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CONFRONTATION ISSUES IN CHILD ABUSE CASES

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The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The confrontation clause was held binding upon the states in Pointer v. Texas, 380 U.S. 400 (1965). The U.S. Supreme Court's most recent confrontation cases have involved the testimony or statements of children in sexual abuse prosecutions.

In addition, Article I, section 10 of the Ohio Constitution provides that an accused has a right to "meet the witnesses face to face." The Ohio Supreme Court's most recent cases also have involved the testimony or statements of children in sexual abuse prosecutions. Significantly, the Court has indicated that the Ohio Constitution provides greater protection than its federal counterpart.

This article examines these developments. There are several related but distinct aspects to the right of confrontation. There is (1) the right to be present at trial, (2) the right to cross-examine adverse witnesses at trial, and (3) the hearsay-confrontation issue, which involves the deprivation of the right to cross-examine out-of-court declarants.

THE RIGHT TO BE PRESENT

At the very least, the right of confrontation guarantees an accused the right to be present during trial. The U.S. Supreme Court has commented: "One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. 337, 338 (1970). *See also* In re Oliver, 333 U.S. 257 (1948); Lewis v. United States, 146 U.S. 370 (1892).

This right precludes a trial *in absentia* unless the defendant forfeits the right to be present at trial by obstreperous conduct, *Illinois v. Allen, supra*, or by failing to attend the trial after its commencement. Taylor v. United States, 414 U.S. 17 (1973). *See also* Crosby v. United States, 113 S. Ct. 748 (1993) (finding that Fed. Crim. R. 43 precludes a trial *in absentia).*

"Face-to-Face" Confrontation

The right to be present includes the right to "face-to-face" confrontation. The Supreme Court has found a Sixth Amendment violation where a screen was used to separate the accused and alleged child sexual abuse victims during their testimony. Coy v. Iowa, 487 U.S. 1012 (1988). "[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Id.* at 1016. This requirement is essential to the fairness and integrity of the fact-finding process. "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' In the former context, even if the lie is told, it will often be told less convincingly." *Id.* at 1019. In the Court's view, the importance of this right outweighs its drawbacks:

> [F]ace-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs. *Id.* at 1020.

The Court declined to determine whether an exception to face-to-face confrontation could be justified. The record in *Coy* did not support such a finding: "Since there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception." *Id.* at 1021.

However, in an important concurring opinion, Justice O'Connor noted that the right to face-to-face confrontation is not absolute and the state interest in protecting the child could outweigh the defendant's right if case-specific findings of necessity are made by the trial court. *Id.* at 1022.

The Exception

Two years later, in Maryland v. Craig, 497 U.S. 836 (1990), the Court rejected a confrontation challenge where a child witness testified outside the courtroom via closed circuit television. The Court adopted Justice O'Connor's position:

> [I]f the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that

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permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. *Id.* at 855.

See generally Note, "Children as Witnesses After Maryland v. Craig," 65 S. Cal. L. Rev. 1993 (1992) (surveying psychological literature).

Ohio Cases

The Ohio Supreme Court addressed this issue in State v. Eastham, 39 Ohio St.3d 307, 530 N.E.2d 409 (1988), a case involving the use of a closed circuit camera to transmit the alleged rape victim's testimony into the courtroom. *Eastham* was decided after *Coy* but before *Craig*. The Court found a violation of both the federal and state constitutions. The Court, however, also noted that a "more particularized finding of necessity would first be required for this court to employ an exception." *Id.* at 310. *See also* R.C. 2907.41 (testifying via closed-circuit television).

In State v. Self, 56 Ohio St.3d 73, 564 N.E.2d 446 (1990), a 6 year old child abuse victim testified via a videotaped deposition pursuant to R.C. 2907.41(A)(2). Under this procedure, the victim was subject to cross-examination, the victim and defendant could see each other via closed circuit television, and the defendant could communicate with counsel.

Citing *Craig*, the Court held that the Ohio statute did not violate the 6th Amendment. Similarly, the Court ruled that the statutory procedure did not violate the Ohio Confrontation Clause, adding that this Clause "provides no greater right of confrontation than the Sixth Amendment." *Id.* at 79. *Coy* and *Eastham*, in the Court's view, were distinguishable because the trial court in *Self* "made a case-specific finding that the child witness would be seriously traumatized by the presence of the defendant." *Id.* at 81.

RIGHT OF CROSS-EXAMINATION

The right of confrontation also encompasses the right of cross-examination. For example, in Davis v. Alaska, 415 U.S. 308 (1974), an accused was prohibited from cross-examining a prosecution witness concerning the witness's status as a juvenile probationer. This curtailment of cross-examination was based on a state statute designed to protect the confidentiality of juvenile adjudications. On review, the U.S. Supreme Court reversed: "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Id.* at 320. *See also* Smith v. Illinois, 390 U.S. 129 (1968).

This aspect of the right of confrontation has not played a significant role in the child abuse cases. If the child testifies, there is no question that the defense has the right to cross-examine the child.

CONFRONTATION AND HEARSAY

There are several possible interpretations for defining the relationship between the hearsay rule and the Confrontation Clause.

Since a hearsay declarant is, in effect, a witness, a literal application of the Confrontation Clause would preclude the prosecution from introducing any hearsay evidence notwithstanding the applicability of a long-recognized hearsay exception. The U.S. Supreme Court has never accepted this interpretation because it "would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." Ohio v. Roberts, 448 U.S. 56, 63 (1980).

The Confrontation Clause also could be interpreted as requiring only the right to cross-examine in-court witnesses and not out-of-court declarants. Under this view, all hearsay exceptions would satisfy constitutional requirements. The Supreme Court also has rejected this view. Although the Court has recognized that the Confrontation Clause and the hearsay rule "stem from the same roots," it "has never equated the two." Dutton v. Evans, 400 U.S. 74, 86 (1970). In another case the Court stated it this way:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception . . . The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied. California v. Green, 399 U.S. 149, 155-56 (1970).

The Court recently reaffirmed this view: "We have been careful 'not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements.' " White v. Illinois, 112 S. Ct. 736, 741 (1992) (quoting Idaho v. Wright, 497 U.S. 805, 814 (1990)).

Instead of either of the approaches discussed above, the Court has attempted to steer a middle course, a task that often has proved elusive. As McCormick's treatise notes: "A discussion of constitutional limitations upon the use of hearsay might well commence with the observation that their outline is somewhat less than clear." McCormick, *Evidence* § 252, at 749 (3d ed. 1984).

OHIO v. ROBERTS

The Court's current confrontation jurisprudence in this area can perhaps be best understood by examining Ohio v. Roberts, 448 U.S. 56 (1980), and its progeny.

In *Roberts* the Court identified two values underlying the Confrontation Clause: the "Framers' preference for face-to-face accusation" and an "underlying purpose to augment accuracy in the factfinding process." *Id.* at 65. From these values, the Court derived a two-pronged analysis that focused on (1) the unavailability of the declarant and (2) the reliability of the hearsay statement. The Court wrote:

> In sum, when a hearsay declarant is not present for

cross-examination at trial, the Confrontation Clause normally requires a showing that [the declarant] is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. *Id.* at 66.

This summation of confrontation requirements immediately raised problems. What is a "firmly rooted" hearsay exception? Most of the hearsay exceptions in the Federal Rules of Evidence reflect well-established exceptions. Some, however, rest on rather shaky grounds. Are they all "firmly rooted"? Moreover, does the widespread adoption of the Federal Rules by the states (now 36) demonstrate that the innovative exceptions are now "firmly rooted" exceptions?

The *Roberts'* decision, however, also raised a far more significant issue. Although both the unavailability and reliability requirements were independently recognized in the Court's prior confrontation cases, the combination of the two in *Roberts* was problematic. *Roberts* involved the admissibility of a preliminary hearing transcript as former testimony, a hearsay exception that traditionally required a showing of unavailability. Most hearsay exceptions, however, do not require a demonstration of unavailability. Did the Court intend to impose an unavailability requirement in every case?

This aspect of the opinion could have significant repercussions. As one commentator noted: "Beneath *[Roberts']* apparently orthodox disposition . . . lies an interpretation of possibly far-reaching significance." Lilly, "Notes on the Confrontation Clause and Ohio v. Roberts," 36 U. Fla. L. Rev. 207, 224 (1984). Another writer pointed out that the *Roberts'* "framework was immediately controversial." Jonakait, "Restoring the Confrontation Clause to the Sixth Amendment," 35 U.C.L.A. L. Rev. 557, 558 (1988).

THE UNAVAILABILITY REQUIREMENT

United States v. Inadi

Roberts' two-prong approach, requiring both reliability and unavailability, was soon modified. In United States v. Inadi, 475 U.S. 387 (1986), the trial court admitted tapes as coconspirator admissions under Federal Evidence Rule 801(d)(2)(E). The defendant objected on confrontation grounds, arguing that the prosecution had failed to establish the unavailability of the declarant as required by *Roberts*.

Despite the broad language on unavailability in *Roberts*, the *Inadi* Court limited *Roberts* to former testimony cases. The Court declared:

> *Roberts* should not be read as an abstract answer to questions not presented in that case, but rather as a resolution of the issue the Court said it was examining: "the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial." *Id.* at 392-93 (quoting *Roberts*, 448 U.S. at 58).

Later in the opinion, the Court returned to this point, writing that *Roberts* does not "stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable." *Id.* at 394.

White v. Illinois

In 1992, the Court reaffirmed this position in White v. Illinois, 112 S. Ct. 736 (1992), a child sexual abuse prosecution, in which the child's hearsay statements were admitted in evidence under two hearsay exceptions: excited utterances and statements made for the purpose of medical treatment. The statements had been made to the child's mother and babysitter, as well as to a doctor, nurse, and police officer. The child did not testify and thus the principal issue was whether the prosecution had to establish the unavailability of the child as a prerequisite to admitting the statements under these exceptions.

The Court, once again, held that the unavailability requirement set forth in *Roberts* was limited to the former testimony exception to the hearsay rule: "*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry *only when* the challenged out-of-court statements were made in the course of a prior judicial proceeding." *Id.* at 741 (emphasis added).

These two cases establish blanket rules dispensing with the unavailability requirement for at least some hearsay exceptions — the coconspirator exception in *Inadi* and the excited utterance and medical diagnosis exceptions in *White*. The Court offered two rationales for these rulings.

"Better Evidence" Argument

First, the Court reasoned that the coconspirator, excited utterance, and medical diagnosis exceptions differ from the former testimony exception at issue in *Roberts*. Unlike former in-court testimony, coconspirator statements "provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court." *Inadi*, 475 U.S. at 395.

Similarly, the *White* Court noted that excited utterances and statements made for the purpose of medical diagnosis had substantial probative value that "could not be duplicated simply by the declarant later testifying in court." *White,* 112 S. Ct. at 743.

In short, the Court believed that the out-of-court statement is "better evidence" than the in-court testimony. "When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence." *Inadi,* 475 U.S. at 394.

This argument is flawed because it presupposes that *either* the out-of-court statement *or* the in-court testimony may be introduced at trial. There is no reason, however, why both cannot be admitted in evidence in most trials. Under the hearsay rule, statements falling within these exceptions are admissible even if the declarant testifies.

"Burden-Benefit" Argument

The second reason noted in these cases involved what the Court believed to be an unnecessary burden on the prosecution. The prosecution subpoenas those witnesses that it needs, and the defense is guaranteed the same

opportunity under the Compulsory Process Clause. An unavailability rule would operate only in those cases where neither side wanted to call the witness. In the Court's view, the benefit of an unavailability rule is therefore marginal. At the same time, keeping track of additional witnesses would impose "substantial burdens" because the "prosecution would be required to repeatedly locate and keep continuously available each declarant." *White*, 112 S. Ct. at 742.

Once, again, the Court's opinions are not persuasive. The prosecution has to keep track of the state's witnesses. Typically, this means retaining their name, address, telephone number, and place of employment, and issuing subpoenas when necessary. The incremental burden of keeping track of additional witnesses would often be minimal. The declarant in *Inadi* failed to appear due to car trouble, a rather unimpressive excuse.

THE RELIABILITY REQUIREMENT

Subsequent decisions also considered the reliability prong specified in *Roberts*. Under this prong, a hearsay statement satisfies confrontation requirements if the statement (1) falls within a "firmly rooted" hearsay exception *or* (2) possesses "particularized guarantees of trustworthiness."

Bourjaily v. United States

The Court's first post-*Roberts* case on this issue was Bourjaily v. United States, 483 U.S. 171 (1987). Like *Inadi*, it involved coconspirator statements. *Inadi*, however, addressed only the unavailability issue. *Bourjaily* examined the reliability issue. Tracing the judicial history of the coconspirator exception back over a century and a half, the Court found the exception "firmly enough rooted in our jurisprudence." *Id.* at 183. Accordingly, in the Court's view, such statements automatically satisfy confrontation demands for reliability. Longevity, by itself, seems to be the talisman for determining whether an exception is "firmly rooted."

Surprisingly, the Court failed to examine the underlying rationale for the exception, a rationale that "is not altogether easy to grasp." Johnson, "The Unnecessary Crime of Conspiracy," 61 Calif. L. Rev. 1137, 1183 (1973). Unlike other exceptions, coconspirator statements are *not* "regarded as carrying some particular guarantee of trustworthiness." *Id.* at 1184. The federal drafters explicitly stated that admissions, such as coconspirator statements, are not based on a reliability rationale: "No guarantee of trustworthiness is required in the case of an admission." Fed. R. Evid. 801(d)(2) advisory committee's note. *See also* Davenport, "The Confrontation Clause and the Coconspirator Exception in Criminal Prosecutions: A Functional Analysis," 85 Harv. L. Rev. 1378, 1384 (1972) ("[T]he coconspirator exception has usually been supported by a variety of theories unrelated to the trustworthiness of the evidence itself.").

Rather, the coconspirator exception is often justified on agency principles — a "partners in crime" rationale. The federal drafters recognized that the "agency theory of conspiracy is at best a fiction." Fed. R. Evid. 801(d)(2)(E) advisory committee's note. The drafters nevertheless failed to supply an alternative rationale. Professor Mueller observes: "In terms of theory, [the rule] is an embarrassment . . . [I]t seems to have been created by accident, and the one traditional explanation which survives does not convince." Mueller, "The Federal Coconspirator Exception: Action, Assertion, and Hearsay," 12 Hofstra L. Rev. 323, 324 (1984). Some commentators candidly admit that the principal justification for the exception is "necessity" and not reliability. *See* Levie, "Hearsay and Conspiracy: A Reexamination of the CoConspirators' Exception to the Hearsay Rule," 52 Mich. L. Rev. 1159, 1166 (1954) ("Conspiracy is a hard thing to prove. . . . Conspirators declarations are admitted out of necessity.").

Coconspirator statements sometimes are against the penal interest of the declarant. But nothing in the coconspirator rule requires that the statement be against interest when made: "the authorities agree that admissions of the agent . . . are admissible whether or not he thought the statements to be against his or his principal's interest at the time he made them." Johnson, *supra,* at 1184. Federal Rule 804(b)(3) now recognizes an exception for statements against penal interest, and thus there is no need for a separate coconspirator exception if the "against interest" notion is the underlying rationale. This exception, however, is more demanding than the coconspirator exception because it requires the unavailability of the declarant.

The Court's casual treatment of the reliability issue in *Bourjaily* belies its stated concern for trustworthiness.

White v. Illinois

The Court adopted the same analysis in *White*, writing that there "can be no doubt" that the excited utterance and medical diagnosis exceptions are "firmly rooted." The Court noted that the excited utterance exception has been recognized for "at least two centuries" and that the Federal Rules of Evidence and nearly "four-fifths" of the states have adopted it. *White*, 112 S. Ct. at 742 n. 8.

Here, again, the Court overlooked the long-standing criticism of the excited utterance exception. As early as 1928, commentators discussed the effect of stress on perception. Hutchins & Slesinger, "Spontaneous Exclamations," 28 Colum. L. Rev. 432, 439 (1928) ("What the emotion gains by way of overcoming the desire to lie, it loses by impairing the declarant's power of observation"). The latest edition of McCormick's text contains the following evaluation:

> The entire basis for the exception is, of course, subject to question. While psychologists would probably concede that excitement minimizes the possibility of reflective self-interest influencing the declarant's statements, they have questioned whether this might be outweighed by the distorting effect of shock and excitement upon the declarant's observation and judgment." 2 McCormick on Evidence 216 (4th ed. 1992).

See also Loftus, *Eyewitness Testimony* 33 (1979) (discussing the effect of stress on perception); Stewart, "Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence," 1970 Utah L. Rev. 1, 27.

The Court's treatment of the medical diagnosis exception is also flawed. As one commentator notes, this exception "is not a centuries' old exception, since it was

firmly adopted only eighteen years ago in the Federal Rules of Evidence. The [*White*] opinion does not mention this." Swift, "Smoke and Mirrors: The Failure of the Supreme Court's Accuracy Rationale in White v. Illinois Requires a New Look at Confrontation," 22 Cap. L. Rev. 145, 155 (1993). Moreover, the Court's broad definition of the exception "would seem to include anything the patient chooses to talk about with a doctor!" *Id.* at 157.

Particularized Guarantees of Trustworthiness

According to *Roberts*, a statement that does not fall within a "firmly rooted" hearsay exception satisfies Confrontation Clause demands if it possesses particularized guarantees of trustworthiness. The Court addressed this issue in a case involving the admissibility of a child's statement under a residual hearsay exception. Idaho v. Wright, 497 U.S. 805 (1990). The Idaho residual exception is patterned after the federal rule, an exception that was not adopted in Ohio.

This trustworthiness requirement involves a case-by-case approach that considers the "totality of the circumstances" at the time the statement was made. These factors include spontaneity, consistency of repetition, the mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motivation to lie. *Id.* at 806.

The Court ruled that after-the-fact corroboration cannot be considered: "[T]he relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.* at 819. In rejecting reliance on corroborating proof, the Court wrote:

> [T]he use of corroborating evidence to support a hearsay statement's "particularized guarantees of trustworthiness' would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility. *Id.* at 823.

The Court did not extensively discuss *Wright* in *White v. Illinois*. The Court's dichotomy between "firmly rooted" exceptions, which are presumptively reliable, and those exceptions that are not "firmly rooted," which require a particularized reliability analysis, seems questionable when the facts of the two cases are examined:

> Ironically, the very statement that was excluded in *Wright* as violating the Confrontation Clause because it did not demonstrate particularized indicia of reliability was given by a two-and-one-half-year-old child to a doctor. One wonders why the four-year-old child's statement to the doctor and nurse in *White* should be subject to different Confrontation Clause analysis than the child's statements to the doctor in *Wright*. The fortuity that the same type of statements were admitted under different hearsay exceptions now appears to govern the type of constitutional analysis ultimately applied to such hearsay. Raeder, "White's Effect on the Right to Confront One's Accuser," ABA Crim. Justice, Winter 1993, No. 4, at 2, 7.

FUTURE DIRECTIONS

Despite the U.S. Supreme Court's statements in earlier cases, the most recent decisions suggest that the right of confrontation has been "deconstitutionalized" into the hearsay rule. Under the Court's current analysis, "firmly rooted" exceptions no matter how flawed are presumptively reliable. Moreover, at this time the unavailability requirement has been applied only to former testimony. Yet, traditional hearsay law always required unavailability as a prerequisite for the use of former testimony, and thus the Confrontation Clause adds little to the safeguards already required by the hearsay rule.

One commentator has written: "The confrontation clause is no longer a constitutional right protecting the accused, but essentially a minor adjunct to evidence law." Jonakait, *supra*, at 558. Another notes that the Supreme Court "has transformed a constitutional guarantee into an evidentiary doctrine 'generally designed to protect similar values,' as the hearsay rule." Berger, "The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model," 76 Minn. L. Rev. 557, 557 (1992). *See also* Haddad, "The Future of Confrontation Clause Developments: What Will Emerge When the Supreme Court Synthesizes the Diverse Lines of Confrontation Decisions?," 81 J. Crim. L. & Criminology 77, 80 (1990) ("Because of these rules, the confrontation clause offers little protection beyond that afforded by domestic hearsay law.").

Nevertheless, the Court has not formally adopted this position, and challenges to hearsay statements should continue to be made on both federal and state constitutional grounds. The Court has granted certiorari in a case involving the declaration against penal interest exception to the hearsay rule, Fed. R. Evid. 804(b)(3). Williamson v. United States, 114 S. Ct. 681 (1993). This will afford the Court an another opportunity to resolve some of these problems.

The Court has also failed to explain what appears to be an inconsistency between the two lines of confrontation cases discussed above: the face-to-face confrontation cases (*Coy* and *Craig*) and the hearsay cases (*White*). One writer put it this way:

> [I]f a child is called to testify, no precautions such as screens or televised testimony are allowed without a showing of necessity. [*Coy* and *Craig*] Yet prosecutors can refuse to call a child at all, offering no justification, and obtain a valid conviction based solely on repetition of the child's statements which meet the criteria for firmly rooted hearsay exceptions. [*White*] Doubtless, most defense counsel would rather cross-examine a child who is hidden behind a screen or located in a different room than have no opportunity at all for cross-examination. Raeder, *supra*, at 4.

OHIO CASES

The Ohio cases involving hearsay problems in child abuse prosecutions first arose in cases interpreting the excited utterance exception, Ohio R. Evid. 803(2). These cases carved out an expansive exception in abuse cases. See State v. Wallace, 37 Ohio St. 87, 524 N.E.2d 466 (1988) (statement made 15 hours after incident admitted). Recently, the Ohio Supreme Court acknowledged this development. In State v. Taylor, 66 Ohio St.3d 295, 612

N.E.2d 316 (1993), the Court wrote:

> There is no *per se* amount of time after which a statement can no longer be considered to be an excited utterance. The central requirements are that the statement must be made while the declarant is still under the stress of the event and the statement may *not* be a result of reflective thought.
>
> Therefore the passage of time between the statement and the event is relevant but not dispositive of the question.
>
> Merely being "upset" clearly does not meet the standard for admissibility under Evid. R. 803(2) because it does not show that [the declarant's] statements were not the result of reflective thought. *Id.* at 303.

The Court went on to distinguish cases in which an excited utterance is made by a sexually abused child. According to the Court:

> In the cases of statements made by children who say they were sexually assaulted, we have upheld the admission of those statements even when made after a substantial lapse of time, but in those cases we have done so because we recognize that children are likely to remain in a state of nervous excitement longer than would an adult. . .
>
> This trend of liberalizing the requirements for an excited utterance when applied to young children who are the victims of sexual assault is also based on the recognition of their limited reflective powers. Inability to fully reflect makes it likely that the statements are trustworthy. *Id.* at 304.

STATE v. BOSTON

In State v. Boston, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989), a child sexual abuse case, the Supreme Court considered the hearsay exception for statements made for the purpose of medical diagnosis, Rule 803(4). The Court identified a number of problematic aspects when this exception is used in child abuse cases.

The first problem relates to the "motivational" rationale. The underlying rationale of Rule 803(4) turns on the motivation of the declarant — a person seeking medical treatment would tell the truth. *Boston* questioned whether this motivational factor applied to a young child: "[S]uch a young child is not giving the doctor the information for the purposes required by Evid. R. 803(4). More than likely, the child does not even want to be seeing the doctor!" *Id.* at 122.

A second problem concerns whether the statement must be made to a physician. Statements made to "a psychologist, counselor, social worker, minister, etc." pose a dilemma.

A third problem concerns the identification of the perpetrator in the out-of-court statement. Is such an identification pertinent to medical diagnosis or treatment?

The Court went on to create, under its inherent authority, its own hearsay exception for child abuse cases. The Court concluded:

> [A]n out-of-court statement of an allegedly abused child of tender years, including identification of a perpetrator, made to a qualified expert in child abuse, is admissible if the expert has independent evidence of physical or emotional abuse of the child, the child has no apparent motive for fabricating the statement and the child has been found unavailable after a good-faith effort to produce the child in court. *Id.* at 127.

STATE v. DEVER

In State v. Dever, 64 Ohio St.3d 401, 596 N.E.2d 436 (1992), cert. denied, 113 S. Ct. 1279 (1993), the Supreme Court once again examined the medical diagnosis exception, ruling that a statement made by a 4-year old child to a pediatrician concerning sex abuse was admissible under Ohio Rule 803(4). In so holding, the Court overruled *Boston* in part. As noted above, *Boston* questioned whether the motivational factor applied to a young child. The Court in *Dever* found the *Boston* analysis too "rigid." The Court wrote:

> Once the child is 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. That is to say, the initial desire to seek treatment may be absent, but the motivation can certainly arise once the child has been taken to the doctor. Absent extraordinary circumstances, the child has no more motivation to lie than an adult would in similar circumstances. Everyday experience tells us most children know that if they do not tell the truth to the person treating them, they may get worse and not better. 64 Ohio St.3d at 410.

The Court also noted that Rule 803(4) was supported by an additional rationale — that such statements are reasonably relied on by the medical profession. In other words, the expertise of physicians in evaluating the accuracy of these statements is a safeguard against false statements.

Nevertheless, these statements are not automatically admissible. The trial court should consider the circumstances surrounding the making of the statement, such as improper influence or the use of suggestive or leading questions. This additional requirement, which the Court labeled "specific examination," applies "only to Evid. R. 803(4) and only to declarants of tender years." *Id.* at 412.

Identity of Assailant

In addition, the Court considered whether statements identifying the perpetrator of the abuse are admissible under Rule 803(4). The Court explicitly adopted the reasoning of United States v. Renville, 779 F.2d 430, 438 (8th Cir. 1985), a controversial federal decision. *See* Mosteller, "Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment," 67 N.C. L. Rev. 257 (1989). According to the *Dever* Court, "statements made by a child during a medical examination identifying the perpetrator of sexual abuse, if made for [the] purpose of diagnosis and treatment, are admissible pursuant to Evid. R. 803(4)." *Id.* at 414.

Confrontation

The Court also ruled that admission of the statement did not violate the defendant's right of confrontation, a holding that tracks the U.S. Supreme Court's decision in *White v Illinois*. Citing *White*, the Ohio Supreme Court held that "Evid. R. 803(4) is a firmly rooted hearsay exception in the circumstances of the case before us." *Id.*

at 418. In addition, "[i]n such a case, the prosecution is not required to demonstrate the unavailability of the declarant." *Id.*

EVIDENCE RULE 807

In *Boston*, the Court invited the Rules Committee to examine the evidence issues raised in child abuse cases. The Committee responded by drafting Ohio Evidence Rule 807, which became effective in July, 1991. This rule recognizes a residual hearsay exception in child abuse cases.

Statements admissible under Rule 807 must satisfy six conditions. First, the statement must have been made by a child who is under the age of 12 at the time of the trial or hearing. Second, the statement must describe a sexual act performed by, with, or on the child, or it must describe an act of violence directed at the child. Third, the statement must be trustworthy. Fourth, the child's in-court testimony must not be reasonably obtainable. Fifth, the statement must be corroborated by independent proof. Sixth, the proponent must give pretrial notice of its intention to introduce a statement under this rule ten days before the trial or hearing.

Later Cases

In *Dever*, the Court noted the adoption of Rule 807, but also quoted a portion of the Staff Note which stated that Rule 807 recognized an exception "in addition to the exceptions enumerated in Evid. R. 803 and 804." Then, the Court commented that "the trial court in its discretion determines which hearsay exception, if any, would most appropriately support the admission of the child's statements into evidence." *Id.* at 414. The dissent, however, believed that *Dever* "seriously undermines Evid. R. 807" because it "will actually allow prosecutors to evade the carefully considered controls of Evid. R. 807." *Id.* at 420.

In In re Coy, 67 Ohio St.3d 215, 616 N.E.2d 1105 (1993), the Court struck down R.C. 2151.35(F), which created a residual hearsay exception for child abuse cases in juvenile court. The Court ruled that this provision was inconsistent with the Ohio Rules of Evidence and thus invalid under Section 5(B), Article IV of the Ohio Constitution, which empowers the Court to make procedural rules. The Court also noted that "Evid. R. 807 should be used by trial courts in determining whether, in abuse cases, an out-of-court statement(s) made by a child who, at the time of trial (or hearing), is under the age of twelve years is admissible at the trial or hearing." *Id.* (syllabus 2).

See also State v. Black, 87 Ohio App.3d 724, 622 N.E.2d 1166 (1993) (physician's testimony that abrasions were consistent with other causes in addition to sex abuse did not satisfy the independent proof requirement).

STATE v. STORCH

In State v. Storch, 66 Ohio St.3d 280, 612 N.E.2d 305 (1993), the Court once again addressed the hearsay issues in child abuse cases. Storch was sentenced to two life terms for rape. There was "virtually no proof . . . placed before the jury indicating that Storch was guilty except for the statements of A.M. [the victim] as related by third parties." *Id.* at 284.

Without overruling *Dever*, the Court significantly modified that holding. The third syllabus of *Dever* stated that the admission of a "statement pursuant to a firmly rooted hearsay exception does not violate a defendant's right of confrontation." However, in *Storch*, the Court noted that the applicability of the Ohio Constitution had not been before the Court in *Dever*. The Court then stated that the admission of a statement pursuant to a firmly rooted hearsay exception "may violate our state constitutional right of confrontation. The third paragraph of the syllabus in *Dever* should be construed to that effect." *Id.* at 291.

Ohio Constitution

The Court ruled that the Ohio Constitution provides greater confrontation protection than that provided by the federal constitution. The Court noted that the current interpretation of the Sixth Amendment by the U.S. Supreme Court "provides less protection for the accused than the protection provided by the Sixth Amendment as traditionally construed and by the express words of Section 10, Article I of the Ohio Constitution." *Id.* The Ohio Constitution, in the Court's view, generally requires a demonstration of the declarant's unavailability before hearsay statements are unavailable:

> We construe the right to confrontation contained in Section 10, Article I to require live testimony where reasonably possible. However, circumstances may exist where the evidence clearly indicates that a child may suffer significant emotional harm by being forced to testify in the actual presence of a person he or she is accusing of abuse. In such circumstances, the child may be considered unavailable for purposes of the Rules of Evidence and the out-of-court statements admitted without doing violence to Section 10 Article I, assuming Evid. R. 807 is otherwise satisfied. *Id.* at 293.

Evidence Rule 807

In *Storch* the Court also stated that "Evid. R. 807 accords with the Sixth Amendment right to confrontation and of the confrontation rights in Section 10, Article I of the Ohio Constitution. We believe that Evid. R. 807 is the best way to protect both sets of confrontation rights, especially those specifically set forth in the Ohio Constitution." *Id.* at 289.

The Court also noted that Rule 807 contemplates a pretrial hearing to determine the child declarant's availability. The Court added: "A pretrial hearing would also permit an interlocutory appeal if the trial court's ruling on the child's availability and/or the admissibility of the child's extrajudicial statements so hinders the state's evidence that the state cannot proceed with its case." *Id.* at 293.

STATEMENTS OF IDENTIFICATION

State v. Boston

As early as *Boston*, the Supreme Court cited Rule 801(D)(1)(c) as a possible vehicle for admitting the out-of-court statements of child abuse victims: "We suggest that a better way of admitting a child's statements identifying the perpetrator of child abuse can be found, under certain circumstances, in Evid. R. 801(D)(1)(c) rather than Evid. R. 803(4)." *Id.* at 124.

This rule exempts statements from the hearsay rule if the "declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is. . . (c) one of identification of a person soon after perceiving him, if the circumstances demonstrate the reliability of the prior identification."

The Court in *Boston* added: "Accordingly, admitting a child's out-of-court identification of the perpetrator under Evid. R. 801(D)(1)(c), without the child's testimony at trial, requires the trial judge to conduct a voir dire examination of the child at which the child, under oath, is subject to cross-examination concerning her identification and responds willingly to questions about her identification." *Id.*

State v. Storch

In *Storch* the Supreme Court again commented on the possible use of Evid. R. 801(D)(1) in child abuse cases:

> We believe the live testimony of a child who has claimed abuse will in most cases enhance the reliability of the fact-finding process. Videotaping or recording the interviews in which the out-of-court statements of the child are obtained would further enhance the integrity of the fact-finding proceeding. In many instances, Evid. R. 801(D)(1) or other Rules of Evidence would allow for the admission of the audio tapes or videotapes. If taping occurs and the tape is actually admitted into evidence, the trier of fact would have the benefit of the child's actual words and at least some insight as to the child's demeanor. The trial court also would have the benefit of the actual questions or conversation which led up to the child's indication that an individual had abused the child. Certainly the questions asked can be a significant factor in determining the reliability of the response, as the Supreme Court of the United States acknowledged in *Idaho v. Wright*. In that case the Supreme Court noted that leading questions could affect a small child's responses. Therefore, such questions tended to make the responses less reliable. 66 Ohio St.3d at 292.

Problems

There are several problems with the use of Rule 801(D)(1)(c). First, the rule explicitly requires cross-examination of the declarant "concerning the statement." *See* United States v. Owen, 484 U.S. 554 (1988). Second, only an "identification" is admissible under this provision. Finally, the legislative history indicates that "stranger" identifications were the focus of the rule. In other words, identifications at lineups, showups, and photographic displays would be admitted under this rule.

The court in State v. Turvey, 84 Ohio App.3d 724, 618 N.E.2d 214 (1992), discussed the effect *Boston* had in the Ohio cases applying Rule 801(D)(1)(c):

> [A] difference exists between the thirteen pre-*Boston* and the ten post-Boston Ohio appellate court cases citing Evid. R. 801(D)(1)(c). The pre-*Boston* cases generally involved identifications made by strangers to law enforcement personnel during the course of investigations conducted shortly after the crime. The stranger often, but not always, identified the defendant among others in a line-up or photo array. In the pre-*Boston* cases, the identifications were necessary to prove no other person committed the crime. *Id.* at 739.
>
> By contrast, the majority of the post-*Boston* cases citing [the rule] involved close relatives — two fathers, three stepfathers, and one uncle — of child victim-declarants. The post-*Boston* identifications generally involved identifications made by children to mothers or doctors weeks or months after the crime. The child observed neither the defendant nor the defendant's photograph during the identification. In the post-*Boston* cases, the identifications addressed not the identity of the defendant, but rather addressed the fact a crime was committed. *Id.* at 740.

The court indicated that the rule had been misused in the post-*Boston* cases: the rule "perhaps should not have been cited or applied in the majority of the post-*Boston* Ohio appellate cases citing the rule." *Id.* at 741.

CONCLUSION

The trial of child sexual abuse cases presents significant problems to both the prosecution and defense. The U.S. Supreme Court has weaken the Confrontation Clause in order to permit these prosecutions. In contrast the Ohio Supreme Court has demonstrated greater concern for recognizing the importance of confrontation values in these trials.

For a further discussion of these issues, see Raeder, "Navigating between Scylla and Charybdis: Ohio's Efforts To Protect Children Without Eviscerating The Rights of Criminal Defendants — Evidentiary Considerations And the Rebirth of Confrontation Clause Analysis in Child Sexual Abuse Cases," 25 U. Toledo L. Rev. 43 (1994