Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception

I. INTRODUCTION

Children are frequently victims of sexual abuse,[1] yet courts often find it difficult to convict the person the child claims is responsible. Court surroundings intimidate children, often making them poor witnesses. In trying to elicit a complete statement from a child, a prosecutor may appear to put words and ideas into the child's mouth. As a result, a child's out-of-court statement may be more complete and descriptive than the one made in court. In addition, the child may be too young to testify, so that her account can only be offered into evidence through hearsay.[2]

In response to the problem, the Washington Legislature created a new hearsay exception.[3] That Act permits admission of a

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1. The following number of child sexual assault victims were treated at the Sexual Assault Center at Harborview Hospital in 1980:

0-4 years old, 127
5-8 years old, 172
9-12 years old, 155
13-16 years old, 275

SEXUAL ASSAULT CENTER, HARBORVIEW HOSPITAL, SEATTLE, WASH., CLIENT CHARACTERISTICS 5 (1980).

2. *See generally* Stafford, *The Child as a Witness*, 37 WASH. L. REV. 303 (1962) [hereinafter cited as Stafford]; Comment, *Youth as a Bar to Testimonial Competency*, 8 ARK. L. REV. 106 (1954) [hereinafter cited as *Testimonial Bar*].

3. WASH. REV. CODE § 9A.44.120 (Supp. 1982). The Act 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

hearsay statement about sexual abuse by a child under the age of ten upon a finding by the court that the circumstances and content of the statement indicate that it is sufficiently reliable to be admitted into evidence. If the child is unavailable as a witness, the Act requires corroboration of the criminal act as well. Whenever this new exception is invoked, the party against whom the statement will be used must receive notice of the intent to use the statement sufficiently in advance so that there is adequate time to prepare a defense.

The Act fails to define unavailability, and in doing so, it condones the admission of hearsay by children who are too young to testify. Admission of this type of hearsay directly conflicts with the principles underlying the established hearsay exceptions and the confrontation clause.[4] Reliability is the primary consideration in determining whether to admit hearsay. Washington courts admit hearsay of incompetent child declarants under very limited circumstances. The Act expands the degree to which this type of hearsay can be used to a point where it is no longer consistent with the principles underlying traditional hearsay exceptions. As a result, the Act is poor law, since it violates the principles basic to all hearsay exceptions, and is unconstitutional, since it fails to meet the standards required by the confrontation clause.

This Comment will first analyze the Act in the light of the principles that form the basis for the hearsay rule and its exceptions. It will then examine the effect of the Act on the preexisting hearsay rules. Next, it will compare the concept of unavailability as used in the hearsay exceptions with the concept of incompetence; both concepts are then analyzed according to the requirements of the hearsay rules and the confrontation clause. The Comment will conclude that the Act is unconstitutional because it permits admission of hearsay of testimonially incom-

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adverse party with a fair opportunity to prepare to meet the statement.

4. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. *See* Pointer v. Texas, 380 U.S. 400 (1965) (confrontation clause applies to the states through the fourteenth amendment).

The Act also violates the Washington Constitution's confrontation clause which gives the accused the right to confront his accuser "face to face." WASH. CONST. art. I, § 22.1. The analysis in this Comment, however, focuses on the confrontation clause of the United States Constitution, because the Washington Supreme Court follows the U.S. Supreme Court's interpretation of the federal confrontation clause. *See infra* notes 61-63 and accompanying text.

petent children.

II. The Available Declarant

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[5] Courts generally exclude hearsay because it is considered less reliable than testimony by a person with firsthand knowledge of the facts.[6] When a child tells an adult that someone sexually abused him or her, and that statement is offered to prove the truth of the child's assertion, the statement is hearsay.

When a declarant's out-of-court statement is allowed into evidence, the court is denied the opportunity to see the declaration tested under cross-examination. The trier of fact has nothing against which to measure the value of the evidence. Some kinds of hearsay, however, are considered so reliable that they are admissible as substantive evidence. In each case, some special necessity must exist for admitting the hearsay.[7] Usually, this is because the declarant is either unavailable, or the hearsay by its nature is thought to be as reliable as the in-court statement.[8] In addition, something either in the content or the circumstances surrounding the statement must demonstrate that it is particularly reliable.[9] For example, present sense impressions are considered trustworthy because the contemporaneity of the event and declaration negate the likelihood of deliberate or conscious misrepresentation.[10] Similarly, dying declarations regarding the cause of death are admissible because the fear of death is considered to make the declarant's statement trustworthy.[11] The

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5. Fed. R. Evid. 801; Wash. R. Evid. 801. "Hearsay is not admissible except as provided by these rules or other rules. . . ." Fed. R. Evid. 802; Wash. R. Evid. 802.

6. 4 J. Weinstein & M. Berger, Weinstein's Evidence 800-9 (1982) [hereinafter cited as J. Weinstein]. The presence of the witness in court under oath solemnifies the occasion; the jury can observe the witness and the defendant can cross-examine. The three together result in an expectation that the witness will tell the truth. Without those three conditions present, testimony may be unreliable "because faults in perception, memory, and narration of the declarant will not be exposed." *Id.* at 800-11.

7. 5 J. Wigmore, Evidence in Trials at Common Law § 1420 (1974) [hereinafter cited as J. Wigmore].

8. *Id.*

9. Fed. R. Evid. 803, Notes of Advisory Committee on Proposed Rules at 240 (1982).

10. "Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant he may be examined as to circumstances as an aid in evaluating the statement." *Id.* at 241.

11. Fed. R. Evid. 804, Notes of Advisory Committee on Proposed Rules at 254

declarant's death supplies the element of necessity. Without these safeguards, there is no justification for dispensing with the requirement that the declarant testify in court subject to cross-examination.

The Federal Rules of Evidence codified the requirements of necessity and trustworthiness in the two residual exceptions.[12] These exceptions allow hearsay not falling within an established exception to come into evidence if: 1) it has circumstantial guarantees of trustworthiness equivalent to those found in the codified exceptions; 2) it is offered as evidence of a material fact; 3) it is more probative than other evidence which might be offered; and 4) its admission serves the interests of both justice and the rules.[13] Although Washington did not include the residual exceptions when it adopted the Federal Rules,[14] these principles are inherent in all of the adopted exceptions.[15]

The Act must thus be examined in relation to these hearsay principles to determine whether it provides sufficient safeguards to warrant the admission of hearsay. The Act has a twofold

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(1982).

12. 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. 803(24), 804(b)(5). The Advisory Committee noted that the purpose of the residual exceptions is to encourage growth in development of hearsay exceptions while embodying the principles underlying the exceptions. FED. R. EVID. art. VIII, Notes of Advisory Committee on Proposed Rules, Introductory Note at 232 (1982).

13. FED. R. EVID. 803(24), 804(b)(5).

14. 5 K. TEGLAND, WASHINGTON PRACTICE VIII (1982). Although Washington did not adopt the residual exceptions, it was not rejection of the underlying principles that prompted the caution but rather a concern about uniform application of the hearsay rules generally. Washington did not adopt FED. EVID. RULE 803(24) for fear that "trial judges would differ greatly in applying the elastic standard of equivalent trustworthiness. The result would be a lack of uniformity which would make preparation for trial difficult." WASH. R. EVID. 803 comment at 222 (1982). The comment notes that rule 102 permits flexibility in the construction of the rules which allows for growth and development. *Id.*

15. "In these principles [necessity and a higher than usual degree of trustworthiness] is contained whatever of reason underlies the exceptions." 5 J. WIGMORE, *supra* note 7, § 1423, at 254-55.

effect on the admission of evidence: first, it expands upon existing evidence rules by admitting prior consistent statements of witnesses as substantive evidence and by admitting prior inconsistent statements not made under oath as substantive; second, the Act admits the statements of incompetent declarants.

A court may admit as nonhearsay prior consistent statements of a witness only to rebut a charge of recent fabrication or improper motive or influence.[16] The Act enlarges upon this rule by permitting admission of prior consistent statements in the state's case-in-chief. This use makes the statement hearsay; consequently, it must meet the criteria for a hearsay exception in that it must be necessary and have circumstantial guarantees of trustworthiness. The necessity for a child victim's hearsay arises from the difficulty the prosecution encounters in eliciting complete and credible testimony from a child witness. Further necessity may arise because the hearsay is more probative than other evidence of the crime. The Act requires that the court find indicia of reliability based on the time, content and circumstances of the declaration prior to its admission.[17] This appears to meet the trustworthiness requirement basic to all hearsay exceptions. Furthermore, in this instance, the child is a witness. The trier of fact has the opportunity to observe the child firsthand, and the opponent may cross-examine the declarant about the circumstances under which he made the statement.

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16. WASH. R. EVID. 801(d)(1)(i).

17. WASH. REV. CODE § 9A.44.120(1) (Supp. 1982). In testimony on the Act before a joint hearing of the Senate Judiciary and the House Ethics, Law and Justice Committees on January 28, 1982, Mary Kay Barbieri of the King County Prosecutor's Office suggested several indicia of reliability that a court might consider when determining the trustworthiness of a child's hearsay statement. *Hearings on S. 4461 Before the Joint Comm. of the Senate Judiciary Comm. and the House Ethics, Law and Justice Comm.*, 47th Leg., Reg. Sess. 7-14 (1982) (testimony of Mary Kay Barbieri, Chief of the Crim. Div., King County Prosecutor's Office, Seattle, Wash.) [hereinafter cited as Barbieri]. She suggested that the courts, in determining trustworthiness, examine the contents of the statement and language used by the child, note when the statement was made, and consider the circumstances surrounding the statement. *Id.* This analysis appears to permit indicia of reliability to replace competency of the hearsay declarant as a basis for admission of the hearsay. Although the evidence rules do not explicitly require that a hearsay declarant be competent, the Advisory Committee stated that "[i]n a hearsay situation, the declarant is of course a witness. . . ." FED. R. EVID. 803, Notes of Advisory Committee on Proposed Rules at 240 (1982). Furthermore, some commentators have expressed the opinion that all hearsay statements introduced under any exception to the rule should be made by someone competent as a witness at the time the statement was made. Stafford, *supra* note 2, at 307; *Testimonial Bar, supra* note 2, at 106.

The Act also expands the use of a witness's inconsistent statements. Washington Evidence Rules admit prior inconsistent statements of a witness only if made under oath subject to cross-examination.[18] The Act, however, permits admission of prior inconsistent statements even if not made under oath. The Act still requires indicia of reliability before the statement can be admitted, but the reliability need not be limited to the under oath requirement. The same necessity exists as with the prior consistent statement, and there is the same opportunity to observe and cross-examine the witness.

III. The Unavailable Declarant

The Act expands the existing hearsay structure and undermines basic hearsay principles by admitting hearsay of incompetent children. The Act's failure to define unavailability leaves open the possibility that a child may be unavailable to testify because of incompetence. The Act apparently allows indicia of reliability and corroboration to rehabilitate the statement of a child too untrustworthy to testify in open court. Since trustworthiness is a basic requirement for any hearsay exception, this application of the Act puts it in direct conflict with existing exceptions.

The Act requires corroboration of the abuse—an explicit recognition that more than indicia of reliability is necessary to provide guarantees of trustworthiness when the declarant is unavailable. To the extent that it allows the hearsay declaration of an unavailable declarant, the Act falls within the ambit of Rule 804.[19] Rule 803 admits hearsay regardless of declarant

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18. Washington Evidence rules do not consider that prior inconsistent statements, made under oath and subject to perjury penalties, constitute hearsay. Wash. R. Evid. 801(d)(1)(A).

19. **Rule 804. Hearsay Exceptions; Declarant Unavailable.**

(a) **Definition of unavailability.** "Unavailability as a witness" includes 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 on 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

availability[20] because the circumstances surrounding the declaration lend the required guarantees of trustworthiness.[21] Recognizing that some hearsay is less reliable,[22] however, Rule 804 allows its admission only if the declarant is unavailable.[23] Rule 804 carefully circumscribes the type of admissible hearsay:[24] it permits its admission only if the declarant is unavailable and limits unavailability to specific circumstances. The Act, though, admits any hearsay deemed reliable by the court,[25] thus creating a broad exception where there previously existed only a very narrow one.

A witness is unavailable with respect to Rule 804 if he is dead,[26] not subject to process,[27] or privileged not to testify.[28] A witness is also unavailable if he claims lack of memory or if he is unable to testify because of an existing physical or mental illness or infirmity.[29] Each category of unavailability is based upon an underlying assumption that the declarant could have been a witness but for the reasons creating the unavailability.[30] In describ-

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infirmity: or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

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.

FED. R. EVID. 804(a)(1)-(5); WASH. R. EVID. 804(a)(1)-(5).

20. WASH. R. EVID. 803.

21. *See supra* text accompanying note 10.

22. FED. R. EVID. 804, Notes of Advisory Committee on Proposed Rules at 253 (1982).

23. WASH. R. EVID. 804.

24. WASH. R. EVID. 804(b)(1)-(5).

25. WASH. REV. CODE § 9A.44.120(2)(b) (Supp. 1982).

26. WASH. R. EVID. 804(a)(4).

27. WASH. R. EVID. 804(a)(5).

28. WASH. R. EVID. 804(a)(1).

29. WASH. R. EVID. 804(3),(4).

30. WASH. R. EVID. 804(a)(1) requires that a witness be testimonially competent, since one cannot raise a privilege unless already a witness. To be a witness, one must be competent. WASH. R. EVID. 804(a)(2) is based on the fact that the witness is actually on the stand but refuses to answer specific questions, thus implying competency. WASH. R. EVID. 804(a)(3) is also based on the proposition that the witness is present on the stand but is unable to remember the subject matter of prior statements. That witness too must be competent prior to becoming "unavailable." According to WASH. R. EVID. 804(a)(4), unavailability due to death or then existing mental or physical infirmity implies that at the time of the prior statement the witness was competent but is now unavailable to

ing unavailability, Dean Wigmore asserts that "[i]f the declarant would have been disqualified to take the stand by reason of infancy . . ., his extra-judicial declaration must also be inadmissible."[31] Wigmore also observes that admission of hearsay under an exception presupposes that the declarant possessed the qualifications of a witness.[32] He noted that ". . . these extra judicial statements may be inadmissible because of their failure to fulfill the ordinary rules about qualifications, even though they may meet the requirements of a hearsay exception."[33] The Federal Advisory Committee Notes seem to agree by explicitly providing that a hearsay declarant must be a witness.[34]

In addition to carefully defining unavailability, Rule 804 also limits the type of hearsay admissible when a declarant is unavailable. For example, a dying declaration,[35] former testimony,[36] and statements against interest[37] can only be admitted when the declarant is unavailable as defined by the rule. Although the statements gain credibility by the surrounding circumstances, the guarantees of trustworthiness are not as strong as in the Rule 803 exceptions. Declarant availability is still a relevant factor. The reliability of the statements stems, at least in part, from the fact that the declarant must have been competent. The Act attempts to infuse the incompetent child's statement with reliability by requiring corroboration of the abuse. The problem, however, is that corroboration of the abuse may have little to do with the truly incriminating aspects of the

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testify because dead or temporarily incompetent or unable to withstand the rigors of testimony. *See* 5 J. WIGMORE, *supra* note 7, § 1406, at 219. Finally, WASH. R. EVID. 804(a)(5) presumes that if the state could compel attendance by process, the witness would be able to testify. Thus, in each instance the person must be competent to be a witness prior to the situation creating the unavailability.

31. 5 J. WIGMORE, *supra* note 7, § 1445, at 304 (1974). Wigmore distinguishes this statement in another section by noting that in situations involving spontaneous exclamations, a child's incompetence does not necessarily disqualify the declaration since "the principle of the present exception obviates the usual sources of untrustworthiness." 6 J. WIGMORE, *supra* note 7, § 1751, at 223. Thus, only if the other requirements of the hearsay provide the guarantee of trustworthiness might an incompetent child's spontaneous exclamation be considered trustworthy.

32. 5 J. WIGMORE, *supra* note 7, § 1423, at 255.

33. *Id.*

34. FED. R. EVID. 803, Notes of Advisory Committee on Proposed Rules at 240 (1982).

35. WASH. R. EVID. 804(b)(2).

36. WASH. R. EVID. 804(b)(1).

37. WASH. R. EVID. 804(b)(3).

child's statement.[38]

The Washington legislature has carefully defined circumstances in which a child is incompetent to testify.[39] Before a child can testify about an event, a court must determine whether a child understands his obligation to tell the truth and whether the child has the mental capacity to receive an accurate impression of the event.[40] Commentators also suggest that a child must be able to retain an independent recollection of the event and to express in his own words his memory of the occurrence.[41] Generally there is agreement that intelligence rather than age is the proper criterion for determining competency.[42]

While courts have been solicitous of the problems of the

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38. *See infra* notes 53-55 and accompanying text.

39. "The following persons shall not be competent to testify:

. . . .

(2) Children under ten years of age who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." WASH. REV. CODE § 5.60.050(2) (1981).

The same rule applies in criminal cases. WASH. CR. R. 6.12(c)(2). WASH. REV. CODE § 5.60.050 does not impose a lower age limit with regard to child competency.

The Statute codifies Washington case law with regard to child competency. A child must be able to relate the facts truthfully. *E.g.*, State v. Allen, 70 Wash. 2d 690, 692, 424 P.2d 1021, 1022 (1967); State v. Ridley, 61 Wash. 2d 457, 459, 378 P.2d 700, 702 (1963). *See also* State v. Tate, 74 Wash. 2d 261, 266, 444 P.2d 150, 153 (1968). Historically, courts have required not only that a child be able to relate the facts truthfully but also that he or she have the capacity to appreciate the obligation of an oath, and the duty to speak the truth. *E.g.*, Ruocco v. Logiocco, 104 Conn. 585, 590, 134 A. 73, 75 (1926); Ball v. State, 188 Tenn. 255, 258-59, 219 S.W.2d 166, 167 (1949); Kalberg v. Bon Marche, 64 Wash. 452, 453-4, 117 P. 227, 227 (1911). The judge may give instruction to the child on the nature and obligation of the oath after which the child should be permitted to testify. *See* State v. Smith, 95 Wash. 271, 272, 163 P. 759, 759 (1917); Hodd v. City of Tacoma, 45 Wash. 436, 88 P. 842 (1907). The oath was required, at least under WASH. REV. CODE § 9.01.111, since a child under eight cannot be convicted of perjury and thus is not subject to punishment. Stafford, *supra* note 2, at 317. Stafford noted that while no religious requirement is part of the understanding, the mode of administering an oath or affirmation should be such as may be most consistent with and binding upon the conscience of the person to whom such oath or affirmation is administered. There is a requirement that the child promise to tell the truth. *Id.* at 319.

40. WASH. REV. CODE § 5.60.050(2)(1981). To be competent, children must have a general capacity to receive "just impressions of the facts respecting which they are examined, or of relating them truly." State v. Fairbanks, 25 Wash. 2d 686, 688, 171 P.2d 845, 846 (1946)(citing REM. REV. STAT. § 1213 (1922)). *See also* State v. Tate, 74 Wash. 2d 261, 444 P.2d 150 (1968)(7 ½ year-old could testify because she was capable of receiving correct impressions of the facts and was capable of relating them truly); Commonwealth v. Tatisos, 238 Mass. 322, 326, 130 N.E. 495, 498 (1921).

41. *E.g.*, Stafford, *supra* note 2, at 307.

42. Ball v. State, 188 Tenn. 255, 258-59, 219 S.W. 166, 167 (1949); State v. Smith, 95 Wash. 271, 273, 163 P. 759, 760 (1917); State v. Wilson, 1 Wash. App. 1001, 1003, 465 P.2d 413, 414 (1970). *See also supra* note 40 and accompanying text.

child as a witness,[43] they have exhibited extreme reluctance to admit hearsay by an incompetent child.[44] The only exceptions courts have made to the rule are in the limited cases of res gestae. For example, in *U.S. v. Nick*,[45] the Ninth Circuit admitted hearsay of a small child under an excited utterance analysis, consistent with and corroborated by a later statement to a physician. In *State v. Beaudin*,[46] the court admitted hearsay of an incompetent declarant, but only to prove that a complaint of sexual abuse had occurred. The court refused to admit the content of the statement, recognizing that to do so would admit evi-

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43. Cases involving indecent assaults on children have received special treatment by a few courts. *See, e.g.*, State v. Davis, 20 Wash. 2d 443, 445, 147 P.2d 940, 942 (1944)(leading question was permitted in case of sexual abuse where child was witness since children are unaccustomed to court proceedings); *see also* Stafford, *supra* note 2, at 307. The courts admit hearsay statements of children tending to incriminate the defendant. *See, e.g.*, State v. Smith, 3 Wash. 2d 543, 552, 101 P.2d 298, 302 (1940)(hearsay statement of 5 year-old witness was admitted since the court found the child competent to testify and there was corroboration of all the hearsay testimony admitted.)

44. State v. Wilson, 156 Ohio St. 525, 103 N.E.2d 552 (1952) (lower court should not have admitted the deposition of a child of tender years who had not been found competent to testify by a judge, even though the child was sworn and subject to cross-examination by defense counsel). *See also* State v. Segerberg, 131 Conn. 546, 547-48, 41 A.2d 101, 102 (1945)(an 8 year-old was found incompetent to testify regarding an indecent assault and the court refused to admit her hearsay statements). *Contra* State v. Bloomstrom, 12 Wash. App. 416, 529 P.2d 1124 (1974). The *Bloomstrom* court admitted hearsay of an incompetent declarant because the court had erroneously relied on State v. Canida, 4 Wash. App. 275, 480 P.2d 800 (1971). In *Canida* the declarants were found competent to testify, whereas in the instant case the child was found incompetent. *Id.* at 276, 480 P.2d at 801. It would therefore be improper to rely on *Bloomstrom* for the proposition that a court will admit incompetent hearsay. *See generally* Annot., 30 A.L.R. 2d 771 (1953)(discussion on admissibility of children's depositions at trial).

45. 604 F.2d 1199 (9th Cir. 1979). The hearsay statement of a 3 year-old to a physician was admitted on the cause of injury where there was physical evidence corroborating the statement. The court also admitted the statements made by the child to his mother under the excited utterance exception.

46. 76 Wash. 306, 136 P. 137 (1913). The court held that it was proper to admit the hearsay statements of a 2½ year-old child to the effect that the child had complained of an assault, but it was error to repeat the statements made to the witness by the child. *Id.* at 307, 136 P. at 137. "To do so was an indirect method of introducing evidence which could not have been given by the child herself owing to her tender years; there being no contention that the remarks made by the child were any part of the res gestae." *Id. C.f. Testimonial Bar, supra* note 2. While courts have frequently admitted hearsay statements under the res gestae exception or for the limited purpose of showing the condition of the child at the time of the statement,

> instances exist for which no basis for admission is apparent unless it would be abhorrence of the crime involved. The better reasoned cases, however, require that all hearsay statements introduced under any exception to the rule be made by someone competent as a witness at the time the statement was made.

Id. at 106. Stafford cited the above quote and noted that the rule had not yet been decided in Washington. Stafford, *supra* note 2, at 306.

dence otherwise inadmissible.

Some confusion still exists with respect to whether competency at the time of the testimony, the event, or the declaration is determinative of admissibility of the hearsay. Commentators have observed, however, that "with the exception of *res gestae utterances*, all hearsay statements introduced under any exception to the rule should be made by someone competent as a witness at the time the statement was made."[47]

In *Huff v. White Motor Corp.*,[48] the Seventh Circuit Court of Appeals considered the competency of an unavailable declarant to determine the admissibility of his hearsay statement.[49] Although the case involved an adult, the court's analysis of competency of an unavailable declarant is instructive. The defense had asked the court to admit a statement against pecuniary interest made by the plaintiffs' decedent in a wrongful death case. The declarant was in the hospital and had made statements about the cause of his accident several days before he died. After considering whether to admit those statements, the *Huff* court held that the trial court should have made a preliminary determination regarding the competency of the declarant at the time he made the declaration.[50] The court arrived at this conclusion by examining the policy requirements underlying the hearsay exceptions and expressed in the residual exceptions.[51] It noted that for the circumstantial guarantees of trustworthiness to be valid, the declarant must have been mentally competent.[52]

The Act attempts to enhance the reliability of hearsay by unavailable and potentially incompetent witnesses by requiring that there be corroboration of the act.[53] Corroboration, however, does not insure trustworthiness.[54] One has little to do with the

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47. Stafford, *supra* note 2, at 307 (emphasis in original).

48. 609 F.2d 286 (7th Cir. 1979).

49. *Id.*

50. *Id.* at 294.

51. *Id.* at 293.

52. "He is a hearsay declarant, not a witness, and the circumstantial guarantees of trustworthiness on which admissibility of the hearsay depends all presuppose the mental capacity of a reasonable man in the position Huff was in. If that mental capacity was lacking, so are the guarantees of trustworthiness." *Id.* at 294.

53. WASH. REV. CODE § 9A.44.120(2)(b) (Supp. 1982).

54. In testimony at a hearing on the Act, Ms. Barbieri suggested that gonorrhea of the throat or another venereal disease would corroborate the child's hearsay; medical trauma evidence might serve as corroboration; a child with no way of getting money, appearing with money that he said he got for performing a sex act, might also corroborate the hearsay. *See* Barbieri, *supra* note 14, at 10. Some of the examples, however,

other. The fact of sexual abuse does not corroborate statements regarding who committed the abuse, the key testimony in most cases. Without the declarant on the stand, the opponent is denied the opportunity to test the recollection and truthfulness of the hearsay. He is unable to test the possibility that, although the abuse occurred, the child is covering up for one adult by naming another, punishing someone for an undisclosed reason, or too afraid to name the real abuser. The Act requires the opponent to rely on a third person's rendition of a statement by a person already found to be unable to not only distinguish truth from falsehood, but also recognize the necessity to tell the truth.

Admission of hearsay of testimonially incompetent children undermines the general preference for first hand evidence.[55] If a child will make a poor witness, a prosecutor now has no incentive to have him testify. In fact, the Act serves as a disincentive to call the child to testify, since the child's statement will come into evidence regardless of the child's availability. Furthermore, a judge, sensitive to the plight of a young child on the witness stand, may more readily find the child incompetent since such a finding will not severely undermine the evidence. Thus, in the interest of protecting the child, both the prosecution and the court may relax their standards, resulting in more findings of incompetency and a relaxation of the rule of preference for first hand evidence in criminal cases. More importantly, such a trend would have a devastating effect on the defendant's right to confrontation.

IV. The Confrontation Clause

The confrontation clause of the United States Constitution bars the admission of hearsay by testimonially incompetent children.[56] The confrontation clause requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted

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assume sexual abuse and put the child's statement in that context. For example, a child may steal money and fear discipline. An interviewer who suspects abuse might unconsciously suggest it to the child who then tells what he or she thinks the interviewer wants to hear. Or a child may get a venereal disease from one adult but fear that person and name another. If the child does not testify, the defense is limited in its ability to raise these possibilities and cast doubt on the truthfulness of the hearsay.

55. Historically, the hearsay rule "evolved to ensure that the facts would be developed by persons having first hand knowledge." 4 J. Weinstein, *supra* note 6, at 800-9.

56. U.S. Const. amend. VI.

with the witnesses against him. . . ."[57] If a child declarant testifies, there is no confrontation problem, since the defendant may cross-examine the child concerning the hearsay. However, when the child does not testify, cross-examination is impossible, and confrontation clause problems arise. The presiding judge must scrutinize the circumstances creating the absence along with the guarantees of trustworthiness that surround the statement to assure that the defendant's constitutional rights are protected.[58]

Although the confrontation clause appears to completely bar hearsay[59] in criminal cases, the U. S. Supreme Court has never insisted that physical presence of a witness and cross-examination are indispensable to a fair trial.[60] The Washington confrontation clause, specifically requiring face-to-face confrontation,[61] has not been construed as strictly as its language might indicate it should.[62] Instead, the Washington Supreme Court recently adopted the analysis of the U.S. Supreme Court and refused to analyze the confrontation issue under the Washington Constitution.[63]

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57. *Id.*

58. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

59. There is ongoing controversy whether the confrontation clause and hearsay exceptions overlap completely. However, although they protect similar values and stem from the same roots, their reach is not coextensive. The admission of hearsay "turns on the due process considerations of fairness, reliability and trustworthiness." United States v. Medico, 557 F.2d 309, 314 n.4 (2d Cir.), *cert. denied*, 434 U.S. 986 (1977). Some believe that the confrontation clause is a rule of preference requiring only that the court admit the most reliable form of testimony in open court. Thus, if the witness is unavailable, the confrontation clause is satisfied and statements satisfying a hearsay exception are admissible. 4 J. WEINSTEIN, *supra* note 6, at 800-20. Others believe the confrontation clause is meant to protect the defendant from facing evidence that he cannot cross-examine effectively, and that "the core right protected by the confrontation clause is satisfied when the evidence admitted at trial was subject to cross-examination or was otherwise reliable, and the absence of the witness was not procured by the government." Government of the Canal Zone v. P. (Pinto), 590 F.2d 1344, 1352 (5th Cir. 1979)(footnote omitted).

60. 4 J. WEINSTEIN, *supra* note 6, at 800-19.

61. WASH. CONST. art. I, § 22. "In criminal prosecutions the accused shall have the right to . . . meet the witness against him face to face. . . ."

62. State v. Valladares, 99 Wash. 2d 663, 664 P.2d 508 (1983); State v. Parris, 98 Wash. 2d 140, 654 P.2d 77 (1982).

63. In State v. Parris, 98 Wash. 2d 140, 654 P.2d 77 (1982), an extrajudicial declarant claimed a privilege and was thus unavailable to testify. The supreme court admitted the hearsay despite the fact that the hearsay did not fall within a "firmly rooted" exception since it met the *Roberts* requirement of corroboration by circumstances clearly indicating its trustworthiness. *Id.* at 152-53, 654 P.2d at 83-84. Justice Williams, in his dissent, opined that the *Roberts* test must be read in the context of the rationales behind the confrontation clause, allowing a balancing "when the amount of infringement on the defendant's sixth amendment rights was minimal in comparison to the trustworthiness of the statement." *Id.* at 167, 654 P.2d at 91 (Williams, J., dissenting). Williams noted

Ohio v. Roberts,[64] the most recent Supreme Court decision

that in sixth amendment cases, including *Roberts*, which admitted hearsay, there was always an *opportunity* to cross-examine regarding the hearsay either at trial or pretrial hearings. *Id.* at 167-68, 654 P.2d at 91. Using his analysis, the Act violates the sixth amendment by virtue of the fact that the child declarant has never been subject to cross-examination either prior to or at trial. It certainly violates the Washington confrontation clause by denying the right to face-to-face confrontation.

Williams reiterated his confrontation clause analysis in his concurrence in State v. Valladares, 99 Wash. 2d 663, 673, 664 P.2d 508, 514 (1983)(Williams, J., concurring). In *Valladares*, the Washington Supreme Court admitted hearsay when a declarant was unavailable under WASH. R. EVID. 804(a), since the declaration was against penal interest. The court noted that the witness was unavailable despite a good faith effort to produce her. *Id.* at 668, 664 P.2d at 511. The court also found sufficient corroboration to prove trustworthiness. *Id.* at 669, 664 P.2d at 511-12.

In *Valladares*, Williams reminded the court that Washington may interpret its confrontation clause more strictly than the parallel provision of the United States Constitution, especially where the language differs substantially. In his opinion the "face to face" language in the Washington confrontation clause should provide greater protection than both the sixth amendment and the hearsay rules. *Id.* at 674, 664 P.2d at 515 (Williams, J., concurring). He suggested a balancing of state and defendant interests with added weight placed on the defendant's side. *Id.* Nevertheless, he concurred in the defendant's conviction because he believed that in that case the error was harmless. *Id.*

64. 448 U.S. 56 (1980). The *Roberts* Court found a witness unavailable after the prosecution attempted to serve five subpoenas on the declarant and produced the declarant's mother to testify that she did not know her daughter's whereabouts. The Court noted that the prosecution did not breach its duty of a good faith effort to produce the witness. *Id.* at 75-76. The dissent, however, strongly objected to the majority's finding of good faith and opined that the prosecution should have made a much more thorough investigation into the whereabouts of the declarant. *Id.* at 79-82.

Prior to *Roberts*, the Supreme Court analyzed the confrontation issue in a variety of ways when a statement would have been admissible under a hearsay exception. In one case the Court held that if the defense chose not to cross-examine, and there was evidence corroborating the hearsay, admission of the hearsay did not violate the defendant's right to confrontation. *See* Dutton v. Evans, 400 U.S. 74 (1970). In another case, the Supreme Court, finding a declarant unavailable due to lapse of memory while a witness, held that there was no violation of the confrontation clause as long as the hearsay fell within the prior testimony hearsay exception. California v. Green, 399 U.S. 149 (1970). However, in yet other cases, the Court found violations even when the witness was available for cross-examination. *See, e.g.*, Davis v. Alaska, 415 U.S. 308 (1973); Smith v. Illinois, 390 U.S. 129 (1968).

In *Dutton v. Evans*, the trial court admitted into evidence a statement made by a coconspirator while he was in prison. Neither the prosecution nor the defense called the declarant as a witness. There was overwhelming evidence against the defendant, including eyewitness testimony corroborating the statement. The court noted the hearsay was not "crucial" or "devastating" to the defendant's case. 400 U.S. at 87.

In *California v. Green*, the Court held that admission of out-of-court declarations does not violate the confrontation clause when the declarant is present at trial and subject to cross-examination about his hearsay statements, and the statements were made under oath and subject to cross-examination. 399 U.S. at 165-68.

In *Green*, the Court admitted the declarations when the witness, although on the stand, became unavailable, because he testified he had no memory concerning either the prior testimony or the event itself. The Court applied the same analysis to the confrontation clause as to the prior testimony hearsay exception. The prior statement is consid-

on the confrontation clause, enunciated a two part test to overcome a confrontation clause challenge: 1) the prosecution must demonstrate that the witness is unavailable after a good faith effort to produce him; and 2) the hearsay must be marked with sufficient indicia of reliability to fall within the policies of the hearsay exceptions.[65] The Court noted that reliability can be inferred when the hearsay declaration falls within a firmly rooted hearsay exception.[66] The Court concluded that in other cases the evidence must be excluded absent "particularized guarantees of trustworthiness."[67]

The Act fails to meet the *Roberts* requirement that the prosecution make a good faith effort to produce the witness. Inherent in that requirement is a produceable witness. Since an incompetent child can never be a witness,[68] the prosecution cannot fulfill its obligation under *Roberts*. Even if the inability to produce the child does not violate the good faith production requirement, that requirement is undermined by the Act. Since under the Act the hearsay is admissible even if the child does not testify, there is little incentive for the prosecution to make the good faith effort to produce the witness. And if the child is likely to make a poor witness, there is an actual incentive to not produce the child. If the court simply admits the hearsay of an incompetent declarant because an incompetent is assumed to be unavailable, the "good faith" requirement of *Roberts* becomes a

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ered reliable because it was made under oath. It does not violate the confrontation clause because it was subject to cross-examination when made. *Id.* at 165.

In *Davis v. Alaska*, the Court found a witness unavailable for purposes of confrontation because Alaska state law precluded the defense from asking questions of a juvenile on cross-examination that would tend to expose past convictions. Since the cross-examination would have exposed a possible bias on the part of a witness, the defense was unable to fully and fairly cross-examine the witness. Consequently, the jury did not have before it the complete defense theory nor did it have the ability to determine the accuracy and truthfulness of the witness, both key elements in the state's case. 415 U.S. at 317.

In *Smith v. Illinois*, the Court found a witness who refused to reveal his correct name and address unavailable for confrontation purposes even though he was on the witness stand available for cross-examination. The Court found the witness unavailable notwithstanding the fact that the defendant did not give any reasons for his refusal. 390 U.S. at 134.

65. *Roberts*, 448 U.S. at 65.

66. The Court suggested that cross-examined prior trial testimony and properly administered business records exceptions "seem to be among the safest hearsay exceptions." *Id.* at 66 n.8.

67. *Id.* at 66.

68. *See supra* text accompanying notes 39-40.

nullity. The ultimate result is that where children are concerned, the confrontation clause becomes a recitation of a hollow right.

The second part of the *Roberts* test requires "particularized" guarantees of trustworthiness where the hearsay in question is not a firmly rooted exception.[69] The Court thus requires a higher standard as a substitute for the traditional hearsay exception. The Act attempts to meet the higher standard by requiring corroboration when the child is not a witness; corroboration not of the child's hearsay, but of the fact that the abuse occurred.[70] However, corroboration that abuse occurred does not lend particular trustworthiness to the child's statement regarding the identity of the abuser, usually a central issue at trial. Consequently, the corroboration is of little value as a substitute for the defendant's right and need to cross-examine the child about his statement.

Some hearsay is particularly reliable, and cross-examination, while desirable, may be waived.[71] However, under the Act, a child's hearsay made weeks, months, or even years after the abuse can come into evidence. Adult hearsay under similar circumstances is inadmissible. Time can have the same effect on a child's memory and truthfulness as on an adult's. Corroboration of the abuse adds no more to a child's hearsay than to an adult's. If a competent declarant's hearsay is untrustworthy and violates the defendant's right to confrontation, the same must be true of an incompetent child's hearsay.

If the prosecution has strong corroboration of the abuse, there is little need for hearsay. If, however, the evidence is inconclusive, the state may need the hearsay to prove its case. When the state's case is weak, the defendant is most vulnerable to the dangers posed by the hearsay and in greater need of his confrontation rights. Thus, the greater the threat to the defendant's rights, the more likely the prosecution will be to use the Act to admit the hearsay. The result will be to use the Act mainly in instances where it will tend to undermine a defendant's right to confrontation.

In a Connecticut case, *State v. Segerberg*,[72] the prosecution argued that there would be no conviction if they could not introduce the hearsay declaration of an eight year-old abuse victim

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

70. WASH. REV. CODE § 9A.44.120(2)(b) (Supp. 1983).

71. 5 J. WIGMORE, *supra* note 7, at § 1420.

72. 131 Conn. 546, 41 A.2d 101 (1945).

after the court had found her incompetent. The Connecticut Supreme Court held that it was fundamental that the state prove its charge by proper evidence.[73] Inadequate proof could not be allowed to open the door to improper evidence. Sexual abuse had to be proven by confrontation of witnesses and the safeguards of cross-examination.[74] The Act does precisely what the *Segerberg* court refused to allow, since it permits admission of evidence that could never come into court through the testimony of the declarant.

V. Conclusion

A Washington case currently under appeal, *State v. Ryan*,[75] demonstrates the problems that are certain to arise as courts begin to apply the Act. Apparently, the prosecutor informed the court that the children were incompetent to testify.[76] There was no hearing conducted by the court to determine competency. The defendant admitted that the children were incompetent, but argued that they were not unavailable.[77] The court rejected this argument and admitted the hearsay.[78] This case is undoubtedly the first of many in which a defendant is forced to rebut the statement of an incompetent child whom he has had no opportunity to observe or cross-examine.

Sexual violence against children is a horrendous crime and a severe social problem. The Act may result in more convictions, but it greatly enhances the risk of convicting innocent people. It is essential that the defendant's constitutional rights, including those guaranteed by the confrontation clause, are respected. The horror with which society reacts toward the act of child abuse

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73. *Id.* at 550-51, 41 A.2d at 103.

74. *Id.* at 552, 41 A.2d at 104.

75. No. 5530-III-2 (Wash. Ct. App., Div. III, 1983).

76. Telephone interview with John G. Burchard, Jr., defense attorney (Sept. 1983). According to appellants, the children were four and five years old. Brief for Appellant at 5, State v. Ryan, No. 5530-III-2 (Wash. Ct. App., Div. III, 1983). Apparently the judge, prosecutor, and defense attorney all assumed the children were therefore incompetent. However, James Lobsenz, an attorney formerly with the King County Prosecutor's Sexual Assault Unit, told this author that children as young as three have been found competent to testify. Interview with James Lobsenz in Seattle, Washington (Aug. 31, 1983).

77. Telephone interview with John G. Burchard, Jr., defense attorney (Sept. 1, 1983).

78. *Id.*

should not result in a conviction based on emotion rather than fact.

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