Sexual Abuse of Children—Washington's New Hearsay Exception

Sheryl K. Peterson

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SEXUAL ABUSE OF CHILDREN—WASHINGTON’S NEW HEARSAY EXCEPTION

In 1982, the Washington state legislature adopted a new exception to the hearsay rule, which applies in criminal prosecutions for sexual abuse of children. This new exception is Washington’s first hearsay exception that gives the trial court discretion to determine whether an out-of-court statement is trustworthy. Under the exception, a statement made by a

1. Washington’s hearsay rule is set forth in WASH. R. EVID. 802, which provides: “Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.”

2. Act of April 1, 1982, ch. 129, § 2, 1982 Wash. Laws 481 (codified at WASH. REV. CODE § 9A.44.120 (1982)). The exception provides:

   A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the state of Washington 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 statement may be admitted only if there is corroborative evidence of the act.

   A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

   Read literally, the new exception could be construed to apply in any criminal proceeding rather than only in a proceeding for the crime described in the child’s statement. It is unlikely that the legislature intended this result. The new exception would, under this construction, be in direct conflict with the Washington Rules of Evidence that provide for the exclusion of irrelevant or unduly prejudicial evidence and character evidence. See WASH. R. EVID. 402, 403, 404(b). The new exception and the existing rules of evidence can and should be harmonized by construing the new exception to apply only to criminal proceedings for the act of sexual misconduct described in the child’s out-of-court statement. See State v. Zornes, 78 Wn. 2d 9, 15, 475 P.2d 109, 114 (1970) (“Where two statutes apply to the same subject matter, . . . the two statutes will be reconciled if possible so that effect can be given to each.”); In Re Horse Heaven Irrigation Dist., 11 Wn. 2d 218, 226, 118 P.2d 972, 976 (1941) (“The courts . . . are not controlled by the literal meaning of the language of the statute . . . [and] no construction should be given to a statute, which leads to gross injustice or absurdity.”).

3. All other exceptions specify circumstances that are thought to indicate the trustworthiness of the statement. See WASH. R. EVID. 803–804; infra Part IA. In applying these defined exceptions, the trial judge merely determines whether the out-of-court statement offered was made under the specified circumstances. He or she does not weigh the trustworthiness of the statement.

   The statement against interest exception gives the trial judge limited discretion to evaluate the trustworthiness of hearsay statements in that it requires both a finding of specified circumstances and a judicial determination that additional unspecified circumstances indicate the trustworthiness of the statement. See WASH. R. EVID. 804(b)(3) (statement against interest that tends to expose the declarant
child under ten years of age describing an act of sexual contact performed
with or on the child by another is admissible if several conditions are met.
First, the child must either testify at the proceeding or be unavailable as a
witness. Second, the court must find, in a hearing conducted outside the
presence of the jury, that the time, content, and circumstances of the
statement provide "sufficient indicia of reliability." Third, if the child is
unavailable as a witness, there must be corroborative evidence of the act
of sexual contact described in the statement. Finally, the prosecution
must notify the defendant of its intention to offer the statement far enough
in advance of the proceeding so that the defendant has a fair opportunity
to prepare a defense to the statement.

Part I of this Comment evaluates the new hearsay exception as a rule of
evidence. It concludes that the exception is an appropriate solution to the
special hearsay problems that arise in child sexual abuse cases. Part II
considers whether the exception violates the accused's constitutional right
to confront the witnesses against him or her. It concludes that the excep-
tion is not unconstitutional per se, although specific applications of the
exception may be unconstitutional.

I. THE NEW EXCEPTION AS A RULE OF EVIDENCE

A. The Development of Discretionary Hearsay Exceptions

The major rationale underlying the hearsay rule is that accuracy and
trustworthiness can best be tested by cross-examination. Exceptions to
the hearsay rule traditionally have been based on the premise that certain
circumstances so strongly indicate the accuracy of a speaker's perception,
memory, and narration that little or nothing would be gained by cross-
examining him or her. The presumed reliability of statements made
under such circumstances is considered an adequate substitute for cross-
examination.

Courts developed the traditional hearsay exceptions by identifying spe-
to criminal liability and that is offered to exculpate the accused is admissible only if "corroborating
circumstances clearly indicate the trustworthiness of the statement").
4. J. WIGMORE, EVIDENCE § 1420 (3d ed. 1940). Other reasons that have been advanced in sup-
port of the hearsay rule are that the witness's presence at trial allows the jury to observe his or her
demeanor as an aid in evaluating the witness's sincerity and that a witness is less likely to lie when
under oath. See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, § 245 (E. Cleary 2d ed. 1972)
[hereinafter cited as MCCORMICK].
5. J. WIGMORE, supra note 4, §§ 1420-23. Necessity has also been a factor in deciding whether
to make an exception to the hearsay rule. Id. § 1420. Necessity alone, however, has not generally
been deemed a sufficient basis for creating an exception to the hearsay rule. Rather, some circumstan-
tial indication of trustworthiness has almost always been required. Id.
6. J. WIGMORE, supra note 4, § 1422.
specific circumstances thought to guarantee trustworthiness. In addition, most jurisdictions recognized the power of judges to make exceptions to the hearsay rule for reliable evidence that did not meet the specific circumstantial requirements of any traditional exception.

In 1975, Congress codified the traditional hearsay exceptions in the Federal Rules of Evidence. Congress included two exceptions in the Federal Rules that allow a federal judge to admit evidence that does not meet the requirements of any defined hearsay exception if the judge determines that it has "equivalent circumstantial guarantees of trustworthiness." These discretionary exceptions were intended to supplement the defined exceptions in the same manner as the common law power to make discretionary hearsay determinations had previously supplemented the traditional exceptions.

Discretionary hearsay exceptions have been the subject of much debate. Proponents of discretionary exceptions argue that these exceptions are desirable for several reasons. First, strict adherence to technical,

7. Id.; Imwinkelried, The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence, 15 SAN DIEGO L. REV. 239, 243-47 (1978). These circumstances fall into the following categories: (1) circumstances in which a sincere and accurate statement would naturally be uttered; (2) circumstances in which the danger of easy detection or the fear of punishment would counteract any desire to falsify; and (3) circumstances in which any error in the statement would probably be detected and corrected. J. WIGMORE, supra note 4, § 1422.


10. See FED. R. EVID. 803(24), 804(b)(5). FED. R. EVID. 803(24) provides that a statement is not excluded by the hearsay rule if it is:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 804(b)(5) contains an identical provision for a statement by a person who is unavailable to testify as a witness.

Of the twenty-two states that have adopted evidence rules modeled after the Federal Rules of Evidence, sixteen have adopted discretionary exceptions. See 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶¶ 803(24)[02], 804(b)(5)[02] (1981 & Supp. 1982).


enumerated exceptions causes some evidence that is both necessary and trustworthy to be excluded while untrustworthy evidence of low probative value is admitted.13 Second, without discretionary exceptions, trial judges are forced to "torture" the defined hearsay exceptions "beyond any reasonable circumstances which they were intended to include."14 Finally, discretionary exceptions merely preserve the power judges had at common law before adoption of rules of evidence.15

Conversely, critics argue against discretionary exceptions on a number of grounds. First, different trial judges may reach different conclusions regarding the reliability of a statement, making trial preparation difficult.16 Second, it may not be clear whether an affirmance of a discretionary hearsay ruling by an appellate court creates a new hearsay exception with the force of precedent or means merely that the trial court did not abuse its discretion.17 Third, the problem of seemingly reliable hearsay evidence that does not meet the technical requirements of any defined exception may be dealt with more effectively by construing defined exceptions broadly.18

The Washington Supreme Court was persuaded by the arguments against discretionary exceptions when it adopted evidence rules modeled after the Federal Rules of Evidence in 1979.19 Consequently, Washington's rules of evidence contain no discretionary exceptions.20 Prior to adoption of the rules, Washington courts could admit hearsay that did not fall within any established hearsay exception based upon a judicial determination that the evidence was reliable.21 By adopting the rules without discretionary exceptions, the Washington Supreme Court removed the

15. Imwinkelried, supra note 7, at 243-47.
17. WASH R. EVID 803(b) task force comment.
18. Id.
20. See WASH R. EVID 803(b) task force comment; Orland & Tegland, supra note 19, at 418-20.
21. See Nordstrom v. White Metal Rolling & Stamping Corp., 75 Wn. 2d 629, 631-35. 453 P.2d 619, 621-24 (1969) (publication of private trade association that contained standards for construction of portable metal ladders admissible because its "trustworthiness . . . was established beyond any reasonable cavi" and because of the impracticality of calling all of the preparers of the publication as witnesses); State v. Canida, 4 Wn. App. 275, 277, 480 P.2d 800, 802 (1971) ("Exceptions are made to the rule excluding hearsay statements whenever reason and logic suggest their reliability and trustworthiness.").
authority of Washington trial judges to make discretionary determinations regarding hearsay that is not within any defined hearsay exception.22

B. The Admissibility of Statements by Sexually Abused Children Under Defined Hearsay Exceptions

Any out-of-court statement made by a child that describes an act of sexual abuse committed against the child is hearsay if offered to show that the act occurred or to identify the offender.23 Thus, prior to the new discretionary hearsay exception, such a statement was inadmissible unless it met the requirements of a defined exception to the hearsay rule.24

Washington appellate courts generally construed existing exceptions broadly to uphold the admission of statements made by sexually abused children. In most cases, the courts used the “excited utterance” hearsay exception.25 They applied the requirements of the exception so liberally to statements by sexually abused children that even responses to questions asked many hours after the alleged sexual assault were sometimes

22. See WASH. R. EVID. 802 (hearsay is not admissible except as provided by court rules or statute); WASH. R. EVID. 803(b) task force comment.
23. See WASH. R. EVID. 801(c).
24. See WASH. R. EVID. 802.
25. The excited utterance exception allows admission of an out-of-court statement “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” WASH. R. EVID. 803(a)(2); Beck v. Dye, 200 Wash. 1, 9–10, 92 P.2d 1113, 1117 (1939). Excited utterances are presumed reliable because their spontaneity and the speaker’s excited state negate the inference that they could have been the product of fabrication, intervening actions, or the exercise of choice or judgment. See State v. Canida, 4 Wn. App. 275, 277, 480 P.2d 800, 802 (1971); MCCORMICK, supra note 4, § 297.


Other hearsay exceptions under which statements by sexually abused children have been admitted are the medical diagnosis exception, see State v. Bouchard, 31 Wn. App. 381, 384, 639 P.2d 761, 763 (1982), and the “recent fabrication” exception, see State v. Murley, 35 Wn. 2d 233, 238–39, 212 P.2d 801, 804–05 (1949). Under the medical diagnosis exception, statements that describe the cause of any present or past symptoms or pain are admissible to the extent that they are made for the purpose of medical diagnosis or treatment. See WASH. R. EVID. 803(a)(4). Under the recent fabrication exception, a victim’s prior out-of-court statements consistent with his or her in-court testimony were admissible for the purpose of rebutting a charge of recent fabrication. See State v. Murley, 35 Wn. 2d at 238, 212 P.2d at 804. Such out-of-court statements are no longer considered hearsay. See WASH. R. EVID. 801(d)(1)(ii).
deemed excited utterances. For example, in \textit{State v. Woodward},\textsuperscript{26} the court upheld the admission of a five-year-old rape victim's hearsay statements that had been made in response to her mother's questions at least twenty hours after the rape.\textsuperscript{27} Taking into consideration the child's young age, her physical condition, and the fact that she was laboring under a threat of further violence from the defendant, the court concluded that it was only remotely possible that she had fabricated the facts she related to her mother.\textsuperscript{28} Thus, despite the long time lapse between the rape and the statement, the court found that the statement was an excited utterance.\textsuperscript{29}

\textbf{C. The Admissibility of Statements by Sexually Abused Children Under the New Exception}

In child sexual abuse cases, the arguments in favor of discretionary exceptions are more persuasive than those against them.\textsuperscript{30} The Washington courts’ broad construction of the excited utterance exception in child sexual abuse cases exemplifies the dangers of judicial “torturing” of the enumerated exceptions.\textsuperscript{31} In applying the excited utterance exception in

\begin{itemize}
  \item \textsuperscript{26} 32 Wn. App. 204, 646 P.2d 135 (1982).
  \item \textsuperscript{27} Id. at 206–07, 646 P.2d at 137.
  \item \textsuperscript{28} Id. at 207, 646 P.2d at 137.
  \item \textsuperscript{29} Id. In \textit{State v. Bouchard}, 31 Wn. App. 381, 639 P.2d 761 (1982), the court considered similar factors in evaluating a three-year-old sexual assault victim’s statements. When the child returned home from visiting her grandfather, her mother discovered that she had blood around her lower abdominal and vaginal areas. When questioned about the blood, the child told her mother, “Grandpa did it.” The court found that this statement qualified as an excited utterance because the danger of fabrication was remote in view of the child’s young age and the short lapse of time between the alleged act of sexual abuse and the child’s statement. The court also pointed out that there were no intervening events that would tend to undermine the reliability of the statement. \textit{See also State v. Bloomstrom}, 12 Wn. App. 416, 529 P.2d 1124 (1974) (eight-year-old rape victim’s statements in response to questions held admissible as excited utterances); \textit{State v. Canida}, 4 Wn. App. 275, 480 P.2d 800 (1971) (six-year-old girls’ responses to their mothers’ questions held admissible as excited utterances in trial for indecent exposure).

  There is no reported Washington decision that overturns a trial court’s admission of a statement by a sexually abused child as an excited utterance. It is noteworthy, however, that in all reported cases there was, in addition to the child’s hearsay statements, convincing physical evidence that the child had been sexually abused and that the defendant was most likely the person who committed the abuse. \textit{See, e.g., State v. Bouchard}, 31 Wn. App. 381, 382–83, 639 P.2d 761, 762–63 (1982) (physical condition of child; medical testimony that vaginal injury was induced by penetration with a projecting instrument; admission by defendant that child was with him when injury occurred; testimony by defendant’s son that defendant had sexually abused him several years earlier); \textit{State v. Bloomstrom}, 12 Wn. App. 416, 417–18, 529 P.2d 1124, 1125 (1974) (physical evidence of injury to child’s vagina and rectum; admission by defendant that he was alone with child when injury occurred; medical testimony that injury could have been caused by forcible rape; presence of defendant’s pubic hairs in child’s underclothing).

  \textsuperscript{30} For a summary of the arguments for and against discretionary hearsay exceptions, see \textit{supra} text accompanying notes 12–18.

  \textsuperscript{31} \textit{See supra} Part IB.

\end{itemize}
other types of cases, courts have required spontaneity and an excited state to ensure that the speaker had no time for reflection. Yet, in a number of child sexual abuse cases, Washington courts have used the exception to justify admission of statements made by the victim in response to questions after considerable prodding and passage of time. Such judicial stretching of defined exceptions defeats the purpose of having only non-discretionary hearsay exceptions. Moreover, broad construction of the excited utterance exception to meet special needs in child sexual abuse cases may be used as a precedent for unintended and unwarranted liberal applications of the exception in other types of cases.

The new exception provides a more satisfactory solution to the problem of seemingly reliable and highly relevant hearsay that is not within any specific hearsay exception. Under the new exception, the court is not required to search for "spontaneity" or an excited state if other equally strong indicia of reliability are present. For this reason, the new exception may result in a more honest and better-reasoned determination of whether to admit a victim’s statement in a child sexual abuse case.

Although the new exception gives trial courts more discretion than they previously had under the rules of evidence, it does not give courts greater authority than they had prior to adoption of the rules. Rather, the exception merely restores the courts' pre-rule authority to make discretionary hearsay determinations in the limited area of child sexual abuse cases. Moreover, the discretion granted by the exception is no greater than that actually exercised by courts through their liberal applications of the excited utterance exception even after adoption of the rules. The courts’ analyses have typically involved a consideration of a number of factors: the time lapse between the alleged sexual assault and the child’s statement; physical evidence consistent with the child’s statement; the circumstances under which the statement was made; and the age of the child. The "time, content, and circumstances" criteria of the new exception, together with the requirement that there be corroborative evidence if the child is unavailable, are the substantial equivalent of these factors.

The criticisms that have been directed toward discretionary exceptions do not apply to the new exception. First, the new exception is more likely to facilitate preparation for child sexual abuse trials than to make it more difficult. Previously, defense counsel had no assurance that the prosecu-

32. See Beck v. Dye, 200 Wash. 1, 9-10, 92 P.2d 1113, 1118 (1939); McCormick, supra note 4, § 297, at 706 (application of excited utterance exception to statement made 14 hours after exciting event considered extreme); Fed. R. Evid. 803(2) advisory committee note, 56 F.R.D. 183, 304 (1972).
33. See supra notes 25–29 and accompanying text.
34. See supra note 21 and accompanying text.
35. See supra notes 26–29 and accompanying text.
tion would not offer a sexually abused child's statement even if it did not meet the technical requirements of the excited utterance exception. If the statement were offered, defense counsel had no way to predict how far the court might be willing to stretch the excited utterance exception in order to admit it. Under the new exception, it may still be difficult to predict whether the court will decide that a child's statement is reliable and thus admissible. The defendant will, however, at least receive notice of the prosecution's intention to offer the statement far enough in advance of trial so that defense counsel can prepare to challenge the reliability of the statement.  

Second, the new exception will not create confusion regarding the effect of appellate decisions that affirm a trial court's admission of evidence under the exception. Because Washington courts no longer have the authority to create hearsay exceptions, such decisions will plainly have precedential value only with respect to evidence offered under the exception in child sexual abuse cases. Thus, rather than creating confusion, appellate decisions will likely provide needed guidance to trial judges in applying the elements of the new exception.

The new hearsay exception, like the traditional exceptions, is based on indications of the reliability of a statement. Although it gives trial judges the discretion to determine the factors that guarantee reliability, it does not present the difficulties that have previously been encountered with more general discretionary exceptions. Thus, the new exception is an appropriate solution to the special hearsay problems that arise in child sexual abuse cases.

II. CONSTITUTIONALITY OF THE NEW EXCEPTION

Because Washington's new hearsay exception permits the introduction of hearsay evidence in criminal proceedings, it is open to constitutional attack on the ground that it contravenes the defendant's sixth amendment right to confront the witnesses against him or her.

A. The Confrontation Clause and the Hearsay Rule

The sixth amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." The purpose of the con-

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36. See WASH. REV. CODE § 9A.44.120.
frontation clause is to assure that the trier of fact has a satisfactory basis for evaluating the truth of statements offered into evidence.38 In defining the right of confrontation, the United States Supreme Court has stressed two factors: (1) the presence of the witness at the trial39 and (2) an opportunity for the defendant to cross-examine the witness.40 The witness's presence enables the jury to observe the witness's demeanor as an aid in evaluating his or her credibility.41 It also decreases the likelihood that the witness will falsely accuse the defendant, because the witness must testify under oath and in the defendant's presence.42 Cross-examination allows the defendant an opportunity to test the credibility of the witness's testimony.43

Construed literally, the confrontation clause would exclude all hearsay evidence in criminal proceedings.44 However, the clause is not absolute.45 While confrontation is a fundamental element of a fair trial, the right to confrontation must sometimes yield to overriding public policy considerations.46

Most evidence that meets the requirements of a recognized hearsay exception is admissible without confrontation because of its presumed trustworthiness.47 Nevertheless, the hearsay rule and the confrontation clause are not coextensive.48 Thus, a statement may be admissible under a hearsay exception but still be inadmissible because of the confrontation clause.49 Conversely, admission of evidence by misapplication of a hearsay exception does not necessarily violate the confrontation clause.50

The United States Supreme Court has refused to develop a theory by a similar right. See WASH. CONST. art. I, § 22 ("In criminal prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face . . .")..

41. McCORMICK, supra note 4, § 252.
42. Id.
45. Id. at 62–64.
46. Id. at 64; Mattox v. United States, 156 U.S. 237, 242–43 (1895).
47. McCORMICK, supra note 4, § 252.
50. See, e.g., Dutton v. Evans, 400 U.S. 74 (1970) (court properly admitted out-of-court statements made by conspirator against his fellow conspirator during concealment phase of the conspiracy, even though the statement would have been inadmissible under traditional conspiracy exception); California v. Green, 399 U.S. 149 (1970) (court properly admitted prior inconsistent statement of witness as substantive evidence where witness was given opportunity to explain or deny prior statement, even though prior statement would be inadmissible under traditional hearsay exceptions).
which the constitutionality of each hearsay exception may be tested.\textsuperscript{51} Instead, courts have examined the constitutionality of specific applications of individual hearsay exceptions on a case-by-case basis.\textsuperscript{52} It is generally acknowledged that the confrontation clause does not bar out-of-court statements made by a person who testifies at trial and can be fully and effectively cross-examined.\textsuperscript{53} On the other hand, the defendant’s right to confrontation may be violated if (1) the person who made the statement does not testify at trial, or (2) the person testifies but cannot be fully and effectively cross-examined.\textsuperscript{54}

1. Confrontation Clause Requirements If the Witness Does Not Testify

In \textit{Ohio v. Roberts},\textsuperscript{55} the United States Supreme Court established a two-part test for determining whether admission of out-of-court statements of a witness who does not testify at trial violates the defendant’s right to confrontation. First, the witness must be unavailable.\textsuperscript{56} Second, the witness’s out-of-court statements must have “adequate ‘indicia of reliability.’”\textsuperscript{57}

The unavailability requirement ensures that the defendant will have face-to-face confrontation whenever possible.\textsuperscript{58} Because of the strong preference for face-to-face accusation, the constitutional definition of “unavailable” is stricter than the evidentiary definition.\textsuperscript{59} Rules of evi-

\textsuperscript{51} Ohio v. Roberts, 448 U.S. 56, 64-65 (1980); see also California v. Green, 399 U.S. 149, 162 (1970).
\textsuperscript{53} See California v. Green, 399 U.S. 149, 161 (1970). The confrontation clause requires only an opportunity for full and effective cross-examination. See \textit{Ohio v. Roberts}, 448 U.S. 56, 70 (1980); California v. Green, 399 U.S. 149, 168 (1970). If the defendant is given such an opportunity but fails to take advantage of it, a complaint that the defendant’s right to confrontation has been violated by virtue of insufficient cross-examination must fail. See Glenn v. Dallman, 635 F.2d 1183, 1187 (6th Cir. 1980), cert. denied, 454 U.S. 843 (1981).
\textsuperscript{54} See California v. Green, 399 U.S. at 161.
\textsuperscript{55} 448 U.S. 56 (1980).
\textsuperscript{56} Id. at 65. \textit{But see} Dutton v. Evans, 400 U.S. 74, 89 (1970) (court found value of trial confrontation so remote that it did not require prosecution to produce apparently available witness).
\textsuperscript{57} Ohio v. Roberts, 448 U.S. 56, 66 (1980).
\textsuperscript{58} Id. at 65.
\textsuperscript{59} The Washington Rules of Evidence define “unavailability” to include situations in which the declarant:

1. Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
2. Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
3. Testifies to a lack of memory of the subject matter of his statement; or
4. Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
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dence typically provide that a witness is "unavailable" if he or she does not respond to process. A witness is "unavailable" for constitutional purposes, however, only if the prosecution has made a good-faith effort to obtain his or her presence at trial.

The "indicia of reliability" requirement ensures that a statement is sufficiently trustworthy so that cross-examining the person who made the statement would not significantly aid the jury in evaluating the statement's reliability. The United States Supreme Court has not specifically defined the term "indicia of reliability." Rather, the determination of reliability has been made on a case-by-case basis.

A number of courts have examined the indicia of reliability of out-of-court statements of sexually abused children. In United States v. Nick, the Ninth Circuit Court of Appeals held that the trial court had not violated the confrontation clause by admitting statements that a three-year-old sexual assault victim had made to his mother. The court found that the statements had the requisite indications of trustworthiness because: (1) the childish terminology of the statement had a "ring of verity" and was entirely appropriate to a young child; (2) there was physical evidence on the child and his apparel to corroborate his statements; (3) the statements were made while the child was still suffering pain and distress from the assault; (4) the child's statements to his mother were directly responsive to her questions; (5) extrinsic evidence established that the defendant

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(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance ... by process or other reasonable means.

WASH. R. EVID. 804(a).

The rules also state that "[a] declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying." See, e.g., WASH. R. EVID. 804(a)(5); FED. R. EVID. 804(a)(5).

Ohio v. Roberts, 448 U.S. 56, 74 (1980); Barber v. Page, 390 U.S. 719, 724–25 (1968). "The lengths to which the prosecution must go to produce a witness ... is a question of reasonableness." Ohio v. Roberts, 448 U.S. at 74 (quoting California v. Green, 399 U.S. 149, 189, n.22 (1970)). If no possibility of procuring the witness exists, good faith may demand nothing of the prosecution; however, if there is even a remote possibility that affirmative measures might produce the witness, good faith may demand that the measures be taken. Ohio v. Roberts, 448 U.S. at 74.

See Ohio v. Roberts, 448 U.S. at 65–66. Reliability can be inferred if the statement falls within a "firmly rooted hearsay exception." Id. at 66. If the statement is not within a well-established hearsay exception, the evidence is admissible only upon a showing of "particularized guarantees of trustworthiness." Id.


One court held that the confrontation clause in a state constitution did not apply to a young rape victim's out-of-court statements because the right extends only to "witnesses," not victims. See State v. Boody, 96 Ariz. 259, 394 P.2d 196, 200, cert. denied, 379 U.S. 949 (1964).

604 F.2d 1199 (9th Cir. 1979).

Id. at 1202–04.
had the opportunity to commit the assault; and (6) the child knew the defendant and was thus unlikely to mistake his identity. In *People v. Orduno* and *Purdy v. State*, the courts upheld the admission of a sexually abused child’s statements over confrontation clause objections based on similar indications of reliability.

2. *Full and Effective Cross-Examination of a Witness Who Testifies*

   Even if a witness testifies at trial, admission of the witness’s out-of-court statements may violate a defendant’s right to confrontation if the witness is not subject to “full and effective cross-examination.” The cases define no general test of what constitutes full and effective cross-examination. Instead, the determination is made on a case-by-case basis.

   The Washington Supreme Court has stated that full cross-examination is particularly important in a prosecution for a sex crime. In *State v.*
Peterson, a rape case, the court explained that the latitude permitted in cross-examination should be at least sufficient to permit the defendant to show lack of credibility or motive for misrepresentation. Accordingly, in State v. Roberts, the court held that the trial judge had violated the defendant's right to cross-examine the thirteen-year-old victim of an alleged rape by preventing the defendant from pursuing a theory that the girl's testimony was motivated by pressure from her parents to cooperate with the prosecutor.

If the defendant's opportunity for cross-examination is insufficient because of the youth of the child, the child is considered constitutionally "unavailable." In such a case, the child's out-of-court statement will be admissible upon a determination by the trial judge that there are sufficient indicia of reliability of the child's statement, despite the lack of full and effective cross-examination.

B. The Confrontation Clause and the New Hearsay Exception for Statements by Sexually Abused Children

Washington's new hearsay exception incorporates the requirements of Ohio v. Roberts. An out-of-court statement is admissible under the exception only if the child is unavailable and the statement has "sufficient indicia of reliability." For this reason, the exception is not unconstitutional per se. Nevertheless, it may be applied in an unconstitutional manner.

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76. Id. at 466-67, 469 P.2d at 981.
78. Id. at 834-36, 611 P.2d at 1300-01.
80. For example, in United States v. Iron Shell, a nine-year-old sexual assault victim was unable to repeat on cross-examination statements that she had previously made to her doctor and a police officer. The court held that admission of these statements did not violate the defendant's confrontation right. The court based its decision on an assumption that the child was "unavailable" for constitutional purposes in that she was too young to be subjected to thorough cross-examination. United States v. Iron Shell, 633 F.2d 77, 87, cert. denied, 450 U.S. 1001 (1981). The court then determined that the statements bore sufficient indicia of reliability, presumably based on the circumstances under which they were made and the physical and mental condition of the child.
81. See WASH. REV. CODE § 9A.44.120.
82. Although the exception does not specifically require full and effective cross-examination if the child testifies, this does not make it unconstitutional per se. A person who testifies is normally subject to cross-examination by the opposing party. The new exception does not restrict this right. See infra Part II B2.

Arguably, no hearsay exception is unconstitutional per se unless no possible application of the exception would meet the Roberts requirements. For example, an exception would be unconstitutional on its face if it permitted admission of an out-of-court statement in a criminal trial only if the person who made the statement were available as a witness but was not asked to testify. No application of such an exception would be constitutional. In cases of an exception that may be applied in either a
Courts should examine specific applications of the new exception on a case-by-case basis, as they do with other hearsay exceptions, to determine whether the confrontation clause has been violated. The analysis will differ depending on whether or not the child testifies.

1. Child Does Not Testify

If a child's statement is offered under the new exception and the child does not testify, the constitutional requirements of "unavailability" and "adequate indicia of reliability" must be satisfied. A child is unavailable for constitutional purposes if the trial court determines that the child is incompetent to testify. A child is also unavailable for constitutional purposes if the child has died, cannot be found despite a search with due diligence, or cannot attend the trial due to physical disability. Although physical absence from the courtroom is not essential to a determination of unavailability, a child is not "unavailable" for constitutional purposes merely because he or she is too nervous or frightened to testify.

In order to meet the reliability requirement, a child's statement must have guarantees of trustworthiness similar to those found in United States
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v. Nick,\textsuperscript{90} Purdy v. State,\textsuperscript{91} and People v. Orduno.\textsuperscript{92} To ensure that the statement is not admitted without the requisite guarantees of trustworthiness, the hearing requirement in the new hearsay exception should be construed broadly.\textsuperscript{93} The exception requires that the court hold a hearing on the issue of reliability prior to admission of the statement. At the very least, the court should thoroughly question the person who will testify concerning the child’s out-of-court statement, any other persons who heard the statement, any persons who have knowledge of the circumstances surrounding the alleged sexual assault, and, if possible, the child. During the questioning, the court should attempt to determine: (1) the time lapse between the alleged sexual act and the child’s recital of the statement; (2) whether the statement was made in response to a leading question; (3) whether either the child or the hearsay witness has any bias against the defendant or any motive for fabricating the statement or implicating the accused; (4) whether the statement was made while the child was still upset or in pain because of the incident; (5) whether the terminology of the statement was likely to have been used by a child the age of the alleged victim; and (6) whether any event that occurred between the time of the alleged act and the time the statement was made could have accounted for the contents of the statement. In all cases, the court should require corroborative evidence showing that the defendant had the opportunity to commit the crime and that the physical condition of the child is consistent with his or her out-of-court statement.\textsuperscript{94}

The court should insist on even stronger corroborative evidence if the child is incompetent to testify. A court’s decision that a child is incompetent as a witness is based on a finding that the child is incapable of receiving accurate impressions and relating them correctly.\textsuperscript{95} If a child is too

\textsuperscript{90} 604 F.2d 1199 (9th Cir. 1979), discussed supra in text accompanying notes 65–67.

\textsuperscript{91} 343 So. 2d 4, 7 (Fla.), cert. denied, 434 U.S. 847 (1977), discussed supra in note 70 and accompanying text.

\textsuperscript{92} 80 Cal. App. 3d 738, 145 Cal. Rptr. 806 (1978), cert. denied, 439 U.S. 1074 (1979), discussed supra in note 70 and accompanying text.

\textsuperscript{93} The exception does not describe the type of hearing that is required. A broad construction of the hearing requirement is necessary to guard against the use of ex parte or summary proceedings to make hearsay determinations under the exception.

\textsuperscript{94} The new exception specifically requires corroborative evidence only if the child is unavailable. See Wash. Rev. Code § 9A.44.120.

\textsuperscript{95} See Wash. R. Crim. P. 6.12(c). Determination of the competency of a child lies within the discretion of the trial court. See, e.g., State v. Allen, 70 Wn. 2d 690, 692, 424 P.2d 1021, 1022 (1967); State v. Ridley, 61 Wn. 2d 457, 459, 378 P.2d 700, 702 (1963). Trial courts have based competency determinations under Wash. R. Crim. P. 6.12(c) and a similar provision in Wash. Rev. Code § 5.60.050 on whether a child (1) understands his or her obligation to speak the truth on the witness stand; (2) had sufficient mental capacity at the time of the occurrence concerning which he or she will testify in order to receive an accurate impression of it; (3) has a memory sufficient to retain an independent recollection of the occurrence; (4) has the capacity to express in his or her own words

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young to describe an alleged sexual assault accurately in court, the child is arguably also too young to describe the assault accurately out of court. For this reason, a statement of a child who is incompetent to testify should be admitted only if convincing corroborative evidence indicates that the child was sexually assaulted and that the defendant was the only person who had a reasonable opportunity to commit the crime.

In the case of conflicting or questionable evidence regarding the alleged act of sexual assault or the reliability of the child’s statement, it may be appropriate to hold a full adversary hearing to determine whether the statement is reliable. At such a hearing, defense counsel could cross-examine the person who will testify concerning the hearsay statement and both sides could present evidence. Any substantial doubts concerning reliability should be resolved in favor of the defendant because of the importance of the confrontation right and the highly prejudicial effect of a child’s statement.

2. **Child Testifies**

An out-of-court statement by a child who testifies at trial should be admitted under the new exception only if the defendant is given an opportunity to fully and effectively cross-examine the child. A child who testifies at trial is on the same footing as any other witness with respect to cross-examination. The trial court determines the scope and extent of cross-examination, and great latitude is usually allowed.

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100. Id.
If the trial judge restricts a defendant’s right to cross-examine a child or cross-examination is ineffective due to lack of cooperation from the witness, the defendant’s confrontation right may be violated. If the ineffective cross-examination is a result of the youth of the child, the child’s out-of-court statement may be admissible over confrontation clause objections if the statement has adequate indicia of reliability.\footnote{101} In all other cases, the defendant’s confrontation right should at least include the opportunity during cross-examination to expose any lack of credibility and any motive the child may have had to fabricate his or her out-of-court statement.

III. CONCLUSION

Washington’s new statutory hearsay exception will eliminate the need to force out-of-court statements made by sexually abused children within the requirements of the excited utterance exception. Instead, courts may determine the reliability of statements by evaluating all relevant factors, including corroborative evidence.

Because the exception incorporates the requirements set forth in \textit{Ohio v. Roberts}, it is not unconstitutional per se. Nevertheless, specific applications of the exception may be unconstitutional if the trial court fails to use proper criteria and procedures to evaluate reliability. The determination of whether a specific application of the exception violates a defendant’s confrontation right should be made on a case-by-case basis, in the same manner that the constitutionality of specific applications of other hearsay exceptions is tested.

\textit{Sheryl K. Peterson}

\footnote{101. See supra notes 79–80 and accompanying text.}