception, even where it might not be clear whether the child understood that the statement must be truthful in order to receive proper diagnosis or treatment.⁶⁸ The *Meeboer* court found that a statement of identity would be reasonably necessary for diagnosis and treatment in the case of a child who contracts a sexually transmitted disease, or a child who becomes pregnant by a family member. Thus, the identity of the assailant should be considered as part of the physician's diagnosis and treatment because it allows the physician to structure the examination and questions to the

63. *People v. Meeboer*, 484 N.W.2d 621, 626 (Mich. 1992).

64. *Id.*

65. *Idaho v. Wright*, 497 U.S. 805, 819 (1990) (looking at the totality of the circumstances, a court may take into consideration many of the facets surrounding the statement); *see also Meeboer*, 484 N.W.2d at 626.

66. *Meeboer*, 484 N.W.2d at 627.

67. *Id.* at 627-28.

68. *Id.* at 628.

exact type of trauma the child recently experienced. By doing this, a physician can prescribe treatment such as psychological treatment, especially where the abuser is a member of the child's home and the child should not be returning to that home.⁶⁹

Some states admit statements made to social workers and psychologists by sexually abused children under the medical diagnosis hearsay exception.⁷⁰ In Connecticut, when a hearsay statement regarding the identity of a perpetrator is presented in a case involving child sexual abuse in the home, those statements made to a physician, psychologist, or psychiatrist are admissible under their medical diagnosis hearsay exception because it is reasonably pertinent to treatment in order to prevent future recurrences.⁷¹ In *State v. Cruz*,⁷² the court found that a statement made to a social worker by a child, who had been sexually abused by the mother's live-in boyfriend, fell within the parameters of their medical diagnosis hearsay exception.⁷³ Although the social worker was not a physician, psychologist, or psychiatrist, and no doctor relied on her interview of the victim for treatment purposes, the court held that because the victim believed the social worker was a doctor, the social worker fell within Connecticut's definition of "medical" personnel.⁷⁴ In Connecticut, when statements by the victim are not made to a physician directly, but instead they are made to someone in the chain of the medical diagnosis or treatment, and the declarant's motive is consistent with the purposes of obtaining medical treatment, the statement is admissible.⁷⁵

Texas also allows statements to come in under the medical diagno-

69. *Id.* at 629.

70. *State v. Tornquist*, 600 N.W.2d 301, 304-05 (Iowa 1999) (finding that the identification of the abuser made by a child to a mental health counselor during counseling sessions admissible under IOWA R. EVID. 803(4) because the source of the post traumatic stress disorder suffered by the child assisted in the diagnosis or treatment of the disorder.); *State v. Hildreth*, 582 N.W. 2d 167, 169 (Iowa 1998) (finding statements made by a child to a social worker admissible under IOWA R. EVID. 803(4) because the statements were made in connection with diagnosis and treatment of emotional trauma only if the social worker is sufficiently qualified by training and experience to provide that diagnosis and treatment); *State v. Jones*, No. 75390, 1999 Ohio App. LEXIS 6268, *8 (Ohio Ct. App. Dec. 23, 1999) (looking to the function of the social worker to determine whether the victim's statement could be interpreted as being for diagnosis or treatment. Therefore, statements made by child to a social worker who was part of an emergency room team admissible under OHIO R. EVID. 803(4) because her duty on the job included a psycho-social assessment by taking a history and determining the type of services needed for the child).

71. *State v. Cruz*, 746 A.2d 196, 199 (Conn. App. Ct. 2000) (citing *State v. Maldonado*, 536 A.2d 600, 603 (Conn. App. Ct. 1988)).

72. *Id.* at 196.

73. *Id.* at 200.

74. *Id.*

75. *State v. Maldonado*, 536 A. 2d 600, 603 n.3 (Conn. App. Ct. 1988).

sis hearsay exception. In *Bearden v. State*,⁷⁶ the court admitted the child victim's statements to a psychologist indentifying the abuser under the medical diagnosis/treatment hearsay exception.⁷⁷ At the time of trial, the child complaintant was seventeen.⁷⁸ The first instance of abuse occurred when the child was eight and was discovered when she told a teacher that she was sexually abused by her father.⁷⁹ The charges were dropped, and the child was returned home, when the father threatened the child and the mother.⁸⁰ The child was abused again at age twelve and, at age seventeen, the child finally confided in a cousin and told the police.⁸¹ It was also found that several other female relatives were also abused by him. *Bearden* is a prime example of the consequences suffered by a child who is returned to an abusive home, and what may happen to others who come in contact with an abuser who is not prosecuted. This case demonstrates that the identity of the abuser is pertinent to medical diagnosis and further that part of the treatment for the child is removing the child from the abusive home.

In an Ohio case, *State v. Dever*,⁸² statements made by a child during a medical examination identifying the perpetrator of sexual abuse were admissible under Ohio's medical diagnosis hearsay exception.⁸³ The court recognized that a young child would probably not personally seek medical treatment, but would generally be directed to treatment by an adult. However, the Ohio Supreme Court did not find that a child's statements relating to medical personel were always untrustworthy for that reason alone.⁸⁴ Once the child was at the doctor's office, the probability of understanding the significance of the visit is heightened and the motivation for diagnosis and treatment will normally be present.⁸⁵ While the initial desire to seek treatment may be absent, the motivation will certainly arise once the child has been taken to the doctor.⁸⁶ The *Dever* court stated that "absent extraordinary circumstances, the child has no more motivation to lie than an adult would in similar circumstances."⁸⁷

76. No. 05-97-01550CR, 05-97-01556CR, 1999 Tex. App. LEXIS 5486 (Tex. App. July 26, 1999).

77. *Id.* at *16.

78. *Id.* at *4.

79. *Id.*

80. *Id.* at *4-5.

81. *Id.* at *7.

82. *State v. Dever*, 596 N.E.2d 436 (Ohio 1992).

83. *Id.* at 449.

84. *Id.* at 445.

85. *Id.* at 443-44.

86. *See id.*

87. *Id.* at 444.

Everyday experience tells us that most children know that if they do not tell the truth to the person treating them medically, they may get worse instead of better. An overly strict motivational requirement for the statements of young children in the context of statements made to medical personnel will almost always keep those statements out of evidence. That is not an acceptable balance of competing interests.

Rather, when an examination of the surrounding circumstances casts little doubt on the motivation of the child, it is permissible to assume that the factors underlying Federal Rule of Evidence 803(4) are present. The statement identifying a perpetrator of sexual abuse assists the doctor to treat any actual injuries the child may have, to prevent future abuse of the child, and to assess the emotional and psychological impact of the abuse on the child. The questioning of the complaining child is important in determining the extent of any abuse, the possibility of continued exposure to the abuser, and the possibility of the presence of sexually transmitted diseases. The identity of the perpetrator is particularly relevant to those inquiries, as well as to the psychological effects on the child. Treating the child for abuse by a father is different than treating the child for abuse by a stranger.

As most state courts have noted, the policy behind the medical diagnosis hearsay exception will not be subverted if the trial court determines that the following factors are present: (1) the child making the statement understood the reason why he was at the doctor; and (2) the doctor relies on his statement to remove him from the home to prevent further abuse and to psychologically treat the child for this trauma. Alternatively, the trial court may look at the totality of circumstances surrounding the making of the statement to determine whether the child understood the need to tell the truth. Once the child understands that the doctor needs truthful answers so that the child get help, the child's statements will be inherently trustworthy, as envisioned under the medical diagnosis hearsay exception.

III. FLORIDA'S STATUTORY CHILD ABUSE HEARSAY EXCEPTION, § 90.803(23)

Section 90.803(23)⁸⁸ was enacted in 1985 by the Florida Legislature in an attempt to balance the need for protecting children against the rights of the accused.⁸⁹ At the time the Florida Legislature was considering section 90.803(23), the bill also expanded the excited utterance and medical diagnosis hearsay exceptions to include children specifically. However, in its final form, the bill did not provide these expan-

88. FLA. STAT. § 90.803(23) (1985).

89. See Act effective May 30, 1985, § 4, ch. 85-53, 1985 Fla. Laws 140, 141-42.

sions.⁹⁰ In reaching its decision in *State v. Jones*, the Florida Supreme Court relied heavily on this fact.⁹¹ Just because the Florida Legislature considered expansion and did not include it in the final bill does not mean that they disapprove of admitting statements under the medical diagnosis exception. The legislators might have felt that they could not decide what was a reliable statement under this exception or might have decided to leave it to judges' discretion to determine what constitutes a reliable out-of-court statement made by a sexually abused child to a doctor identifying the abuser. Most states and the federal government have not amended their medical diagnosis hearsay exceptions to specifically include children, but judges have taken the initiative to interpret their medical diagnosis hearsay exceptions as including children's statements of identification.

Perez v. State was one of the first cases to interpret section 90.803(23) and hold it constitutional under both the United States Constitution and the Florida Constitution.⁹² Under *Perez*, the defendant argued that the statements the child made to her mother, an officer, and a detective were inadmissible hearsay, and that section 90.803(23) was unconstitutional because it violated his Sixth Amendment right to confront and cross-examine an adverse witness.⁹³ The trial court held an evidentiary hearing, as required by the statute, and found that the child's out-of-court statements were reliable, but that the child was unavailable as a witness because testifying would likely severely traumatize the child emotionally and mentally.⁹⁴ Citing *Ohio v. Roberts*, the Florida Supreme Court stated that the Sixth Amendment reflects the preference that a witness be available at trial so that the witness may be cross-examined.⁹⁵ However, if the witness is found to be unavailable, then those out-of-court statements may come in under a hearsay exception. According to *Ohio v. Roberts*, an out-of-court statement is reliable under the Confrontation Clause if it is admissible under a "firmly rooted hearsay exception."⁹⁶ Otherwise, there must be a finding that the statement has "particularized guarantees of trustworthiness" as demonstrated by

90. FLA. H.R. COMM. ON JUDICIARY, HB 874 (1985) Staff Analysis 1-2 (May 4, 1985 and final May 11, 1985); FLA. S. COMM. ON JUDICIARY-CIV., SB 290 (1985) Staff Analysis 1-3 (April 2, 1985 and rev. May 1, 1985).

91. *State v. Jones*, 625 So. 2d 821, 825-26 (Fla. 1993) ("The proposed expansion of existing hearsay exception were removed after discussion, and lawmakers chose instead the more balanced new hearsay exception codified in section 90.803(23)") (citations omitted).

92. 536 So. 2d 206 (Fla. 1988).

93. *Id.* at 208.

94. *Id.* at 207-08.

95. *Id.* at 208 (citing *Ohio v. Roberts*, 448 U.S. 56 (1979)).

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

Idaho v. Wright.⁹⁷

The court compared the nature of the exception in section 90.803(23) against the standard set in *Roberts*.⁹⁸ In accordance with *Roberts*, the court under section 90.803(23) must hold a hearing to decide whether the time, content, and circumstances of the statement provide sufficient safeguards of reliability.⁹⁹ The Florida Supreme Court found that these requirements met both the federal and Florida constitution and, therefore, section 90.803(23) was constitutional.¹⁰⁰ In a more recent case, the Florida District Court of Appeal had to decide if statements by child victims of sexual abuse could only be admitted under section 90.803(23) and, therefore, the statute would preempt any other hearsay exception.¹⁰¹ In *Doe v. Broward County School Board & YMCA*, the court found that *Jones* stands for the proposition that under the medical diagnosis hearsay exception, identity of the perpetrator is not admissible.¹⁰² *Jones*, however, did not mandate or suggest that section 90.803(23) is the only hearsay exception that can be applied to a child victim's out-of-court statements.¹⁰³ Ultimately, the *Doe* court reversed and remanded the case to determine whether the statements made to the psychologist by the child regarding her sexual abuse, but not relating to the abuser's identity, were admissible under the medical diagnosis hearsay exception.¹⁰⁴

A. Reliability and Unavailability

A year after the *Jones* decision, the Florida Supreme Court in *State v. Townsend*¹⁰⁵ was asked to determine if a finding of incompetency because one is unable to recognize the duty to tell the truth, satisfies the unavailability requirement of section 90.803(23)(a)(2).¹⁰⁶ *Townsend* challenged the availability of his daughter, who was two at the time of the abuse and when she made statements to her mother about the alleged abuse.¹⁰⁷ Under section 90.803(23), two reliability requirements had to be met before hearsay statements could be admitted under the statute.

97. *Perez*, 536 So. 2d at 209.

98. *Id.*

99. FLA. STAT. § 90.803(23)(a)(1) (2000).

100. *Perez*, 536 So. 2d at 209.

101. *Doe v. Broward County Sch. Bd. and YMCA*, 744 So. 2d 1068, 1070 (Fla. 4th DCA 1999).

102. *Id.* at 1072.

103. *Id.* at 1072-73. For example, a statement can come in under section 90.801(2)(b), *Florida Statutes*, as a prior consistent statement. *Id.* at 1073 n.3; see also *Jones*, 625 So. 2d at 826.

104. *Doe*, 774 So. 2d at 1073.

105. 635 So. 2d 949 (Fla. 1994).

106. *Id.* at 952.

107. *Id.*

First, the source of the information through which the statement was reported must indicate trustworthiness.¹⁰⁸ Second, the time, content, and circumstances surrounding the statement must reflect that the statement provides safeguards of reliability.¹⁰⁹ The reason for the first requirement is to insure that the source is examined to determine that the statement has a clear showing of reliability.¹¹⁰ For example, if the parents are going through a divorce, the child's statement might be influenced by an angry spouse telling the child what to say.¹¹¹

In order to be unavailable under section 90.803(23), the trial court must find, according to expert testimony, that there is a substantial likelihood that the child would suffer severe emotional or mental harm if the child testifies, or the court finds that the child satisfies one of the definitions under section 90.804(1), *Florida Statutes*.¹¹² In determining whether or not the child is competent to testify, factors that may be taken into account in Florida are: (1) whether the child is capable of observing and recollecting facts; (2) whether the child is capable of narrating those facts to the court or to a jury; and (3) whether the child has a moral sense of the obligation to tell the truth.¹¹³ If the court determines that the child is unavailable, then other corroborative evidence of the abuse or offense, which have particularized guarantees of trustworthiness, must accompany the child's out-of-court statement.¹¹⁴

Moreover, in *Perez*, the Florida Supreme Court stated that even though a child might not understand the duty to tell the truth as a witness, that alone did not rule out the statement as unreliable because the court must first analyze whether the statement is reliable.¹¹⁵ *Townshend* was different because it focused on whether the test for incompetence fell within the definition of "unavailable" under section 90.803(23). The

108. *Id.* at 954 (citing *Weatherford v. State*, 561 So. 2d 629 (Fla. 1st DCA 1990)).

109. *Id.*

110. *Id.*

111. *Id.* (citing CHARLES W. EHRHARDT, *FLORIDA EVIDENCE* § 803(23), at 652 (1993 ed.)).

112. *Id.*; FLA. STAT. § 90.804(1) (2000) states:

A witness is unavailable for purposes of admitting a hearsay statement if the witness: (a) Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of his statement; (b) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; (c) Has suffered a lack of memory of the subject matter of his statement so as to destroy his effectiveness as a witness during the trial; (d) Is unable to be present or to testify at the hearing because of death or because of then existing physical or mental illness or infirmity; or (e) Is absent from the hearing, and the proponent if his statement has been unable to procure his attendance or testimony by process or other reasonable means.

113. *Griffin v. State*, 526 So. 2d 752 (Fla. 1st DCA 1988).

114. *Id.*

115. *Perez v. State*, 536 So. 2d 206, 211 (Fla. 1988).

court found in *Townsend* that the child could be incompetent at the time he said the statement under section 90.803(23).¹¹⁶ The court held that the particularized guarantees of trustworthiness ensured the reliability of a statement, not the competency of the witness making the statement.¹¹⁷

Townsend's next argument was that section 90.803(23) was unconstitutional because it violated the Confrontation Clause. Although this issue had already been decided in *Perez*, the Supreme Court decided *Idaho v. Wright*¹¹⁸ after that case, and Townsend believed that it reversed the decision in *Perez*.¹¹⁹ In *Wright*, the Supreme Court decided that in looking at the sufficient guarantees of trustworthiness of an out-of-court statement, a court had to look at the totality of circumstances surrounding the making of the statement.¹²⁰ Other corroborative evidence, however, could not be used in determining whether the statement was reliable.¹²¹

The Florida Supreme Court found that *Perez* and *Wright* were not in conflict because section 90.803(23) still requires that the hearsay evidence be determined to be reliable before being admitted.¹²² Section 90.803(23), however, further requires that corroborating evidence exist, supporting the reliability of the hearsay statement.¹²³ To resolve any questions about inconsistency between section 90.803(23) and *Perez*, the court announced a new procedure: the trial judge must first find that the hearsay statement is reliable, and the source is trustworthy, without regard to the corroborating evidence.¹²⁴ If the first condition is met, then the trial judge must look at the corroborating evidence.¹²⁵ If either condition is not met, then the hearsay statement will not be admitted.¹²⁶

Townsend's final argument was that the trial court admitted statements under the statutory procedure that were not reliable. The Florida Supreme Court announced that there were other facts a court could take into account when determining whether an out-of-court statement was trustworthy such as:

[A] consideration of the statement's spontaneity, whether the statement was made at the first available opportunity following the alleged incident; whether the statement was elicited in response to

116. *Townsend*, 635 So. 2d at 956.

117. *Id.* at 955.

118. *Idaho v. Wright*, 497 U.S. 805 (1990).

119. *Townsend*, 635 So. 2d at 956.

120. *Wright*, 497 U.S. at 819.

121. *Id.* at 822-23.

122. *Townsend*, 635 So. 2d at 956-57.

123. *Id.*

124. *Id.* at 957.

125. *Id.*

126. *Id.*

questions from adults; the mental state of the child when the abuse was reported; whether the statement consisted of a child-like description of the act; whether the child used terminology unexpected of a child of similar age; the motive or lack thereof to fabricate the statement; the ability of the child to distinguish between reality and fantasy; the vagueness of the accusations; the possibility of any improper influence on the accusation.¹²⁷

In *Doe v. Broward County School Board and YMCA*, the judge relied on the mother's testimony that she did not want the child to testify and a report from the psychologist who evaluated the child to determine the child was unavailable to testify.¹²⁸ Similarly, in *Perez*, the court stated that the trial judge did not have to examine the child in order to determine if the child is competent to testify.¹²⁹ A representative from a mental health association testified to the effects of having a child testify in court, and after evaluating the child, she thought it would cause severe emotional and psychological harm.¹³⁰ The court also heard testimony from the mother stating that the child would suffer mental and emotional distress if he had to testify.¹³¹ In the concurrence, however, Justice Overton made it clear that he felt that the judge should meet with the child in camera in order to evaluate the child's statements.¹³²

B. *Out-of-Court Statement Conflicting With In-court Testimony*

In *Department of Death and Rehabilitation v. M. B.*, the Florida Supreme Court held that a child's out-of-court statement can be admitted if it passes the requirements of section 90.803(23), even when the out-of-court statement conflicts with the child's in-court testimony.¹³³ An eight-year-old girl repeated to her third grade teacher, a guidance counselor, a Child Protection Team ("CPT") coordinator, a CPT nurse practitioner, and a clinical psychologist on referral from the CPT that her stepfather had sexual intercourse with her.¹³⁴ At the trial to remove her from her home, the child testified that she did not know who abused her, even though she had been sexually abused.¹³⁵ The trial court made case-specific findings that the statements made by the child prior to the hearing were reliable under section 90.803(23).¹³⁶ The court's policy behind

127. *Id.* at 957-58.

128. 744 So. 2d 1068, 1070 (Fla. 4th DCA 1999).

129. *See Perez*, 536 So. 2d at 211.

130. *Id.* at 210.

131. *Id.*

132. *Id.* at 212.

133. *Dep't of Health & Rehab. Serv. v. M.B.*, 701 So. 2d 1155 (Fla. 1997).

134. *Id.* at 1156.

135. *Id.*

136. *Id.* at 1157.

agreeing with the trial court that these prior statements were admissible, was that childrens' statements are usually more reliable when made closer to the event, rather than when time has passed and the pressures of testifying in court might affect the answer.¹³⁷ The court reiterated its findings in *Jones and Townsend*, and stated that once reliability had been determined under the strict standards of section 90.803(23), then the statement could come in as substantive evidence.¹³⁸ The court concluded that a statement need not be consistent with the in-court testimony as long as the out-of-court testimony had undergone section 90.803(23) analysis.¹³⁹

C. Other Corroborative Evidence

Florida courts have tried to define what "other sufficient corroborative evidence" may include. In *Reyner v. State*, a police officer testified as to statements made by a defendant after his arrest, and the issue on appeal was whether the police officer's statement was admissible as corroborative evidence.¹⁴⁰ According to the police, after the arrest the defendant said that while he and his niece were on the bed, and after they tickled each other, they both fell asleep, and she had snuggled under the covers closer to him.¹⁴¹ The defendant stated that he was wearing open fly boxers, so it was possible that when he was sleeping on his side, his penis could have fallen out.¹⁴² The court found that the statement made to the police was also enough to corroborate the child's statement to her father that she and the defendant had taken a nap, shared the same bed, played at his house, and the possibility that she could have seen his penis.¹⁴³

The First District Court of Appeal held in *Jones v. State* that corroborative evidence under section 90.803(23) does not even have to come from the same case.¹⁴⁴ Jones argued that the section 90.803(23) plainly stated that corroborative evidence had to come from the actual case on trial.¹⁴⁵ The court rejected this argument because a Florida Supreme Court case had already held that similar fact evidence from another crime may be used to satisfy the "other corroborative evidence of the abuse or offense."¹⁴⁶

137. *See id.* at 1161.

138. *Id.* at 1162.

139. *Id.*

140. 745 So.2d 1071, 1072 (Fla. 1st DCA 1999).

141. *Id.* at 1073.

142. *Id.*

143. *Id.*

144. *Jones v. State*, 728 So. 2d 788, 790-91 (Fla. 1st DCA 1999).

145. *Id.* at 790.

146. *Id.* at 791 (citing *State v. Rawls*, 649 So. 2d 1350 (Fla. 1994)).

D. Other States' Child Sexual Abuse Hearsay Exception

Many states have adopted special hearsay exceptions for child sexual abuse victims similar to section 90.803(23), although many of those states do not preclude the use of the medical diagnosis hearsay exception.¹⁴⁷ For example, in *State v. Cole*, where statements made by a three-year-old to a police officer and a foster parent were admissible under its child abuse hearsay exception, section 595.02(m)(3), *Minnesota Statutes*, as well as a statement made to a physician, which under Minnesota Rule Evidence 803(4) was admissible as an statement made for the purpose of medical diagnosis or treatment.¹⁴⁸ In a Washington case, *State v. Lopez*, three siblings made statements regarding abuse to a social worker.¹⁴⁹ To determine whether there had actually been sexual abuse, the trial court admitted the children's statements under both the medical treatment exception to the hearsay rule¹⁵⁰ and the statutory child sexual abuse hearsay exception.¹⁵¹ The appellate court found that the

147. ALASKA STAT. § 12.40.100 (Michie 2000) as construed in *State v. Nollner*, 749 P.2d 905 (Ak. App. 1988); ARIZ. REV. STAT. § 13-1416 (2000) as construed in *State v. Robinson*, 735 P.2d 801, 802 (Ariz. 1987); ARK. CODE ANN. § 16-41-10 (Michie. 2000) as construed in *Clausen v. State*, 901 S.W.2d 35, 37-8 (Ark. 1995); CAL. EVID. CODE § 1360 (West 2001) as construed in *People v. Brodit*, 61 Cal. App. 4th 1312 (Cal. Ct. App. 1998); COLO. REV. STAT. § 13-25-129 (2000) as construed in *People v. District Court*, 776 P.2d 1083, 1088-89 (Colo. 1989); DEL. CODE tit. 11, § 3513 (2000) as construed in *Jones v. State*, 599 A.2d 413 (Del. 1991); 725 ILL. COMP. STAT. 5/115-10 (2000) as construed in *People v. Falaster*, 670 N.E.2d 624, 628-31 (Ill. 1996); BURNS IND. CODE ANN. § 35-37-4-6 (2000) as construed in *Fleener v. State*, 656 N.E.2d 1140 (Ind. 1995); KY. REV. STAT. ANN. § 421.350 (Michie. 2001) as construed in *Edwards v. Commonwealth*, 833 S.W.2d 842, 844 (Ky. 1992); MD. ANN. CODE art. 27, § 775 (2000) as construed in *In re Rachel T.*, 549 A.2d 27 (Md. Court. Spec. App. 1988); MINN. STAT. § 260C.165 (2000) as construed in *State v. Salazar*, 504 N.W.2d 774, 776 (Minn. 1993); MISS. CODE ANN. § 13-1-403 (2000) as construed in *Eakes v. State*, 665 So.2d 852 (Miss. 1995); OHIO R. EVID. 807 (Anderson 2000) as construed in *State v. Dever*, 596 N.E.2d 436 (Ohio 1992); OKLA. STAT. tit. 12, § 2803.1 (2000) as construed in *Kennedy v. State*, 839 P.2d 667 (Okla. Crim. App. 1992); UTAH CODE ANN. § 76-5-411 (2000); WASH. REV. CODE § 9A.44.120 (2000) as construed in *State v. Florczak*, 882 P.2d 199 (Wash. App. 1994).

148. 594 N.W.2d 197, 199 (Minn. Ct. App. 1999).

149. 980 P.2d 224, 226 (Wash. Ct. App. 1999).

150. *Id.* at 225; WASH. R. EVID. 803(4) provides an exception for statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

151. *Lopez*, 980 P.2d at 225. In Washington, out-of-court statements describing child sexual abuse are admissible if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:
 - a. Testifies at the proceedings; or
 - b. Is unavailable as a witness, provided that when the child is unavailable as a witness, such a statement may be admitted only if there is corroborative evidence of the act. Unavailability shall include a finding by the court that

statements did not fall under the medical diagnosis hearsay exception because the statements were made to a social worker who only served an investigative purpose for the prosecution in order to prepare for trial and there was no evidence that the children understood that their statements would further medical diagnosis or treatment.¹⁵² The court, however, determined that those same statements could come under the statutory exception for child sexual abuse cases because all the reliability requirements had been met.¹⁵³

The leading case that addresses the question of what constitutes adequate liability is *State v. Ryan*. In *Ryan*, the Washington Supreme Court adopted a set of factors for determining the reliability of out-of-court declarations: (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness.¹⁵⁴ Using the *Ryan* test, the court in *Lopez* admitted the children's statement because there was no evidence that the children had a motive to lie and no evidence that the children had a reputation for not telling the truth.¹⁵⁵ The children made similar statements to their mother, police, and the social worker and although some of the children told different versions, the statements were similar enough.¹⁵⁶ The children's statements were spontaneous, as they volunteered the information themselves and did not offer the information only after leading or suggestive questions had been asked.¹⁵⁷ Also, the children made the statements in an environment that allowed them to speak candidly to a professional trained in interviewing sexually abused chil-

the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to section 90.904(1)

- (b) In a criminal action, the defendant shall be notified no later than 10 days before the trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.
- (c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

WASH. REV. CODE § 9A.44.120 (2000).

152. *Lopez*, 980 P.2d at 228.

153. *Id.* at 232.

154. *Id.* at 229 (citing *State v. Ryan*, 691 P. 2d 197 (Wash. 1984)).

155. *Id.* at 229.

156. *Id.* at 229-30.

157. *Id.* at 230.

dren, thereby enhancing the reliability of the statements.¹⁵⁸ Plus, the children were eight and nine when they made the statements to the social worker and, therefore, even though some of the details are missing, they were old enough to remember what had happened to them.¹⁵⁹

The state of Texas has a statute that allows statements made by sexually abused children to the out cry witness (i.e. the first person the child told about the abuse) to be admitted into evidence.¹⁶⁰ In *Foreman v. State*,¹⁶¹ a child that was participating in a program for children with behavioral problems told a counselor that she had been molested by an uncle a couple of years earlier.¹⁶² The defendant argued that the child's mother and the step-father had been the first outcry witnesses, and therefore, the counselor's testimony regarding the child's out-of-court statement should not be admitted.¹⁶³ The child testified that the first people she told were her mother and stepfather, but neither of them remembered this because when the child told them about the incident, they were both under the influence of drugs.¹⁶⁴

Foreman was a case of first impression. The court had never been presented with the question of who was the first outcry witness when the first people the child told cannot remember the child making the statement.¹⁶⁵ In beginning its analysis, the court began by stating, "[t]he outcry witness must be the first person, 18 years old or older, to whom the child makes a statement that in some discernible manner describes the alleged offense."¹⁶⁶ The Texas legislature, in picking the first person to which a child makes these statements, tried to strike a balance between the general prohibition against hearsay statements and effective prosecution of child sexual abuse cases.¹⁶⁷ The court interpreted the statute as meaning the first person "to remember and relate at trial the child's statement that in some discernable manner describes the alleged offenses."¹⁶⁸ Therefore, the counselor was allowed to testify to these

158. *Id.*

159. *Id.*

160. TEX. CODE CRIM. PROC. ANN art. 38.072 (2001). The code states in pertinent part:

This article applies only to statements that describe the alleged offense that:

(1) were made by the child against whom the offense was allegedly committed; and
(2) were made to the first person, 18 years of age or older, other than the defendant,
to whom the child made a statement about the offense.

Id. at §2(a)(2).

161. 995 S.W.2d 854, 855 (Tex. Crim. App. 1999).

162. *Id.* at 855.

163. *Id.* at 857.

164. *Id.*

165. *Id.*

166. *Id.* at 858 (quoting *Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990)).

167. *Id.*

168. *Id.* at 859.

statements because the counselor was the only person who remembered and related the facts of the alleged abuse from the the child's statements.¹⁶⁹

California has both a specially tailored medical diagnosis hearsay exception for sexually abused children that applies both in civil and criminal cases and a child abuse hearsay exception.¹⁷⁰ In *People v. Brodit*,¹⁷¹ the defendant argued that these excpetions were unconstitutional because it only benefited the prosecution.¹⁷² The court disagreed, finding that these new sections specify a further limited exception to the general hearsay exclusionary rule, giving the state a new tool in which to prosecute these cases.¹⁷³ The California court, following the federal courts, found that the statements made in the course of a child sexual abuse examination to a nurse and a therapist describing the nature and circumstances of sexual abuse are admissible under the new rule, as they are reasonably pertinent to diagnosis or treatment.¹⁷⁴ The court held that a hearsay statement, identifying the sexual abuser who is a member of the victim's family or household, is admissible where the abuser has such an intimate relationship with the victim that the abuser's identity becomes reasonably pertinent to the victim's proper treatment.¹⁷⁵ The court recognized that sexual abuse victims need emotional and mental treatment, and a doctor might need to know who the abuser is in order to render proper treatment.¹⁷⁶

All the above-mentioned states recognize that a statement made by a child to a doctor constitutes a wholly different situation than one covered by the traditional medical diagnosis exception, and therefore both are needed. The conflict inherent in the Florida Supreme Court's opinion in *State v. Jones* is that the court is assuming that the statements that may have been admitted under the medical diagnosis hearsay exception will overlap with statements that may be admitted under section 90.803(23). On the contrary, the two exceptions are inherently different. Statements coming in under the medical diagnosis hearsay exception are admitted for the circumstances surrounding them. When a child goes to a doctor or therapist, it is the beginning of the treatment process. If the child understands that the doctor is there to help him, then the state-

169. *Id.*

170. CAL. EVID. CODE § 1253 (2001) (medical diagnosis or treatment hearsay exception); CAL. EVID. CODE § 1360 (2001) (child abuse hearsay exception).

171. *People v. Brodit*, 72 Cal. Repr. 2d 154 (Cal. Ct. App. 1998).

172. *Id.* at 161.

173. *Id.*

174. *Id.* at 164.

175. *Id.* at 165.

176. *Id.*

ment's reliability is assured because a child will not lie if his treatment depends on what he tells the doctor.

IV. A LOOK AT FEDERAL CASES

Most child sexual abuse cases are decided in state courts because each state has its own law regarding this issue. Although the number of federal cases on this issue is small, these federal cases serve as guidance for state courts. Under cases such as *Maryland v. Craig*, the United States Supreme Court has found a strong public interest in protecting children and, in certain instances such as child sexual abuse, dispensing with confrontation at trial may be warranted.¹⁷⁷ As Justice O'Connor stated, "[o]ur precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face to face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where reliability of the testimony is otherwise assured."¹⁷⁸

In *Idaho v. Wright*, a landmark case, the federal court faced the question of whether statements made by a child to a pediatrician violated the defendant's Sixth Amendment right to confrontation.¹⁷⁹ The Supreme Court of Idaho found that the pediatrician used leading questions and had a preconceived idea of what the child was going to say, and therefore, the child's statements were unreliable and inadmissible under its residual hearsay exception.¹⁸⁰ The United States Supreme Court affirmed and established the rule that particularized guarantees of trustworthiness of the child's statement should be based on a consideration of the totality of the relevant circumstances surrounding the making of the statements that render the declarant worthy of belief.¹⁸¹

State and federal courts have identified a number of factors that relate to whether hearsay statements made by a child witness in child sexual abuse cases are reliable; including spontaneity and consistent repetition, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and lack of motive to fabricate.¹⁸² The *Idaho* court made it clear that the presence of evidence tending to corroborate the truth of the statement would be no substitute for cross-examination because hearsay used to convict a defendant should be reliable by virtue of its inherent trustworthiness, and not by reference to

177. *Maryland v. Craig*, 497 U.S. 836 (1990).

178. *Id.* at 850.

179. 497 U.S. 805, 808 (1990).

180. *Id.* at 812.

181. *Id.* at 819.

182. *Id.* at 821 (citations omitted).

other evidence at trial.¹⁸³

In some cases, it has been argued that the rationale behind Rule 803(4) is absent when dealing with a child's statement because the child does not completely understand the need to tell the truth. In *United States v. Pacheco*, a doctor on a child sexual abuse team, testified as to the child's identification of her abuser and what the abuser had done.¹⁸⁴ The defendant argued that due to the young age of the child, there was no evidence that the child understood the need to tell the truth or that she was speaking with a doctor who was there to help with her diagnosis and treatment.¹⁸⁵ The Tenth Circuit rejected this argument and cited to *United States v. Norman T.*,¹⁸⁶ which had already established that there was no basis for the argument that the age of a child would affect the understanding that a trained medical professional was there to treat or diagnosis the child.¹⁸⁷ The court found that the doctor explained to the child the purpose of her visit.¹⁸⁸ The defendant then tried to argue that the identification was not admissible because he was not an immediate member of the child's household.¹⁸⁹ The court refused to so narrowly define "household" and found that the child spent enough time over at the defendant's home, and was actually present at the defendant's home when the abuse occurred.¹⁹⁰

In *United States v. Sumner*,¹⁹¹ the Eighth Circuit reversed a conviction for abusive sexual contact and aggravated sexual abuse of a child because the psychologist did not discuss with the child the need to be truthful. So therefore, there was no evidence that the child understood that admitting the identity of the abuser would aid in her treatment, and whether the child was aware that the doctor was a psychologist.¹⁹² The young girl had actually told a therapist that she had gone to the psychologist just to talk, and therefore, the court held that she did not understand that the psychologist was there to treat her.¹⁹³ Once the court established that the child's statement to the psychologist could not be admitted under the medical diagnosis hearsay exception, the court examined the statement itself to determine whether the statement had particularized guarantees of trustworthiness using the totality of circum-

183. *See id.* at 826.

184. 154 F.3d 1236 (10th Cir. 1998).

185. *Id.* at 1240.

186. 129 F.3d 1099 (10th Cir. 1997).

187. *Id.* at 1104.

188. *Pacheco*, 154 F.3d at 1241.

189. *Id.* at 1241-42.

190. *Id.* at 1241.

191. *United States v. Sumner*, 204 F.3d 1182 (8th Cir. 2000).

192. *Id.* at 1185.

193. *Id.* at 1186.

stances standard. The child's statements, however, were mostly in response to leading questions from the psychologist, so the statement was not admissible.¹⁹⁴

In an earlier case, *Oleson v. Class*,¹⁹⁵ the Eighth Circuit held that a child's statement to a doctor was inadmissible under Federal Rule of Evidence 803(4) because the doctor had not told the five-year-old child why identifying the abuser was important to her diagnosis and treatment.¹⁹⁶ The doctor only told the child "what was going to happen" during the physical examination, and never explained why it was important for her to tell the truth nor why the questions he was asking were important to her treatment.¹⁹⁷ When looking at the *Ohio v. Roberts* and *Idaho v. Wright*¹⁹⁸ tests, the court found that the statement did not have particularized guarantees of trustworthiness because the record showed that the child only nodded to questions and offered little description or detail.¹⁹⁹

Federal courts have also deliberated on the question of whether a family member's statement regarding child abuse to a medical professional may be admissible under Rule 803(4). In *Lovejoy v. United States*,²⁰⁰ the mother told the nurse that she saw Lovejoy standing over her daughter with an erection, the daughter's tee shirt was raised, and her underwear was lowered.²⁰¹ The court found that this statement could be admitted under the medical diagnosis hearsay exception because this information, "would aid the medical professionals examining the victim 'by pinpointing areas of the body to be examined more closely and by narrowing the examination by eliminating other areas.'"²⁰²

V. THE CONCLUSION

Under *State v. Jones*, the Florida Supreme Court tried to balance two competing interests: (1) the right of the accused to confront his witnesses against him; and (2) effective prosecution of child sexual abuse cases. The court found that the medical diagnosis hearsay exception would be stretched too far if it applied to child sexual abuse cases allowing the admission of statements of identity because it would evis-

194. *Id.*; see also *Ohio v. Roberts*, 448 U.S. 56 (1980); *Idaho v. Wright*, 497 U.S. 805 (1990).

195. *Oleson v. Class*, 164 F.3d 1096 (8th Cir. 1999).

196. *Id.* at 1098.

197. *Id.*; see also *United States v. Beaulieu*, 194 F.3d 918, 921 (8th Cir. 1999).

198. See *Ohio v. Roberts*, 448 U.S. 56 (1980); *Idaho v. Wright*, 497 U.S. 805 (1990).

199. *Oleson*, 164 F.3d at 1099.

200. *Lovejoy v. United States*, 92 F.3d 628 (8th Cir. 1996).

201. *Id.* at 631-32.

202. *Id.* at 632 (quoting *United States v. Iron Shell*, 633 F.2d 77, 84 (1981)).

cerate the rationale for the medical diagnosis exception. As most state and federal courts have noted, however, the medical diagnosis hearsay exception is a valuable tool in the fight against child sexual abuse. Most state and federal courts have agreed that statements of identity in child sexual abuses cases are admissible under the medical diagnosis hearsay exception because the identity of the abuser is pertinent to medical diagnosis or treatment when the abuser is part of the same household or family. The judges in those states and federal circuits have taken the initiative to interpret the law and determine whether a child's statement is reliable when it is admitted under the medical diagnosis hearsay exception. In a jurisdiction that admits statements made by children under a medical diagnosis hearsay exception, the child most of the time has not testified and the only people who are testifying to the child's out-of-court statements are medical personnel who may, by state law, have a duty to report this kind of abuse.

The Florida Supreme Court stated in *Jones*: "Clearly, section 90.803(23) is the Florida Legislature's response to the need to establish special protections for child victims in the judicial system."²⁰³ However, by eliminating admissibility of the identity of an abuser under the medical diagnosis exception, the *Jones* court has enormously hindered the fight against child sexual abuse. For example, in Florida if a child is twelve and is sexually abused, her statements to a doctor may not be admitted under section 90.803(23) because she is too old. If the statement of identity was admissible under section 90.803(4), however, then the state can bring her abuser to justice and help the child receive treatment. Without this option, the state is left without an alternative.

Because of the nature of child sexual abuse, often the only direct witnesses to the crime will be the perpetrator and the victim. Consequently, much of the state's evidence will necessarily be hearsay statements made by the victim to relatives and medical personnel. Florida courts argue that a child's statement is not reliable because a child may not understand the importance of being truthful with the doctor, or the child does not have the same motivation to tell the truth as an adult because the child has not gone to the doctor on his own volition. It is the duty of the trial court as set out in *Renville*, however, to examine the understanding that the child had as to the purpose of his visit with the doctor and whether that statement was reliable under section 90.803(4).

The trial court may make findings as to the type of questioning that was used by the doctor, such as if there was the use of leading questions. Before admitting a child's statement, the court may examine the intent behind the child declarant's statements and establish that the child had

203. *State v. Jones*, 625 So. 2d 821, 825 (Fla. 1993).

the requisite intent by demonstrating that the child made the statements understanding that it would lead to medical diagnosis or treatment.

In child sexual abuse cases, when the doctor asks what happened, the answer is intertwined with the identity of the abuser. If the abuser is a family member or someone who is around the child often, the doctor may need this information to structure the examination and questions to the exact type of trauma that the child recently experienced, to test for the possibility of sexually transmitted diseases, and, most importantly, to take the child out of that environment to prevent future abuse. The doctor must treat the psychological, as well as the physical injuries that arise from being sexually abused.

Disclosure of the identity of the abuser is especially important in cases where the abuser is a member of the household because the child cannot protect himself from an abuser at home. Unlike an adult, a child cannot escape this situation on his own. The child needs the aid of a doctor or family member to help the child out of this horrible situation. After the child has been removed, the child needs extensive emotional and psychological treatment for the unforgettable injuries that she has suffered by being sexually abused by a person she should be able to trust the most.

A sampling of all these federal and state cases show that the job of the judge is to interpret the law and under the law, the admission of identity in a child sexual abuse case under the medical diagnosis hearsay exception is not so far fetched an idea. When society and the law have found that children are to be protected, judges should not defer the task to someone else and eliminate a valuable tool in the medical diagnosis hearsay exception to bring violators to justice. As the Florida Supreme Court noted in *Perez v. State*, "a child victim's statements are valuable and trustworthy in part because they exude the naiveté and curiosity of a small child, and were made in circumstances very different from interrogation or a criminal trial, and therefore are usually irreplaceable as substantive evidence."²⁰⁴ Therefore, a child's statement identifying his abuser when the abuser is part of the same household or is a family member should be admissible in Florida under the medical diagnosis hearsay exception. Every facet of treatment of the abused child, including the removal of the child from the abusive environment so that future abuse is prevented, depends on knowing the identity of the abuser.

CELINA E. CONTRERAS

204. *Perez v. State*, 536 So. 2d 206, 209 n.5 (Fla. 1988) (internal citations and quotations omitted).