CON, continued

is fine, but setting a blanket protocol around such a concern is inappropriate.

Theory: An expert witness could use the videotape to help form an opinion about whether the child was abused.

Reality: No ethical expert would. Yet, the defendant will find his hired gun to so opine. Some self-proclaimed experts claim they can look at a videotape and determine whether the child is truthful or not. As a prosecutor, one would never hire someone who claims this expertise. Such an opinion should not ordinarily be admissible at trial. Why would a prosecutor want to encourage such a practice and help create that cottage industry?

Theory: Videotaping may be used as a therapeutic tool, or be used to confront potential parental disbelief or denial.

Reality: Videotaping disclosures may have an important therapeutic role. If so, the therapist should decide whether to videotape clinical interviews. Investigative interviews have a distinctly different purpose. An investigative interview should not be treated as a clinical or therapeutic device.

Theory: A good videotaped interview may convince the defendant that the child will be a powerful witness and that, therefore, he should plead.

Reality: I believe this is the greatest advantage to videotaping. However, a confession or guilty plea is also likely to be obtained when a child's statements are clear, well-documented, and made to a professional child interviewer. There are an insufficient number of cases in which a guilty plea has been obtained only through a videotaped statement to justify routine videotaping of investigative interviews. Besides, this is a sword that can cut both ways: If the videotaped interview is poor, a defendant who might otherwise plead guilty might decide to go to trial.

Conclusion

In theory, there are many advantages to routinely videotaping investigative interviews with children. Experience to date suggests, however, that in reality those advantages have not been realized. The disadvantages are substantial. Videotapes give too much power to the defendant to dictate the focus of the trial and to mislead and confuse the fact-finder.

Child abuse prosecution should be based on a system that promotes full and fair review of all the evidence available. The videotaping of selected interviews with children presents instead a piece of evidence which can too easily be distorted and misused. When that occurs, the interests of proecution, of justice, and of the child, are ill-served.

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An extended version of this exchange is published in the Journal of Interpersonal Violence 7, 2 (June, 1992).

LAW

ADMISSIBILITY OF CHILDREN'S STATEMENTS OF ABUSE UNDER THE CONFRONTATION CLAUSE AND RECENT SUPREME COURT CASES

—by Josephine Bulkley and Debra Whitcomb

Introduction

Child victims of sexual abuse often make convincing disclosures to parents, doctors, teachers, or other people they trust. When, for example, a seven-year-old girl casually asks her father, "Daddy, does milk come out of your wiener? It comes out of Uncle Bob's, and it tastes yukky" (Berliner and Barbieri, 1984), there can be little doubt that the child has been sexually abused. Similarly, during the course of an investigation, children frequently offer detailed descriptions of abusive acts to social workers, law enforcement officers, or mental health professionals. Statements like these are extremely valuable to investigators as they seek to complete the puzzle of what happened to the child. Moreover, these statements may be the most compelling evidence available to the prosecution—save for the child's testimony in court. Indeed, a child's statements may be the only evidence available, since other witnesses or physical trauma to the child are rarely found, and the child may be ruled incompetent or otherwise unavailable as a witness.

When the prosecution offers such "out-of-court" statements at trial as evidence that a child was abused, however, such statements are considered "hearsay," and under the hearsay rule cannot be admitted to prove the truth of the statement. Hearsay statements are not admissible because it is difficult to determine whether they are trustworthy: they are not made under oath, there is no opportunity to cross-examine the child, and the jury is unable to observe the child's demeanor. Numerous exceptions to the hearsay rule have been adopted, however, to allow certain statements into evidence because the declarant (the person who made the statement) is considered likely to have been telling the truth at the time.

Thus, when the prosecution wants a witness to testify about what an alleged child sexual abuse victim told him or her, the witness's testimony may only be admitted if the child's statement satisifes an exception to the hearsay rule. Hearsay exceptions commonly used for children's statements of abuse include excited utterances (also called spontaneous declarations) statements made for purposes of medical diagnosis or treatment, residual (or "catch-all") exceptions, and special child abuse exceptions.

Hearsay exceptions for children's statements of abuse

Excited utterances. The excited utterances exception to the hearsay rule often applies in child sexual abuse cases. The three essential requirements of an excited utterance are: (1) a sufficiently startling experience suspending reflective thought; (2) a spontaneous reaction, not one resulting from reflection or fabrication; and (3) a statement relating to the startling experience. Traditionally, the statement must have been made contemporaneously with the event, but the modern trend is to consider whether any delay between the event and the statement provided an opportunity to fabricate the statement.

Under the excited utterances exception, some courts have allowed in a child victim's spontaneous statements made days, weeks, or even months after the abusive incident, provided there is a plausible explanation for the delay. Reasons for a child's reticence to disclose may include threats made by the defendant, fears of not being believed, feelings of confusion and guilt, and efforts to forget. Many courts have admitted as excited utterances statements made in response to limited questioning (Commonwealth v. Fuller, State v. Mateer, State v. Wagner).

From a practical standpoint, the primary effect of White will be to relieve the state from proving that a child who is unable to testify is "unavailable."

Statements made for purposes of medical diagnosis or treatment. Under this exception, statements to doctors relating to bodily feelings, conditions, pains or symptoms are admissible if made in order to obtain treatment. The underlying assumption is that people do not lie when seeking medical attention because they believe the effectiveness of treatment depends largely on what they tell the examining clinician. Courts have even allowed in statements identifying the perpetrator under this exception, reasoning that the perpetrator's identity is important to the child's treatment, particularly if the child is diagnosed with a sexually transmitted disease or if the perpetrator shares the child's household (State v. Robinson; State v. Olesen).

Some courts have also applied this exception to statements made by children to nonmedical personnel, such as psychologists or social workers regarding psychological feelings, although others have excluded such statements where the child does not clearly or subjectively appreciate the need to provide accurate information for

treatment (Mosteller, 1989).

Residual exceptions. Many states' rules of evidence include a residual or "catch-all" category to allow certain out-of-court statements that do not fall within any of the existing categories, but possess "equivalent circumstantial guarantees of trustworthiness."

Special child abuse exceptions. At least 29 states have statutorily created a special hearsay exception to allow into evidence certain out-of-court statements made by child abuse victims (Whitcomb, 1992). These special exceptions were passed to provide a means of admitting children's statements of abuse, if shown to be reliable, that do not fit the strict requirements of traditional exceptions (Bulkley, 1985; Bulkley, in press; Whitcomb, 1992).

Hearsay and the confrontation clause

Although many children's statements of abuse fall within the above exceptions to the hearsay rule, such statements also must satisfy the requirements of the sixth amendment's confrontation clause, which provides: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." When a child testifies and prosecutors offer into evidence the child's out-of-court statement, there is no confrontation problem because the defendant can physically confront and cross-examine the child in court. A problem arises, however, when the prosecution seeks to admit out-of-court statements made by a child who does not testify. Under these circumstances, hearsay exceptions may collide with the confrontation clause, and the child's out-of-court statements may be excluded from evidence.

In 1980, the U.S. Supreme Court set forth a two-pronged test for determining whether an out-of-court statement can be admitted without violating the confrontation clause when the declarant does not testify. In Ohio v. Roberts, which involved the preliminary hearing testimony of an absent witness at trial, the Court stated:

When a hearsay declarant is not present for cross-examination at trial, the confrontation clause normally requires a showing that he is unavailable. Even then his statement is admissible only if it bears adequate indicia of reliability (Ohio v. Roberts; emphasis added).

Subsequent Court opinions have clarified both the "unavailability" and "reliability" prongs of the test in Roberts. The Supreme Court repeatedly has indicated that it would not equate the confrontation clause with the hearsay rule, holding that some hearsay admissible under a hearsay exception is not admissible under the confrontation clause. However, recent opinions appear to signal the end of this principle, indicating that, if a statement falls within a "firmly rooted" hearsay exception, it also satisfies the confrontation clause and should be admissible into evidence (White v. Illinois; Idaho v. Wright; Bourjaily v. United States; United States v. Inadi; Bulkley, in press; Bulkley, 1985; Graham, 1988).

Unavailability requirement. Many believed that the two requirements in *Ohio v. Roberts* (involving the hearsay exception for prior testimony) applied to all hearsay exceptions. In *Inadi v. United States*, however, the Supreme Court in 1986 held that the confrontation clause did not require a showing of unavailability when the prosecution offers a non-testifying co-conspirator's statement under the co-conspirator exception to the hearsay rule. Although *Inadi* made it clear that the unavailability rule, applicable to prior testimony, did not apply to all other hearsay exceptions, it did not specifically state that unavailability would never be required. After *Inadi*, therefore, courts were not sure whether unavailability applied to exceptions commonly used in child abuse cases.

In February, 1992, in *White v. Illinois*, the Supreme Court decided that the confrontation clause also does *not* require the state to produce a child as a witness or prove his or her unavailability before admitting the child's statement under the excited utterance and medical diagnosis exceptions. In *White*, a four-year-old child made a series of statements to her babysitter, her mother, a law enforcement officer, a nurse, and a physician—all describing a recent incident of sexual abuse. The trial court allowed these persons to testify, despite the fact that the child was present in the courtroom during the trial but did not testify, and the prosecutor made no showing of her unavailability to testify. The defendant was convicted solely on the basis of the child's out-of-court statements.

The Court in *White* not only expanded its holding in *Inadi* from the co-conspirator exception to the excited utterances and medical diagnosis exceptions, it also explicitly eliminated the "unavailability rule" for *all* firmly rooted hearsay exceptions. *White* did not address, however, the unavailability requirement for non-firmly rooted exceptions, and thus whether this opinion will apply to the residual or special child abuse exceptions remains to be seen.

From a practical standpoint, the primary effect of White will be to relieve the state from proving a child who is unable to testify is "unavailable." *White* does not mean the state can prevent a child from being a witness if he or she is truly available to testify, since both *Inadi* and *White* clearly indicate that the defendant has a right to call the child for cross-examination. Indeed, a major reason the Court in these decisions held that an unavailability rule was of little benefit was because the defendant may call any witnesses the state has not called.

There are, however, situations in which an unavailability rule would exclude a child's out-of-court statements from evidence and probably force the state to abandon prosecution altogether. For example, parents might not allow their child to testify, fearing emotional distress. At the same time, the state might not be able to show emotional trauma sufficient to prove "unavailability." A recent California case allowed a child's hearsay statements to be admitted into evidence under this scenario (People v. Lusk).

In another situation, a prosecutor may have excellent testimony from several adults regarding statements made by the child (as in *White*), but the child witness is not likely to be a credible or sympathetic witness. In yet another scenario, the state may not be able to meet the very high thresholds required by the courts for demonstrating emotional distress (Bulkley, 1985; Bulkley, in press). If the state nevertheless does not call the child because she in fact would be traumatized, an unavailability rule would preclude use of the child's out-of-court statements.

In sum, the Supreme Court's ruling in *White v. Illinois* may permit some prosecutions that otherwise could not go forward. It should not, however, encourage prosecutors to refrain from calling child witnesses who are available to testify. In those few cases where the state does not produce a child who is in fact available to testify, defendants should exercise their right to call the child.

Reliability requirement. Several recent Supreme Court decisions have confirmed the principle (set forth in *Roberts*) that the reliability of an out-of-court statement may be assumed if the statement falls within a firmly rooted hearsay exception. And, in *Idaho v. Wright*, the Court reaffirmed *Roberts*'s holding that statements not falling within a firmly rooted exception must be excluded, unless the state demonstrates they possess "particularized guarantees of trustworthiness." *Idaho v. Wright* was a child sexual abuse case in which the prosecution sought to admit a 2½ year old's statements to a physician under a residual hearsay exception.

In sum, the Supreme Court's ruling in White v. Illinois may permit some prosecutions that otherwise could not go forward. It should not, however, encourage prosecutors to refrain from calling child witnesses who are able to testify.

After finding that the residual exception was not firmly rooted, the Court held

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BOOK REVIEWS

—edited by Mark Chaffin

With the best of intentions: The child sexual abuse prevention movement. By Jill Duerr Berrick and Neil Gilbert. New York: Guilford Press. 210 pages. Hardback $25.00.

—Reviewed by Sandy K. Wurtele

In recent years, child sexual abuse (CSA) has gained increasing attention as a serious problem for children of all ages. The prevailing model for preventing sexual abuse involves programs delivered to children in the classroom setting. The objective of this book is to illuminate the purpose, design, and consequences of these CSA prevention training programs. Berrick and Gilbert acknowledge that these programs are begun with the best of intentions; but the authors question whether the programs are appropriate for young children, specifically those in preschool through the third grade.

The book begins with an historical perspective. In Chapter 1, the authors trace the history of the sexual exploitation of children along with recent efforts to prevent CSA. Their thesis is that feminist theory is at the ideological core of the CSA prevention movement, as reflected in programs' emphases on empowering children and teaching them self-defense. The ideology of empowerment, as applied to young children, is called into question throughout the text.

In Chapter 2, Berrick and Gilbert describe the development of legislation in California which made publicly funded training available to children in every preschool program in the state. Their concern about this legislation (and about the entire CSA prevention movement) is that it was supported without empirical evidence of program effectiveness. Reviewing findings from their own evaluation of preschool programs, they note that overall gains made by young children were quite low.

The book is well written and informative, and its developmental emphasis is clearly a strength.

The middle section contains a review of what's taught in prevention programs and how well children learn this information. In Chapter 3 they compare 15 CSA prevention curricula in terms of structural features (e.g.,

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BULKLEY, continued from page 9

that indicators of a statement's reliability must be found in the circumstances surrounding the making of the statement itself, and not from extrinsic or corroborating evidence. In other words, evidence that tends to corroborate the child's allegations of abuse, such as medical findings or testimony of other witnesses, may not be used to support the reliability of the child's out-of-court statements. Examples of "circumstances surrounding the making of the statement" (cited by a Washington state court decision) relevant in assessing a statement's trustworthiness under *Wright* include the following:

1. whether there is a motive to lie
2. the general character of the declarant/child
3. whether more than one person heard the statement
4. whether the statement was spontaneous
5. the timing of the statement and the relationship between the declarant/child and witness
6. the statement contains no express assertions about past fact
7. cross-examination could not show the declarant/child's lack of knowledge
8. the possibility of the declarant/child's faulty recollection is remote
9. the circumstances surrounding the statement are such that there is no reason to suppose the declarant/child misrepresented the defendant's involvement (State v. Ryan).

The Court in *Wright*, however, found that, "Given the presumption of inadmissibility accorded accusatory hearsay statements not admitted pursuant to a firmly rooted hearsay exception, we agree with the court below that the state failed to show that the younger daughter's incriminating statements to the pediatrician possessed sufficient 'particularized guarantees of trustworthiness' under the confrontation clause to overcome that presumption" *(Idaho v. Wright)*.

Conclusion

After *White v. Illinois* and *Idaho v. Wright*, for firmly-rooted exceptions commonly used in child abuse cases, such as the excited utterances and medical diagnosis exceptions, the prosecution must only show that a child's statement satisfies a particular hearsay exception, and has no other proof requirements even if the state does not put the child on the witness stand. For non-firmly rooted exceptions, such as the child abuse and residual exceptions, however, when the state does not put the child on the witness stand, the confrontation clause requires the state to prove a child's statement is trustworthy. *White* left open whether the state must produce the child to testify or demonstrate her unavailability when offering the child's statement under these exceptions.

Because *Roberts* and *Wright* emphasized the presumptive inadmissibility of statements falling within non-firmly rooted exceptions, the Court may well require an unavailability showing for the special child abuse and residual exceptions when the prosecution does not produce the child to testify. Most statutory child abuse exceptions contain an unavailability requirement, because they were adopted to confrom with *Ohio v. Roberts*. About seven statutes do not require unavailability, however, and if the Court were to require unavailability for non-firmly rooted exceptions, such statutes would violate the confrontation clause (Whitcomb, 1992).

On the other hand, the Supreme Court's recent decisions appear to focus on the trustworthiness requirement, and if the state has met its burden of proving a statement has "particularized guarantees of trustworthiness" to satisfy even a non-firmly rooted exception, the Court may eliminate the unavailability rule for these exceptions, too. This result also is supported by the reasoning in *Inadi* and *White* for eliminating the unavailability requirement, where the Court indicated that the rule was of little benefit because the defendant could call witnesses not called by the prosecution—equally applicable to non-firmly rooted exceptions.

References

Berliner, L., and Barbieri, M K. (1984). The testimony of the child victim of sexual assault, *Journal of Social Issues*, Vol. 40: 133

Bourjaily v. United States, 107 S. Ct. 2775 (1986).

Bulkley, J.A. (in press), *Recent Supreme Court Decisions Ease Child Abuse Prosecutions: Use of Closed-Circuit Television and Children's Statements of Abuse under the ConfrontationClause, Nova L. Rev.*

Bulkley, J.A.(1985), *Evidentary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 Dick. L. Rev. 645.

Commonwealth v. Fuller, 22 Mass. App. Ct. 152, 491 N.E. 2d 1083 (1986) (allowing statements made by a child to her mother in response to questions on the way to the doctor's office).

Graham, M (1988), *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 Minn. L. Rev. 523.

Idaho v. Wright, 110 S. Ct. 3139 (1990).

Mosteller, R.P.(1989). *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N. C.L. Rev. 227, 257-77.

Ohio v. Roberts, 448 U.S. 56, 66.

People v. Lusk, 267 Cal. Rptr. 146 (Cal. Ct. App. 1990).

State v. Mateer, 383 N.W. 2d 533 (Iowa 1986) (allowing statements made in response to questioning by a police officer because they were "impulsive" rather than "reflective").

State v. Olesen, 443 N.W. 2d 8 (S.D. 1989).

State v. Robinson, 153 Ariz. 191, 735 P 2d 801 (1987).

State v. Ryan, 103 Wash. 2d 165, 691 P. 2d 197 (Wa. 1984).

State v. Wagner, 30 Ohio App.3d 261, 508 N E 2d 164 (1986) (allowing a child's demonstration with anatomically detailed dolls, conducted for an investigator).

Whitcomb, D., *When the Victim is a Child*, U.S. Dep't of Just., Nat'l Inst. of Just. (2nd ed. 1992).

United States v Inadi, 475 U.S. 387 (1986).

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