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Idaho v. Wright: Who Can Speak For the Children Now?

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IDAHO V. WRIGHT: WHO CAN SPEAK FOR THE CHILDREN NOW?

INTRODUCTION

In *Idaho v. Wright*,[1] a divided United States Supreme Court[2] held that admission of a child abuse victim's hearsay testimony violated the defendant's Sixth Amendment right to be confronted with adverse witnesses.[3] The Court held that the hearsay testimony of the unavailable child sexual abuse victim to a pediatrician, who had extensive experience in child abuse cases, lacked the 'particularized guarantees of trustworthiness' which are required for admission under the Confrontation Clause.[4]

The Sixth Amendment to the United States Constitution safeguards a defendant's right "to be confronted with the witnesses against him" in a criminal trial. The Supreme Court has not read the right to confrontation to be an absolute right.[5] In apparent contradiction to the Confrontation Clause, the Court has recognized that certain testimony is so valuable that justice is better served if such testimony is admitted into evidence.[6] Although the Court has permitted the testimony of unavailable adverse witnesses to be admitted into evidence for nearly a century,[7] hearsay testimony, by its very nature, impinges upon constitutional rights of confrontation. Thus, the inherent friction between hearsay testimony and the defendant's right to confront adverse witnesses has been one of the most difficult questions that the Court has faced.[8]

This note discusses how the Court reached the decision in *Idaho v. Wright* to exclude the hearsay testimony of a child abuse victim. The note examines the Court's reasoning and the effects which the exclusion of hearsay testimony of child abuse victims may have on future prosecutions. The note concludes that the Court's decision is likely to add chaos into the already difficult and complex arena of child abuse prosecution.

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[1] 110 S.Ct. 3139 (1990).

[2] Justice O'Connor delivered the opinion of the Court, in which Brennan, Marshall, Stevens, and Scalia, J.J., joined. Kennedy, J., filed a dissenting opinion, in which Rehnquist, C.J., and White and Blackmun, J.J., joined.

[3] *Wright*, 110 S.Ct. at 3139.

[4] *Id.* at 3149-50.

[5] *See, e.g.*, Mattox v. United States, 156 U.S. 237, 243 (1895); United States v. Inadi, 475 U.S. 387, 394 (1986).

[6] *See, e.g., Mattox*, 156 U.S. at 243.

[7] *See, Id.*

[8] *See, e.g.*, J. MYERS, CHILD WITNESS LAW AND PRACTICE 297-300 (1987).

BACKGROUND

The Confrontation Clause

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the defendant shall enjoy the right . . . to be confronted with the witnesses against him."[9] The right to confrontation illustrates the Framers' belief that confrontation is an essential and fundamental right of the defendant in obtaining a fair criminal trial.[10] The Due Process Clause of the Fourteenth Amendment requires the states to permit an accused in a state criminal trial to exercise the Sixth Amendment right to confront adverse witnesses.[11]

The mission of the Confrontation Clause was to promote the accuracy of the truth-determining process.[12] The courts believed that face-to-face confrontation ensured that the declarant spoke the truth while being subjected to the "ordeal of a cross-examination."[13] Because an accuser who must face the accused is less likely to lie, the courts believed that face-to-face confrontation allowed the trier of fact to detect false statements.[14] Thus, the law preferred face-to-face confrontation.[15]

The law has been slow to change the preference for face-to-face confrontation.[16] As Justice Scalia noted, "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'"[17] Due to this deep rooted philosophy, the courts have been reluctant to allow a criminal defendant's rights to slip away.

The defendant's ability to confront adverse witnesses in a criminal trial serves three purposes:[18] (1) to insure that the witness' statements are given under oath, which will thus serve to impress upon the witness the gravity of the criminal prosecution and guard against false statements through the threat of perjury; (2) to permit the jury to observe the witness' demeanor, which will aid the jury in assessing

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[9] U.S. CONST. amend. VI (1791).

[10] Lee v. Illinois, 476 U.S. 530, 540 (1986), *overruled* on on other grounds by Bourjaily v. United States, 483 U.S. 171 (1987). The Court described the right to confrontation as "primarily a functional right that promotes reliability in criminal trials." *Id.* The Court noted the underlying reasoning of selective incorporation which the Court articulated in Gideon v. Wainwright, 372 U.S. 335 (1963). Specifically, "a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment." Pointer v. Texas, 380 U.S. 400, 403 (1965) (quoting *Gideon*, 372 U.S. at 342).

[11] *Id.*

[12] Dutton v. Evans, 400 U.S. 74, 89 (1970).

[13] *Mattox*, 156 U.S. at 244.

[14] *Id.* at 242-243.

[15] *Id.* at 242.

[16] *See, e.g., Lee*, 476 U.S. at 540; *Mattox*, 156 U.S. at 242; Ohio v. Roberts, 448 U.S. 56, 63 (1980); Coy v. Iowa, 108 S.Ct. 2798, 2801 (1988). The Court in *Coy* referred to the preference for face-to-face confrontation in stating: "[w]hat was true of old is no less true in modern times." *Id.*

[17] *Coy*, 108 S.Ct. at 2801 (quoting *Pointer*, 380 U.S. at 404).

[18] California v. Green, 399 U.S. 149, 158 (1970).

the witness' credibility; and (3) to force the witness to undergo cross-examination. The common focus of the three underlying purposes of the Confrontation Clause rests upon the individual witness.[19]

Of the underlying purposes of the hearsay exceptions, cross-examination is the most important.[20] Moreover, cross-examination is perhaps the best method[21] to discover the truth. Cross-examination exposes the falsity of a statement through rigorous questioning.[22] A part of rigorous questioning involves leading questions which are designed to draw the witness away from the truth.[23] Leading questions serve as the principal tool and hallmark of cross-examination.[24] Rigorous questioning allows the trier of fact to measure a statement's reliability.[25]

Reliability appears to be the key in the controversy over whether to admit hearsay testimony. The assurance of reliability protects defendants in criminal cases.[26] A statement is reliable if the surrounding facts and circumstances suggest that it is unusually likely to be trustworthy.[27]

The Hearsay Rule and Its Exceptions

The evidentiary rules reflect legal and policy determinations of the scope of admissible evidence.[28] The only evidence which may be admitted is that evidence which satisfies the technical requirements of the evidentiary Rules.[29]

The Federal Rules of Evidence have defined hearsay as those out-of-court statements which are offered into evidence to prove the truth of the matter asserted.[30] Hearsay is inadmissible unless the rules of evidence, the Supreme Court or an Act of Congress permit its admittance.[31] Public policy sometimes requires courts to admit certain evidence.[32] The Court and the drafters of the Federal Rules of Evidence have recognized certain types of hearsay as evidence that should not be lost:

[19] Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986).

[20] *Mattox*, 156 U.S. at 242-43. "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Id.*

[21] *See, e.g.*, Roberts, 448 U.S. at 63-64.

[22] *See, e.g., Id.*, (quoting *Mattox*, 156 U.S. at 242-243).

[23] *See, e.g., Id.* at 71.

[24] *Id.* at 70.

[25] *See, e.g., Id.* at 63-64 (quoting *Mattox*, 156 U.S. at 242-243).

[26] *Pointer*, 380 U.S. at 404.

[27] *See Dutton*, 400 U.S. at 89.

[28] *Bourjaily* v. United States, 483 U.S. 171, 175 (1987).

[29] *Id.*

[30] FED. R. EVID. 801(c).

[31] FED. R. EVID. 802.

[32] FED. R. EVID. 803 advisory committee's note.

"Common sense tells that much evidence which is not given under the three conditions (in the Anglo-American tradition) [(1) under oath; (2) in the personal presence of the trier of fact; and (3) subject to cross-examination] may be inherently superior to much that is."[33] To this end, twenty-four exceptions to the rule against hearsay exist where the availability of declarant is immaterial;[34] five exceptions to the rule exist where the declarant is unavailable;[35] three exceptions to the rule exist where the statements is the witness' prior statement;[36] and five exceptions exist where the admission is that of a party opponent.[37]

The Relationship Between the Confrontation Clause and Hearsay Exceptions

The Confrontation Clause collides with the Rules of Evidence.[38] The Court has recognized that while the Confrontation Clause is intended to exclude some hearsay,[39] the Confrontation Clause does not preclude the admittance of all hearsay.[40] The Confrontation Clause contemplates only evidence marked with such inherent trustworthiness that there is no material departure from the reason for the general rule.[41] The existence of adequate assurances of credibility is the fundamental touchstone for the admittance of hearsay.[42]

The Court has consistently refused to "map out" a theory of the Confrontation Clause that would determine the validity of the residual hearsay exception.[43] Instead, the Court has set forth a "general approach" to determine when the Confrontation Clause requirements have been met and when they will permit hearsay evidence to be admitted.[44] First, the party seeking to admit the hearsay evidence must demonstrate the necessity for the hearsay statement.[45] Unavailability of the declarant establishes necessity.[46] Second, the statement of the unavailable declarant must bear adequate 'indicia of reliability.'[47] Experience has shown the court that certain hearsay exceptions, such as the excited utterance[48] and dying declaration,[49] are so inherently trustworthy that admission of virtually any evidence

[33] FED. R. EVID., Article VIII, advisory committee's introductory note.
[34] FED. R. EVID. 803(1)-(24).
[35] FED. R. EVID. 804(b)(1)-(5).
[36] FED. R. EVID. 801(d)(1)(A-C).
[37] FED. R. EVID. 801(d)(2)(A-E).
[38] *See Dutton*, 400 U.S. at 73.
[39] *Roberts*, 448 U.S. at 63.
[40] *Dutton*, 400 U.S. at 80.
[41] *Roberts*, 448 U.S. at 65-66.
[42] FED. R. EVID. 803 advisory committee notes.
[43] *Green*, 399 U.S. at 162.
[44] *Roberts*, 448 U.S. at 65.
[45] *Id.*
[46] The court may declare a child witness unavailable for purposes of the necessity requirement. *See, e.g., Wright*, 110 S.Ct. at 3146.
[47] *Roberts*, 448 U.S. at 66.
[48] FED. R. EVID. 803(2).
[49] FED. R. EVID. 804(b)(2).

within the particular exception comports with the "substance of the constitutional protection."[50]

The Court has recognized that while the Confrontation Clause and the hearsay exceptions are "generally designed to protect similar values, it is quite another 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."[51] Constitutional considerations must occasionally yield to public policy and the necessities of a case to protect the interest in admitting reliable hearsay testimony.[52]

Child Abuse Considerations

Since most child abuse occurs "behind closed doors," it is one of the most difficult crimes to detect and prosecute.[53] Child victims of sexual abuse feel vulnerable and guilty, particularly when the abuser is the parent.[54] Even an outside observer can understand why the child sexual abuse victim would hesitate and refuse to come forward with allegations of sexual abuse.[55] Even when the child sexual abuse victim does come forward, particularly difficult problems are encountered in the prosecution. Presenting especially difficult dilemmas are cases in which the crime leaves no physical traces, the victim is very young, the victim is directly or indirectly the key witness against the alleged abuser, and the case involves incest.[56] The increase in child abuse prosecutions thus strains the traditional notions of procedural justice.[57] To address this problem, at least twenty states have enacted hearsay exception statutes that relate to child abuse prosecutions.[58]

STATEMENT OF THE CASE

Respondent Laura Lee Wright and Wright's male companion Robert Giles were jointly charged with sexually victimizing Wright's two children in violation of Idaho Code sec. 18-1508 (1987).[59] At the time of the alleged abuse, Wright's

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[50] *Roberts*, 448 U.S. at 66 (quoting *Mattox*, 156 U.S. at 244).

[51] *Green*, 399 U.S. at 155. The Court stated further: [w]e 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." *Id.* at 155-156.

[52] *Mattox*, 156 U.S. at 243.

[53] Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987).

[54] *Id.*

[55] *See Id.*

[56] Nelson v. Farrey, 874 F.2d 1222, 1224 (1989), *cert. denied*, Nelson v. Farrey, 107 L. Ed. 2d 831 (1990).

[57] *Id.*

[58] M. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 534 (1988) [hereinafter *Confrontation Clause*].

[59] *Wright*, 110 S. Ct. at 3143.

children were 2 1/2 and 5 1/2 years old.[60]

The natural father of the older daughter agreed to alternate custody with Wright every six months.[61] In November 1986, the older daughter told Cynthia Goodman, the girlfriend of her natural father, that Giles had had sexual intercourse with her while Wright held her down and covered her mouth.[62] The older daughter also told Goodman that she had seen Wright and Giles similarly abuse Wright's younger daughter.[63]

The next day, Goodman reported the allegations to the police and took the older daughter to the hospital.[64] Dr. John Jambura, a pediatrician with extensive experience in child abuse cases, was one of the examining physicians.[65] A medical examination revealed evidence of sexual abuse.[66] The police and welfare officials assumed custody of the younger daughter for protection and investigation.[67] The next day, Dr. Jambura examined the younger daughter.[68] From this examination, Dr. Jambura found evidence which strongly suggested that the younger daughter had been the victim of sexual abuse with vaginal contact two to three days prior to the examination.[69]

The trial court conducted a voir dire examination of the younger daughter at the joint trial of respondent and Giles.[70] The trial court found that the younger daughter was incapable of communicating to a jury.[71] The prosecution and the parties agreed with the trial court's determination.[72]

Under Idaho's residual hearsay exception, the trial court admitted Dr. Jambura's testimony[73] of the statements which the younger daughter had made in the

[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] The relevant portion of Dr. Jambura's testimony is as follows:

"Q. [By the prosecutor] Now, calling your attention then to your examination of Kathy Wright on November 10th. What would you describe any interview dialogue that you had with Kathy at that time? Excuse me, before you get into that, would you lay a setting of where this took place and who else might have been present?

"A. This took place in my office, in my examining room, and, as I recall, I believe previous testimony I said that I recall a female attendant being present, I don't recall her identity.

"I started out with basically, `Hi, how are you,' you know, `What did you have for breakfast this

examining room.[74] Dr. Jambura acknowledged that a drawing that had been used during the interview had been discarded and that his summary notes of the conversation were not detailed and did not reflect any changes in the child's affect or attitude.[75]

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morning?' Essentially a few minutes of just sort of chitchat.

"Q. Was there response from Kathy to that first- those first questions?

"A. There was. She started to carry on a very relaxed animated conversation. I then proceeded to just gently start asking questions about, `Well, how are things at home,' you know, those sorts. Gently moving into the domestic situation and then moved into four questions in particular, as I reflected in my records, `Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?' And again we then established what was meant by pee-pee, it was a generic term for genital area.

"Q. Before you get into that, what was, as best you recollect, what was her response to the question 'Do you play with daddy?

"A. Yes, we play-I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.

"Q. And 'Does daddy play with you?' Was there any response?

"A. She responded to that as well, that they played together in a variety of circumstances and, you know, seemed very unaffected by the question.

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

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

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

"A. Yes.

"Q. What did you observe?

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

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

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

[74] Idaho's residual hearsay exception provides in relevant part:

"Rule 803. Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

. . . . . .

"(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

[75] *Wright*, 110 S.Ct. at 3144.

The jury found respondent and Giles guilty of two counts of lewd contact with a minor under age 16 and sentenced each defendant to 20 years imprisonment.[76]

Respondent and Giles separately appealed only from the conviction involving the younger daughter.[77] Giles failed to raise a constitutional challenge to the admittance of Dr. Jambura's testimony under Idaho's residual hearsay exception.[78] The Idaho Supreme Court affirmed Giles' conviction.[79] The respondent argued that admission of Dr. Jambura's testimony under the residual hearsay exception violated her Confrontation Clause rights.[80] The Idaho Supreme Court agreed with the respondent's contention, reversed the respondent's conviction and remanded the case for a new trial.[81] The Idaho Supreme Court reasoned that admission of the inculpatory hearsay testimony violated the respondent's federal constitutional right to confront adverse witnesses.[82] The court found Dr. Jambura's testimony of the interview to be too unreliable to be admitted.[83] Specifically, the court found that the younger daughter's statements "lacked the particularized guarantees of trustworthiness necessary to satisfy the requirements of the Confrontation Clause" and that the trial court erroneously admitted them.[84]

The United States Supreme Court granted certiorari to decide whether the State of Idaho had proven that the younger daughter's incriminating statements to Dr. Jambura bore sufficient indicia of reliability to withstand scrutiny under the Confrontation Clause.[85] The Court held that the State of Idaho had not satisfied its burden of proof and affirmed the Idaho Supreme Court's decision.[86]

ANALYSIS

'Indicia of Reliability'

The Court followed the two prong "general approach" of *Ohio v. Roberts*[87] to decide whether Dr. Jambura's testimony should have been admitted.[88] Because

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[76] *Id.* at 3145.
[77] Idaho v. Wright, 116 Idaho 382, 775 P.2d 1224 (1989); State v. Giles, 115 Idaho 984, 772 P.2d 191 (1989).
[78] *Giles*, at 984, 772 P.2d at 191.
[79] *Id.*
[80] *Wright*, at 383, 775 P.2d at 1225.
[81] *Id.* at 382, 775 P.2d at 1224.
[82] *Wright*, at 385, 775 P.2d at 1227.
[83] *Id.*
[84] *Wright*, 110 S.Ct. at 3146-48.
[85] 110 S.Ct. at 833.
[86] *Wright*, 110 S.Ct. at 3152-53.
[87] *Roberts*, 448 U.S. at 65-66. The first prong is the demonstration of the unavailability of the declarant whose statement is sought to be used against the defendant. The second prong requires a statement to bear adequate indicia of reliability. Reliability can be inferred if the evidence falls within a firmly-rooted hearsay exception. Otherwise, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.*
[88] *Wright*, 110 S.Ct. at 3146-48.

neither party questioned whether the child was available,[89] the Court considered the existence of adequate 'indicia of reliability' to be of primary importance.[90]

The Court noted that under *Roberts*, a court may deem testimony as exhibiting adequate 'indicia of reliability'[91] in two circumstances: (1) where the hearsay statement falls within a firmly rooted hearsay exception;[92] or (2) where the hearsay statement is supported by a "showing of particularized guarantees of trustworthiness."[93] The Court has consistently refused to consider the residual hearsay exception to be a firmly rooted hearsay exception.[94] This has meant that child hearsay testimony must bear 'particularized guarantees of trustworthiness.'[95]

While the lower court focused upon the lack of procedural safeguards used in the child's interview, the Court noted that the Constitution does not impose "a fixed set of procedural prerequisites to the admission of such [hearsay] statements at trial."[96] "Out-of-court statements made by children regarding sexual abuse arise in a wide variety of circumstances."[97] The Supreme Court of Idaho articulated commendable procedural safeguards. However, interview techniques could become more important than the substance of the allegations if the Court so heavily emphasizes procedure. The procedural safeguards do not accommodate the practical necessities that may arise when children make allegations of sexual abuse.[98] The Court wisely declined to imply "a preconceived and artificial litmus test" into the Confrontation Clause for the "procedural propriety of professional interviews" during which children may make incriminating statements.[99]

'Totality of the Circumstances'

The Court expressly held that "'particularized guarantees of trustworthiness' must be shown from the totality of the circumstances."[100] The Court cannot formulate a mechanical test to determine the reliability of out-of-court statements.[101] Only those circumstances that surround the making of the statement and that render the declarant particularly trustworthy are relevant.[102] The 'particularized guarantees

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[89] The trial court found the child to be unable to communicate to the jury. *Id.* at 3143.
[90] *Id.* at 3147-3153.
[91] *Id.* at 3147.
[92] State v. Ryan, 103 Wash. 2d 165, 691 P.2d 197 (1984). "Exceptions to the general rule are based on the historically established trustworthiness of the statement." *Id.* at 180, 691 P.2d at 204.
[93] *Roberts*, 448 U.S. at 66.
[94] *See, Green*, 399 U.S. at 155-156; *Dutton*, 400 U.S. at 86; *Inadi*, 475 U.S. at 393, n.5.
[95] *Wright*, 110 S.Ct. at 3148.
[96] *Id.*
[97] *Id.*
[98] *See, e.g.*, Nelson, 874 F.2d at 1229 (videotaping not feasible where psychologist began therapy sessions before psychologist knew criminal charges would be filed).
[99] *Wright*, 110 S.Ct. at 3148.
[100] *Id.*
[101] Barker v. Morris, 761 F.2d 1396, 1400 (1983), *cert. denied*, 474 U.S. 1063 (1986).
[102] *Wright*, 110 S.Ct. at 3149.

of trustworthiness' "must be at least as reliable as evidence admitted under a firmly rooted hearsay exception."[103] The hearsay statement is excluded under the Confrontation Clause "unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial."[104] Thus, corroborating evidence cannot be used to determine the reliability of child hearsay statements. Only the circumstances surrounding the making of the statement are relevant under the Court's totality of the circumstances examination.[105] The Court noted: "We think the 'particularized guarantees of trustworthiness' required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief."[106]

In reaching the decision, the Court relied upon the rationale for permitting exceptions to the general rule against hearsay evidence. Specifically, the Court found that there may be instances where the test of cross-examination may be superfluous and the proffered testimony is "free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation."[107] The Court's opinion refused to allow corroborating evidence, in whole or in part, to determine trustworthiness.[108] The Court believed that corroborating evidence is merely bootstrapped onto the trustworthiness of other evidence at trial.[109] Because the proffered evidence must be so trustworthy that cross-examination would not aid the fact-finding process, the Court refused to allow "presumptively" unreliable evidence to be admitted.[110] Presumptively unreliable evidence is that hearsay evidence which fails to fall within one of the firmly rooted exceptions or which fails to fulfill the adequate indicia of reliability.[111]

The Court rendered such a decision notwithstanding the many lower court decisions that have relied upon corroborating evidence to establish reliability.[112] As Justice Kennedy stated in the dissent: "It is a matter of common sense for most

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[103] *Id.*

[104] *Id.*

[105] *Id.* at 3152.

[106] *Id.* at 3149.

[107] *Wright*, 110 S.Ct. at 3149 (quoting 5 J. Wigmore, Evidence sec. 1420, p. 251 (J. Chadbourne rev. 1974)). *See also, Barker*, 761 F.2d at 1400-01. "While always central to Confrontation Clause analysis and even dispositive in some cases, cross-examination is not required in every case. . . . Thus, circumstances other than prior cross-examination of the declarant by the defendant can show evidence to be trustworthy to a degree that warrants its submission to the jury." *Id.*

[108] *Wright*, 110 S.Ct. at 3153.

[109] *Id.* at 3150.

[110] *Id.*

[111] *See, e.g., Id.* at 3147.

[112] *See, e.g., Nelson*, 874 F.2d at 1222; State v. J.C.E., 235 Mont. 264, 767 P.2d 309 (1988); State v. Sorenson, 143 Wis. 2d 226, 421 N.W.2d 77 (1988); Gregory v. State of N.C., 900 F.2d 705 (4th Cir. 1990); Ellison v. Sachs, 769 F.2d 955 (4th Cir. 1985); United States v. Dorian, 803 F.2d 1439 (8th Cir. 1986); Jones v. Dugger, 888 F.2d 1340 (11th Cir. 1989).

people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence."[113] Corroboration strengthens the reliability of an out-of-court statement.[114] The reliability of a child's statement is enhanced through expert testimony which asserts that a child was sexually abused.[115]

Future Implications

In ten years, the incidence of reported child sexual abuse increased from less than 1% per 10,000 children in 1976 to nearly 18% in 1985.[116] This increase may have resulted from the mandatory child abuse reporting laws which all 50 states have enacted.[117]

Recognizing that the traditional hearsay exceptions inadequately assist child sexual abuse prosecutions,[118] many state legislatures enacted hearsay exceptions specifically designed for child sexual abuse victims.[119] At least ten other states have enacted hearsay exception statutes applicable to child sexual abuse prosecutions.[120] The legislatures have slowly realized that a judicial system designed by adults for adults simply does not address the special needs of child sexual abuse victims. Indeed, one commentator has called for all states to enact new hearsay exceptions designed specifically to allow the admissibility of out-of-court statements of child sexual abuse victims.[121]

While the states have attempted to address the growing problem of child sexual abuse prosecutions, the Court's decision in *Idaho v. Wright* appears to dampen this progress. In refusing to allow corroborating evidence of child hearsay statements, the Court has failed to recognize the specific nature of child sexual abuse cases.[122] Child abuse cases, by their very nature, lack an abundance of admissible evidence.[123] Child abuse, particularly sexual abuse, generally occurs behind closed doors, not in public for all to witness. Familial witnesses to the abuse are reluctant to come forward, often due to the abuser's influence and intimidation.[124] The

[113] *Wright*, 110 S.Ct. at 3153.

[114] Myers, *supra* note 8, at 364.

[115] *Id.* at 365.

[116] G. Nuce, *Child Sexual Abuse: A New Decade for the Protection of our Children*? 39 EMORY L.J. 581, 581 (1990).

[117] *See*, L. Plaine, *Evidentiary Problems in Criminal Child Abuse Prosecutions*, 63 GEO. L.J. 257, 260-261 (1974).

[118] D. Capra, *Innovations in Prosecuting Child Sexual Abuse*, NEW YORK L.J. 3, 3 (Nov. 9, 1989).

[119] W. Mlyniec and M. Dally, *See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights*? 40 U. MIAMI L. REV. 115, 116, n.3 (1985).

[120] Graham, *supra* note 58, at 534.

[121] M. Graham, *Indicia of Reliability and Face to Face Confrontations: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. Miami L. Rev. 19, 94-95 (1985).

[122] The Supreme Court of Montana noted that "special consideration must be given to proffered hearsay testimony when the child declarant is unavailable as a witness." *J.C.E.*, at 273, 767 P.2d at 315.

[123] Plaine, *supra* note 117, at 259.

[124] *See, generally, Id.* at 260.

prosecutor is left to rely upon the hearsay, character and circumstantial evidence to prove the guilt of the accused beyond a reasonable doubt.[125] Thus, relatively few child sexual abuse prosecutions actually result in a conviction.[126]

The residual hearsay exception is an appropriate method to admit child hearsay statements if the statements are "otherwise proven sufficiently trustworthy."[127] One commentator has noted that a general exception to the hearsay rule in all cases of alleged child sexual abuse, however, might be unfair to a defendant.[128] A defendant in such a position would be required to refute damaging hearsay evidence without the benefit of cross-examination.[129] However, this result also occurs when other hearsay testimony which falls under a firmly rooted hearsay exception is admitted in child abuse cases.[130] Therefore, a compelling need exists for admission of hearsay evidence which arises from the child sexual assault victim's inability or refusal to verbally express themselves in court.[131]

The Supreme Court of Wisconsin has recognized the need to admit child hearsay testimony in alleged sexual abuse cases.[132] The Wisconsin courts have focused upon five factors that its courts should examine to determine whether a child's statements, under the residual hearsay exception, possess the sufficient guarantees of trustworthiness to be admitted.[133] These factors include: (1) the attributes of the child making the statement; (2) the person to whom the statement was made; (3) the circumstances under which the statement was made; (4) the content of the statement itself; and (5) other corroborating evidence.[134] Thus, Wisconsin, like many other states, has explicitly deemed 'other corroborating evidence' to be a valuable aid. Yet now, the United States Supreme Court's *Wright* decision appears to exclude, for Confrontation Clause purposes, such other corroborating evidence regardless of common sense's and prior judicial philosophy's recommended scope of admissible evidence.

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[125] *See, generally, Id.*

[126] Nuce, *supra* note 116.

[127] *Sorenson*, at 243, 421 N.W.2d at 84.

[128] Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 820 (1985).

[129] *Id.*

[130] *See, e.g., Dorian*, 803 F.2d 1439 (district court did not abuse its discretion in admitting the testimony of a foster mother which related a statement made by a five-year-old sexual assault victim where the victim could not testify in a meaningful way due to her age and fright.); Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050 (1983), *cert. denied*, 464 U.S. 1071 (1984) (child's incriminating declarations to nurses and a police officer were "excited utterances" within the ambit of the hearsay exception so that defendant's Sixth Amendment right to confrontation was not violated by the admission.); United States v. Iron Shell, 633 F.2d 77 (1980), *cert. denied*, 450 U.S. 1001 (1981) (district court properly admitted testimony of doctor who examined nine-year-old victim concerning statements made by her following the assault, inasmuch as all of her statements were related to her physical condition and were consistent with the motive to promote treatment).

[131] *Sorenson*, at 243, 421 N.W.2d at 84.

[132] *Id.* at 243, 421 N.W.2d at 834-84.

[133] *Id.* at 245, 421 N.W.2d at 84.

[134] *Id.* at 245-46, 421 N.W.2d at 84-85.

Obviously, the interests of both the child sexual abuse victim and the defendant must be adequately protected. As the Supreme Court of Arizona stated:

Society's need to prosecute accused abusers is no greater than its need to preserve the Constitution. We refuse to repeal the confrontation clause for child abuse cases. Child-victims' out-of-court statements are admissible only when . . . the rules of evidence and the principles announced in *Roberts* are fully satisfied. However, when these elements are satisfied, and . . . the child's hearsay statements are the most reliable evidence available, it would be a perversion of the confrontation clause to exclude the evidence. The confrontation clause was intended to give the defendant the benefit of what is usually the most reliable procedure, not to absolutely preclude society's use of the most reliable evidence available.[135]

CONCLUSION

The very nature of a prosecution of an alleged child sexual abuser places the child in an adversarial posture against the defendant. Such a prosecution requires the prosecutor to offer every piece of relevant information to the trier of fact. The Court's decision in *Idaho v. Wright*[136] has taken away one of the methods which prosecutors have utilized to demonstrate the reliability of hearsay statements: corroboration. By excluding such potentially vital information, the Court has rejected a common sense approach to aid in determining the reliability of the proffered testimony and has thereby hindered the search for the truth. Thus, the sexually victimized children remain powerless but for the adults who try to speak out on their behalf.

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[135] State v. Robinson, 153 Ariz. 191, 205, 735 P.2d 801, 815 (1987).

[136] 110 S. Ct. 3139.