

COMMENTS

THE DANGER OF VALUE-LADEN INVESTIGATION IN CHILD SEXUAL ABUSE CASES: ARE DEFENDANTS' CONSTITUTIONAL RIGHTS VIOLATED WHEN MENTAL HEALTH PROFESSIONALS OFFER TESTIMONY BASED ON CHILDREN'S HEARSAY STATEMENTS AND BEHAVIORS?

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I. INTRODUCTION

In criminal cases involving child sexual abuse,¹ an analysis of the extent to which mental health professionals²

* Associate, Dickstein, Shapiro, Morin & Oshinsky LLP, Washington D.C. J.D., University of Pennsylvania Law School 1999; M.S.W., University of Michigan, 1993. This Comment is dedicated to my parents, Bill and Carol Celandor, who taught me by example to find joy and inspiration in the service of others and to develop a passion for education and life-long learning. I am particularly grateful for the insight my mother, Carol Celandor, an infant mental health therapist, has given me into the lives of the young children and families that she touches every day. I am also very thankful to Professor Kim Scheppele for her assistance in developing the idea for this Comment and to Professor Pamela Harris for sharpening my arguments; to the members of the *University of Pennsylvania Journal of Constitutional Law*, especially Lou Virelli, for their diligence; and to my husband, John DeSarbo, for his unwavering support and encouragement to challenge myself intellectually and follow my dreams.

¹ The term "child sexual abuse" is a particularly expansive one, comprising all "non-consensual sexual activity involving children. It includes all forced sexual acts, sexual contact by an adult with a child or by a teenager with a significantly younger child, and non-contact sexual activity such as voyeurism, exposing, and making or showing child pornography." Lucy Berliner, *Nature and Dynamics of Child Sexual Abuse*, in *A JUDICIAL PRIMER ON CHILD SEXUAL ABUSE* 1, 1 (Josephine Buckley & Claire Sandt eds., 1994) [hereinafter *A JUDICIAL PRIMER ON CHILD SEXUAL ABUSE*] (citations omitted). Ascertaining the prevalence of child sexual abuse cases, however, is particularly problematic due to the multiplicity of definitions and reporting practices utilized by various collection authorities; no single source is viewed as definitive. See DEBRA WHITCOMB, *WHEN THE VICTIM IS A CHILD* 1-3 (Nat'l Inst. of Just. 2d ed. 1992) (indicating, for example, that varying sources define the end of the childhood period differently and only capture statistics for a limited time period). Child sexual abuse has recently gained considerable recognition as a serious and pervasive social problem. See ELLEN GRAY, *UNEQUAL JUSTICE: THE PROSECUTION OF CHILD SEXUAL ABUSE* 1-14 (1993) (explaining the historical genesis of a newly-developed public understanding of the problem of child sexual abuse).

² I use the term "mental health professionals" to refer collectively to psychiatrists,

("MHPs") should be able to introduce hearsay statements generated from investigative or therapeutic interviews with children depends upon a critical examination of the Constitution's Confrontation Clause³ and various hearsay exceptions.⁴ The Confrontation Clause, as well as the Federal Rules of Evidence, restrict the introduction of hearsay testimony.⁵ Despite this general distrust of hearsay statements⁶ and the particular difficulties associated with child witnesses,⁷ child hearsay testimony may be the best or only evidence available to a prosecutor in a criminal sexual abuse case.⁸ As a result, MHPs are frequently called upon to testify to children's hearsay statements and behaviors based on

psychologists, and clinical social workers.

³ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."). The Clause was made applicable to the states via the Fourteenth Amendment in *Pointer v. Texas*, 380 U.S. 400 (1965).

⁴ See discussion *infra* Part IV.

⁵ See *Idaho v. Wright*, 497 U.S. 805, 814-15 (1990) (noting that the Confrontation Clause and hearsay rules are not coextensive: the Clause prohibits the introduction of some out-of-court statements which would otherwise be permissible as exceptions to hearsay prohibitions).

⁶ See WHITCOMB, *supra* note 1, at 85 ("[I]t is impossible to determine whether or not [hearsay statements] are trustworthy. The statements are not made under oath, the trier of fact is not able to observe the demeanor of the declarant, and the defense has no opportunity to cross-examine the declarant.").

⁷ Research demonstrates that young children exhibit greater difficulty in recalling events accurately. See WHITCOMB, *supra* note 1, at 24-26. Yet, by the time children are six years of age, they can separate fact from fantasy as well as adults. See *id.* at 25. Multiple interviews can enhance the accuracy of children's statements, although an interviewer's assumption of an authoritative role seems to increase children's susceptibility to suggestion. See *id.* Repeating questions during an interview, however, is dangerous, given that children may believe that the interviewer is seeking a different answer and change their response accordingly. See Lucy S. McGough & Amye R. Warren, *The All-Important Investigative Interview*, JUV. & FAM. CT. J., 1994 No. 4, at 13, 13. Also, young children are more prone to suggestion than older children or adults, although the age differential dissipates somewhat when "the event in question is understandable and interesting; memories have not been weakened by delay; the questioning concerns the central action or information rather than peripheral detail; [and] the interviewer is supportive rather than hostile or cold." *Id.*

⁸ See *id.* at 85 ("[H]earsay may be the only evidence, since child sexual abuse frequently occurs in the absence of other witnesses or physical trauma to the child, and the child may be found incompetent or otherwise unavailable as a witness."). The constraints, however, are narrowly construed by the Court: "while a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, th[e] Court has rejected that view as 'unintended and too extreme.'" *Wright*, 497 U.S. at 814 (citing *Bourjaily v. United States*, 483 U.S. 171, 182 (1987) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)). Likewise, under the authority of *California v. Green*, 399 U.S. 149 (1970), if an alleged sexually abused child were to testify under adversarial cross-examination, the child's out-of-court statement could be admitted without violating the Confrontation Clause. See 2 JOHN E.B. MYERS, *EVIDENCE IN CHILD ABUSE AND NEGLECT CASES* 349 (3d ed. 1997) (discussing *Green*).

their interviews with such children.⁹

With the backdrop of serious concerns about the reliability of children's hearsay statements and behaviors in general,¹⁰ a look at whether children's therapeutic relationships with MHPs negatively influence the reliability of such hearsay statements is necessary to determine the admissibility of these professionals' testimony. An important inquiry is whether the goals of the criminal justice system and those of MHPs are simply too divergent to warrant the admission of MHPs' hearsay testimony based on their therapy sessions with alleged child victims. The criminal justice system places a premium on the criminal defendant's constitutional right to confrontation,¹¹ to a fair trial,¹² and to a presumption of innocence.¹³ The MHP, on the other hand, may assume a therapeutic, rather than a neutral, investigative role with respect to an alleged victim in the same system. As the Montana Supreme Court noted:

A therapist does not see a child for treatment of the effects of sexual abuse unless there has been a claim that the child has been sexually abused. The therapist is therefore arguably predisposed to confirm what he or she has been told. We conclude that the nature of the relationship between a therapist and a child client has a negative impact on the trustworthiness of the hearsay statement.¹⁴

It is the central thesis of this Comment that the helping values which are inherent in MHPs' therapeutic, rather than investigative,¹⁵ role should preclude them from testifying to a child's statements or behaviors observed during a therapeutic relationship because such testimony may be dangerously un-

⁹ See, e.g., *Wright*, 497 U.S. 805 (1989); *Ohio v. Roberts*, 448 U.S. 56 (1980).

¹⁰ See discussion *infra* Part II.

¹¹ See U.S. CONST. amend. VI.

¹² See U.S. CONST. amend. V ("No person shall . . . be deprived of . . . liberty . . . without due process of law . . ."); U.S. CONST. amend. XIV ("No state shall make or enforce any law which shall . . . deprive any person of . . . liberty . . . without due process of law . . .").

¹³ See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 812 n.9 (3d ed. 1996) ("[T]he 'presumption of innocence' . . . is a hallmark of Anglo-American criminal jurisprudence. [It] gives positive expression to the truth that the prosecutor bears the burden of persuasion on each element of the offense, and it amounts to a symbol of freedom and respect for human rights and dignity.").

¹⁴ *State v. Harris*, 808 P.2d 453, 459 (Mont. 1991).

¹⁵ MHPs serving only as forensic investigators may be able to offer limited testimony, provided that sufficient precautions are taken to ensure the reliability of investigative interviews. Where such interviews are conducted in a grossly unreliable manner, however, even if by a neutral professional, testimony concerning hearsay statements and behaviors should be inadmissible under the Due Process Clause. It is beyond the scope of this Comment to address the advisable substantive scope of such testimony.

reliable hearsay. This Comment will argue that such unreliable testimony would violate defendants' constitutional rights to confrontation and a fair trial and should never be admitted in a criminal child sexual abuse case.

Part II of this Comment examines the reliability of children's reports of sexual abuse. Part III analyzes the competing values of MHPs and of the criminal justice system in child sexual abuse cases. Part IV examines when hearsay exceptions can be used to allow MHPs to testify about hearsay statements from children. Part V presents my proposal both for ensuring the reliability of MHP testimony that is based on children's hearsay statements and behaviors, and for reconciling the conflicting demands of the criminal justice system.

II. THE DEBATE CONCERNING THE RELIABILITY OF CHILDREN'S REPORTS OF CHILD SEXUAL ABUSE.

The reliability of children's reports of sexual abuse bears significantly on the question of whether MHPs should be permitted, under either the Federal Rules of Evidence or the Confrontation Clause of the Sixth Amendment, to introduce hearsay testimony based on their interviews with alleged child victims of sexual abuse. Unbiased investigative interviews are crucial to enhancing the reliability of children's reports of such abuse. The reliability of MHPs' interviews of alleged sexually abused children depends on whether MHPs' particular relationship with the child interviewee is therapeutic or investigative.

The reliability of children's reports of abuse is difficult to measure. For example, in *Jeopardy in the Courtroom*, Stephen Ceci and Maggie Bruck painstakingly examine the multifaceted issue of the reliability of children's reports of child sexual abuse, focusing on the difficulties encountered with interviews of preschool-aged child witnesses.¹⁶ They conclude, from their review of a wide range of research studies, that particularly suggestive interviews may influence a child's statements or behaviors.¹⁷ Ceci and Bruck paint a complex

¹⁶ See STEPHEN J. CECI & MAGGIE BRUCK, *JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY* 4 (1995). The authors offer a synopsis of their view on children's suggestibility: "[A]lthough we think that there are data that highlight the potential weaknesses of children's reports, we do not think that these data are so consistent as to categorically discredit children from testifying or even to recommend skepticism upon hearing a child's disclosure." *Id.* Interestingly, of the child sexual abuse cases that are actually adjudicated, forty-one percent involve children of preschool age, making the study of young children's experience in the legal system particularly salient. See *id.* at 36-37.

¹⁷ See *id.* at 234 (noting that the assumption that bodily acts are "impervious to

picture of the credibility of children's reports of abuse, noting that young children are not so highly suggestible that they should always be disbelieved, but rather that such children sometimes make false allegations of abuse.¹⁸ Despite documented shortcomings in young children's memories,¹⁹ it is true that child witnesses possess some undeniable strengths.²⁰ Proper interviewing techniques—those taking into account child witnesses' strengths and weaknesses—should thoughtfully guard against potential problems. This section examines the constitutional importance of the investigative interview through which MHPs attempt the difficult task of ascertaining whether a child has in fact been sexually abused and discusses the distinguishing features between reliable and unreliable investigative interviews.

distortion" by preschoolers is erroneous and that suggestive interviewing techniques have in fact been shown in research demonstrations to generate false reports by young children about happenings concerning their own bodies, even those with sexual undertones). The authors define suggestibility as: "the degree to which the encoding, storage, retrieval, and reporting of events can be influenced by a range of internal and external factors [including social and cognitive factors]." *Id.* at 44-45. Children are not the only groups vulnerable to suggestibility in the interviewing process; adults are also sometimes susceptible to suggestion and may experience difficulties in memory and recall as a result. *See id.* at 251.

¹⁸ *See id.* at 1-5.

¹⁹ *See id.* at 76. Ceci and Bruck discuss three types of factors which they argue impede the accuracy of fact-gathering from children:

The first concerns the general linguistic problem of obtaining detailed information from children who are unaccustomed to providing elaborate verbal narratives about their experiences. The second concerns the cognitive problem that arises when children are asked to recall events that happened long before the interview; as a result, the child may have problems remembering the information. Finally, reporting information about stressful, embarrassing, or painful events may be very difficult, especially for the young child.

Id.

²⁰ *See id.* at 251 (Stating that "in response to the questions of a neutral, unbiased interviewer, young children give very accurate reports, though they may contain few details"). Child witnesses' strengths often receive little public attention. *See id.* at x (noting an imbalance in the documented cases that underscore the weaknesses, not the strengths, of children's memories and stating their belief that "this imbalance reflects the fact that much of the time children's statements are reliable and credible and in such situations the cases are quickly settled, obviating the need for further investigatory procedures and, hence, for documenting the child's testimony."). Ceci and Bruck examined several flagrant cases involving grossly suggestive interviews. They noted that even the children interviewed under such conditions, though ultimately conveying reports which were not inviolable by the interviewers' unprofessional techniques, persisted in denying abuse throughout months of weekly interviews, and often recanted subsequent "disclosures". *See id.* at 297-98. Although children, much like adults, are likely to demonstrate a certain degree of inconsistency in recalling events, *see id.* at 39-46, courts should not unilaterally discard critical testimony or reports of child witnesses simply because of these unavoidable discrepancies.

A. *The Constitutional Salience of the Investigative Interview*

As intimated by the majority of the Supreme Court in *Idaho v. Wright*,²¹ unbiased pretrial investigative interviews of suspected sexually abused children are critical to obtaining reliable statements that later might be repeated at trial by MHPs as hearsay.²² For example, in a highly publicized New Jersey case, *State v. Michaels*,²³ a preschool instructor, Kelly Michaels, was convicted of sexually abusing her students.²⁴

²¹ 497 U.S. 805 (1990), discussed in Lucy S. McGough & Amye R. Warren, *The All-Important Investigative Interview*, JUV. & FAM. CT. J., 1994 No. 4, at 13, 13.

²² See McGough & Warren, *supra* note 21, at 13 (discussing *Wright*, 497 U.S. 805 (1990)); see also Diana Younts, Note, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 1991 DUKE L.J. 691, 700 ("The *Idaho v. Wright* decision specifically addressed trustworthiness problems and admissibility when a child abuse investigator testifies to a child's hearsay statements."). The Federal Rules of Evidence define hearsay as 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." FED. R. EVID. 801(c).

²³ 625 A.2d 489 (N.J. Super. Ct. App. Div. 1993) (reversing conviction), *aff'd*, 642 A.2d 1372 (N.J. 1994).

²⁴ For a full description of the suggestive interviewing techniques utilized by the social workers who interviewed the children in *Michaels*, see CECI & BRUCK, *supra* note 16, at 223-26. For example, Ceci and Bruck discuss an excerpt of the transcript of an interview of "Child B" in which the interviewer attempts to determine if Kelly Michaels abused children at the day care center by using certain utensils to smear peanut butter on her body. Child B was given utensils and an anatomical doll. The excerpt reads:

Interviewer: Okay, I really need your help on this. Did you have to do anything to her with this stuff?

Child: Okay. Where's the big knife at. Show me where's the big knife at.

Interviewer: Pretend this is the big knife because we don't have a big knife.

Child B: This is a big one.

Interviewer: Okay, what did you have to do with that? What did you have to . . .

Child B: No . . . take the peanut— put the peanut butter . . .

Interviewer: You put what's that, what did you put there?

Child B: I put jelly right here.

Interviewer: Jelly?

Child B: And I put jelly on her mouth and on the eyes.

Interviewer: You put jelly on her eyes and her vagina and her mouth?

Child B: On her back, on her socks.

Interviewer: And did you have to put anything else down there?

Child B: Right there, right here and right here and here.

Interviewer: You put peanut butter all over? And where else did you put the peanut butter?

Child B: And jelly.

Interviewer: And jelly?

Child B: And we squeezed orange on her.

Interviewer: And you had to squeeze an orange on her?

Child B: Put orange juice on her.

Interviewer: And did anybody— how did everybody take it off? How did she make you take it off?

Child B: No. Lick her all up, eat her all up and lick her all up.

Interviewer: You had to lick her all up?

Child B: And eat her all up.

On appeal from the order reversing the conviction, the Supreme Court of New Jersey held that in order to retry Michaels, the possible prejudice created by suggestive, albeit well-intentioned, pretrial interviewing must not have unduly influenced the reliability of the alleged victim's statements.²⁵ Ultimately, the prosecution decided to forego the jurisdiction's required hearing on possible undue influence and declined to pursue the case further, leaving Michaels finally free, at least under the law, from her arduous six-year ordeal.²⁶

Extreme cases like Kelly Michaels' illustrate the constitutional salience of reliable pretrial investigative interviews. If MHPs are to testify in a criminal sexual abuse trial based on children's statements and behaviors gleaned from investigative interviews, the reliability of such interviews should be a key factor in determining whether the defendant's rights under the Confrontation Clause are satisfied.²⁷

B. The Difference Between Reliable and Unreliable Investigative Interviews

The reliability of investigative interviews conducted by MHPs should determine whether such professionals may offer hearsay testimony based on children's statements and behaviors during these interviews. I contend that the Confrontation Clause does not permit MHPs to offer hearsay testimony from unreliable investigative interviews with alleged sexually abused children.²⁸ This contention, however, first requires a discussion of the characteristics of reliable and unreliable child interviews.

Interviewer: Yeah? What did it taste like?

Child B: Yucky.

Interviewer: So she made you eat the peanut butter and jelly and the orange juice off of the vagina too?

Child B: Yeah.

Interviewer: Was that scary or funny?

Child B: Funny, funny and scary.

Id. at 100-01.

²⁵ See *Michaels*, 642 A.2d at 1382.

²⁶ See CECI & BRUCK, *supra* note 16, at 11-13. At trial, Kelly Michaels was convicted of one hundred fifteen counts of sexual abuse perpetrated upon 20 three-to-five-year old children (nineteen children provided testimony) and was sentenced to a maximum of 47 years in prison. See *Michaels*, 642 A.2d at 493. By the time her conviction was reversed, Kelly Michaels had spent five years in jail. See CECI & BRUCK, *supra* note 16, at 13.

²⁷ See discussion *infra* Part IV (concerning the application of various hearsay exceptions and the Confrontation Clause to sexual abuse cases involving children).

²⁸ See *infra* Part IV (discussing the Confrontation Clause as applied in sexual abuse cases involving children).

1. *Indicators of Unreliable Investigative Interviews*

Researchers caution against the use of suggestive techniques which may seriously compromise the accuracy of children's reports of sexual abuse.²⁹ For instance, McGough and Warren assert that the use of leading questions³⁰ may "promote greater inaccuracy" in young interviewees, despite their potential positive effect in aiding children's recollection.³¹ Repeating questions during a given interview session is equally dangerous; children may think such questioning means the interviewer is displeased with their initial answer, and may change their response accordingly.³² Children's reports concerning their experiences may also be contaminated by recurrent interviews, despite some researchers' suggestion that repetition highlights recall.³³ Finally, the use of anatomical dolls³⁴ in the questioning of purported child sexual abuse victims may seriously hamper the reliability of children's reports of abuse. Anatomical dolls have potential for serious misuse,³⁵ including misdiagnosis, which may implant false memories in therapy and damage the reliability of MHPs' testimony based upon such hearsay reports.³⁶

²⁹ See McGough & Warren, *supra* note 21, at 16-23.

³⁰ See Sue White & Kathleen M. Quinn, *Investigatory Independence in Child Sexual Abuse Evaluations: Conceptual Considerations*, 16 BULL. AM. ACAD. PSYCHIATRY L. 269, 271 (1988) ("In legal terms, leading is used to refer to a question in which the answer is expected to be the information introduced in the question.").

³¹ See McGough & Warren, *supra* note 21, at 17. Cf. Bharti Kalra & Wendy P. Heath, *Perceptions of a Child as Witness: Effects of Leading Questions and the Type of Relationship between Child and Defendant*, 80 PSYCHOL. REP. 979, 983 (1997) (concluding that mock jurors in this study "thought that the child witness was more credible and honest in the Nonleading-question condition than in the Leading-question condition . . .").

³² See McGough & Warren, *supra* note 22, at 18.

³³ See 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES 59 (3d ed. 1997) ("Not infrequently, an interviewer must ask about something more than once.").

³⁴ WHITCOMB, *supra* note 1, at 36 (indicating that an analysis and set of recommendations pertaining to anatomical dolls would also pertain to the use of other props, such as drawings or puppets).

³⁵ See CECI & BRUCK, *supra* note 16, at 184 (expressing their belief that the validity of the use of anatomical dolls has not been settled and that the APA's suggestion that such dolls can be important tools when used by competent clinicians is too speculative); see also Younts, *supra* note 22, at 707-20 (finding that studies of the use of anatomical dolls are inconclusive in determining whether such dolls are a valid assessment tool); cf. KATHLEEN COULBORN FALLER, UNDERSTANDING CHILD SEXUAL MALTREATMENT 120 (Sage Sourcebooks for the Human Services Series No. 12, 1990) ("[I]t is inappropriate to conclude, based solely on a child's demonstration of sexual activities with dolls or other media, that a child has been sexually abused.").

³⁶ See *In re the Dependency and Neglect of C.L. and R.P.*, 397 N.W.2d 81 (S.D. 1986) (concluding that social worker testimony regarding a child's use of anatomical

Despite the problems associated with grossly suggestive interviewing, it is clear that mildly suggestive and leading questions are sometimes necessary when interviewing children for three reasons: (1) child victims are frequently under "psychological pressure" that may engender "halting, piecemeal disclosure;"³⁷ (2) young children do not respond effectively to free recall questions;³⁸ and (3) child victims' "emotional development and the psychological effects of trauma" may impede their effective testimony.³⁹ MHPs must be conscious of the narrow distinction between effective and improperly leading questions inherent in investigative interviews with alleged victims of child sexual abuse, and must design their questions accordingly. Proper interview techniques are essential to maintaining defendants' rights under the Sixth Amendment: by avoiding the aforementioned unreliable practices, the use of proper techniques prevents the MHP from infecting the interview with his or her personal biases. It is not enough, however, for interviewers to focus on *avoiding unreliable* interviews—instead, MHPs should take affirmative steps to *encourage reliability* in their interviews with alleged victims of child sexual abuse.

2. Indicators of Reliable Investigative Interviews

In conducting effective investigations of suspected child

dolls was not prejudicial where other evidence established sexual abuse).

The concern about the efficacy of anatomical dolls for forensic and diagnostic purposes stems from the inability of the existing literature to answer the following critical questions: (a) "Do abused children interact with the dolls differently than do non-abused children?" (b) "How do normal children interact with the dolls?" (c) "How accurately do children use dolls to report events?" CECI & BRUCK, *supra* note 16, at 164. Other commentators suggest, however, that it is precisely because the data are so inconclusive, that it is too premature to suppress the use of anatomical dolls by mental health professionals as assessment and evidentiary tools. See, e.g., Gwat-Yong Lie & Anjanette Inman, *The Use of Anatomical Dolls as Assessment and Evidentiary Tools*, 36 SOC. WORK 396, 399 (1991). Advocates of the use of anatomical dolls assert that dolls enhance the interviewer's ability to accomplish the following: (1) "[e]stablish rapport and reduce stress;" (2) "[r]educe vocabulary problems;" (3) "[s]how what may be difficult or embarrassing to say;" (4) "[e]nhance the quality of information;" and (5) "[e]stablish competency." WHITCOMB, *supra* note 1, at 34. Despite the seeming benefits associated with the use of anatomical dolls with allegedly sexually abused children in a therapeutic context, the potential dangers of their use as a diagnostic tool should lead to the restriction of their use to therapy sessions.

³⁷ See 1 MYERS, *supra* note 33, at 62.

³⁸ See *id.* at 67. Myers notes, however, that "[m]any interviews are genuine emergencies . . . [and] in such circumstances the law must accommodate the stark reality facing police officers, social workers, and other professionals who interview children . . . [that] sometimes they have no choice but to ask suggestive questions). *Id.* at 454.

³⁹ *Id.* at 69.

sexual abuse, interviewers should maintain "[i]nvestigatory independence . . . both externally and internally through all phases of an evaluation"⁴⁰ According to McGough and Warren, "insuring that a child is skillfully interviewed during the investigation of a case is more important for the reliability of children's testimony than revisions of the hearsay rule or competency determinations, witness-shielding at trial and all other proposals of the last twenty years."⁴¹ The authors suggest: (1) that suspected child victims should be interviewed as soon as possible following the alleged act(s) of abuse; (2) that ground rules for the interview be communicated to the child, such as that the interviewer is not more knowledgeable about the event(s) and is relying upon the memory of the child, and that only what is actually remembered is to be reported; (3) that the child be effectively prepared for an upcoming real interview through a practice one; (4) that repeated questions be averted; and, finally, (5) that interviewers utilize "developmentally sensitive language."⁴² Additionally, Ceci and Bruck recommend that in criminal sexual abuse investigations, all interviews with children who are suspected victims of abuse be recorded, by audio or video tape, to prevent the interviewer's own biases from infecting their reports and to aid in determining the reliability of children's statements.⁴³

A number of other suggestions may improve the investigation of child sexual abuse cases. The number of interviews to which each alleged victim must submit should be limited.⁴⁴ Multi-disciplinary teams may combine the expertise of several agencies, including the prosecutor's office, law enforcement agencies, doctors, child advocates, and possibly therapists, to process cases more efficiently and effectively.⁴⁵ Finally, a spe-

⁴⁰ See White & Quinn, *supra* note 30, at 269-70 ("External independence requires that an interviewer maintain 'an objective stance of not allying himself/herself with any particular individual involved in the investigation of the allegation.'" (citation omitted). Internal independence refers to "the evaluator's internal ability not to be biased relative to the allegations." Lack of internal independence is exhibited in two major categories: (1) the verbal content of the interview and (2) the interviewer's behavioral influences." *Id.* (citation omitted).

⁴¹ McGough & Warren, *supra* note 21, at 23 (citing LUCY S. MCGOUGH, *CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM* (1994)).

⁴² See *id.*

⁴³ See CECI & BRUCK, *supra* note 16, at 242-50.

⁴⁴ See WHITCOMB, *supra* note 1, at 138-39.

⁴⁵ See DAVID HECHLER, *THE BATTLE AND THE BACKLASH: THE CHILD SEXUAL ABUSE WAR* 221-24, 254-55 (1988) (recommending that multi-disciplinary teams should be formed in all jurisdictions to better process child sexual abuse cases); WHITCOMB, *supra* note 1, at 135, 138-39 (discussing the Children's Advocacy Center in Madison County, Alabama, which consolidates interviewers so that the child may be interviewed by all interested interviewers at one time and in one location; such centers

cially-trained panel of expert validators may be selected by a court-appointed committee to interview children who may have been sexually abused.⁴⁶

Whether MHPs should be able to offer testimony (based on children's hearsay reports of abuse) in criminal child sexual abuse cases under the Confrontation Clause depends in part on whether such professionals used only proper investigative interviewing techniques. The admissibility of such hearsay testimony under the Confrontation Clause, however, should also depend upon the particular role, either therapeutic or investigative, fulfilled by a given MHP in interviewing a particular child.

III. THE COMPETING ROLES AND DIVERGENT VALUES OF MENTAL HEALTH PROFESSIONALS AND THE CRIMINAL JUSTICE SYSTEM AS EVIDENCED IN CHILD SEXUAL ABUSE CASES

Because child sexual abuse is so difficult to prove, MHPs are often called upon to testify about children's reports of abuse. A MHP's particular role, either therapeutic or investigative, in a child sexual abuse case has a significant impact upon the reliability of a child's testimony. The admission of unreliable child testimony may lead to a defendant being denied his or her Sixth Amendment right to confrontation. Despite the potential impact that the MHP can have on defendants' rights under the Confrontation Clause, MHPs are often ignored by the courts. According to Mary Ann Mason:

The [MHP] as therapist [in child sexual abuse cases] cannot start with the posture that the child may be intentionally lying or that the child's testimony has been influenced by other adults. The therapist must build a bond of trust that deals with the child's subjective reality. The therapist must take a supportive, affirmative role, not a critical, investigative role.⁴⁷

Recognizing this inherent incompatibility between thera-

exists in 40 or more similar communities throughout the country).

⁴⁶ See HECHLER, *supra* note 45, at 243. According to Hechler:

Such a committee might consist of criminal and family court judges, prosecutors, defense attorneys, police officers, social workers, and law guardians. The validators themselves would not be restricted to any one profession, such as psychologists or social workers. Physicians, for example, might also be nominated. The committee would promulgate qualifications for the position, given due consideration to appropriate education, training, and experience in interviewing children and in testifying in court.

Id. at 242.

⁴⁷ Mary Ann Mason, *The McMartin Case Revisited: The Conflict between Social Work and Criminal Justice*, 36 SOC. WORK 391, 393 (1991) [hereinafter Mason, *The McMartin Case Revisited*].

peutic and investigative roles is particularly relevant to determining whether these professionals should be able to offer testimony based on children's hearsay statements and behaviors, given the aforementioned general concerns about the reliability of children's reports of abuse.⁴⁸ It is my position that where a MHP engages in ongoing therapy with an alleged child victim, the risk of unreliability is too great to allow the admission of hearsay testimony by that professional. In cases where a MHP engages in a reliable investigative interview, however, the admission of that MHP's hearsay testimony is permitted under the Confrontation Clause of the Sixth Amendment.

A. The Various Roles Fulfilled by Mental Health Professionals and Why Their Testimony is Sought in Child Sexual Abuse Cases.

Mental health professionals may become intimately involved in the processing of child sexual abuse cases as reporters of suspected sexual abuse, evaluators or investigators of children and families, or therapists for children and families.⁴⁹ "Even though prosecutors rely on the evaluations made by social workers [or, correspondingly, other MHPs], the legal world has paid surprisingly little attention to the way they handle their investigations."⁵⁰

MHPs' testimony from interviews with alleged child victims is frequently sought in child sexual abuse cases because of the relative paucity of available evidence in such cases. As the Supreme Court in *Pennsylvania v. Ritchie*⁵¹ recognized, "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."⁵² Children's role as the primary witnesses to sex abuse creates a significant barrier to the conviction of alleged offenders; likewise, requirements for corroborating child witnesses' testimony and the emotional trauma that children often battle in the courtroom pose tremendous problems for the prosecution.⁵³ Medical examinations also

⁴⁸ See discussion *supra* at Part III.

⁴⁹ See FALLER, *supra* note 35, at 79 (noting that in most states, mental health professionals are only required to report suspected abuse to child protective services. MHPs, however, may choose to make such a referral due to ethical concerns, but a corresponding referral to the local police is optional.).

⁵⁰ Younts, *supra* note 22, at 694.

⁵¹ 480 U.S. 39 (1987).

⁵² *Id.* at 60.

⁵³ That children experience trauma in testifying in the courtroom is not a universal proposition and may depend on the circumstances and the particular child in-

frequently fail to provide sufficient physical evidence of sexual abuse, because the results are only "consistent with" maltreatment.⁵⁴

As a consequence of the formidable obstacles faced in ascertaining whether suspected sexual abuse has occurred, MHPs are often enlisted to bolster or to dispute the initial findings of abuse by lesser-trained child protective workers or law enforcement personnel.⁵⁵ The specific role to be played by a MHP, however, is the subject of considerable debate.

B. The Necessity of Bifurcating Investigators' Forensic and Therapeutic Roles.

The inherent difficulties in proving child sexual abuse require prosecutors to often rely on MHPs' testimony based on children's statements and behaviors indicating such abuse. Such testimony should not, however, be blindly accepted as admissible in criminal cases without an analysis of the role fulfilled by the particular MHP. Where competing therapeutic and investigative roles are fulfilled by one MHP, the roles become conflated. Such role conflation may have serious deleterious consequences for the reliability of a child's report of sexual abuse to a MHP acting in dual capacities. Furthermore, as Mason asserts through her social work example, a conflict in values may exist between MHPs focused on therapeutic interventions with alleged child sex abuse victims, on the one hand, and the criminal justice system on the other.⁵⁶ According to Mason, the focus of the criminal justice system is the defendant; in social work, it is the child.

This difference in purpose can lead to conflict at several stages during the legal process. Social work ideology and, often, individual social workers are sometimes seen as obstructing the legal process. The *McMartin* case⁵⁷ illustrates two procedures—interviewing and videotaping—in which the social worker's need to protect and treat the child interfered with criminal procedure.⁵⁸

volved. See, e.g., 2 MYERS, *supra* note 8, at 3 ("Beginning in the 1980s, psychologists studied the effect on children of testifying, and a small corpus of empirical research exists. Based on this research, it cannot be stated conclusively that testifying is either harmful or beneficial to sexually abused children.").

⁵⁴ JAMES SELKIN, *THE CHILD SEXUAL ABUSE CASE IN THE COURTROOM* 30 (2d ed. 1991) (citation omitted).

⁵⁵ See FALLER, *supra* note 35, at 114.

⁵⁶ See Mason, *The McMartin Case Revisited*, *supra* note 47, at 391.

⁵⁷ See CECI & BRUCK, *supra* note 16, at 250 for a description of the *McMartin* preschool case.

⁵⁸ Mason, *The McMartin Case Revisited*, *supra* note 47, at 391.

In the McMartin preschool case, the jury was privy to videotapes of social workers' interviews of the supposed victims in which improper interviewing techniques, such as grossly leading questions, were utilized to elicit bizarre tales of ritualistic abuse.⁵⁹ These videotapes may save children from facing countless repetitive interviews or even from testifying in the purportedly traumatic environment of the courtroom.⁶⁰ Videotaping therapy sessions may also aid the therapist in structuring the healing process.⁶¹ The use of videotapes in the courtroom, however, raises "serious constitutional questions" concerning the rights of the accused under the Confrontation Clause.⁶² Although a number of state legislatures have enacted statutes to provide for the admission of videotaped testimony, such testimony's legal status is unclear.⁶³ What is clear, however, is that the enhanced clarity of electronic recordings of interviews with suspected child abuse victims—whether audio or, preferably, videotapes—acts as a check on the suggestibility of biased reports of those interviews.⁶⁴ Therefore, interviews with allegedly sexually abused children should be electronically recorded.

As an illustration of this conflict of roles, the social workers who interviewed the children in the McMartin case were responsible not only for assessing the allegations of sexual abuse for possible criminal prosecution, but also for serving as therapists seeking to ameliorate any trauma the children might have suffered.⁶⁵ According to Mason, "[i]n attempting to play both roles, [the social workers] interfered with the gathering of evidence."⁶⁶ Ceci and Bruck assert that based

⁵⁹ See generally CECI & BRUCK, *supra* note 16, at 27.

⁶⁰ See Mason, *The McMartin Case Revisited*, *supra* note 47, at 393.

⁶¹ See *id.*

⁶² See *id.* at 394 ("[V]ideotaped interviews may hinder criminal justice. Protecting the child from testifying in court by videotaping interviews or depositions raises serious constitutional issues regarding the defendant's right to confront and cross-examine the witness and may unnecessarily confuse the jury. It is also not clear that all children need protection."). See *infra* Part IV for a discussion of Confrontation Clause jurisprudence.

⁶³ See Mason, *The McMartin Case Revisited*, *supra* note 47, at 393-94 (explaining that, following *Coy v. Iowa*, 487 U.S. 1012 (1988), and *Maryland v. Craig*, 497 U.S. 836, 856 (1990), it is difficult to ascertain the Supreme Court's likely position on videotaped testimony). In *Coy*, 487 U.S. at 1022, the Court held that a one-way screen in the courtroom that enabled the child witnesses to testify without having to see the accused was unconstitutional. In *Craig*, 497 U.S. at 858, however, the Court upheld the use of closed circuit television in the courtroom to avoid the child's "serious emotional distress."

⁶⁴ See generally CECI & BRUCK, *supra* note 16, at 238-51 (discussing memory distortion and suggestibility effects in adults).

⁶⁵ See Mason, *The McMartin Case Revisited*, *supra* note 47, at 391.

⁶⁶ *Id.*

upon the recently-enhanced knowledge base concerning the suggestibility of children, it is not wise to intertwine the divergent roles of therapist and forensic investigator.⁶⁷ They suggest that separate professionals fulfill each role.⁶⁸ Ceci and Bruck also recommend that, when therapists work with young children suspected of having been sexually abused, they postpone the use of suggestive interviewing techniques that are often helpful for therapeutic purposes, such as "fantasy inductions, imagery play, and 'memory work'" until the child has had the opportunity to offer a sworn statement to a forensic interviewer.⁶⁹ A mental health therapist privy to the first disclosure of the alleged child victim should, in recognition of her dual roles as therapist and investigator, be prepared to offer an objective account of her therapeutic techniques;⁷⁰ a real possibility exists that such methods "may lead to a co-construction of events and feelings that are not entirely reality-based"⁷¹ and therefore diminish the evidentiary value of such disclosures by the alleged child victim.

The bifurcation of therapeutic and investigative roles, in addition to enhancing the reliability of the investigative process, enables therapists to concentrate upon their critical mission—to help the child—unfettered by concerns of maintaining objectivity.⁷² Therapy is critically important regardless of whether a court ultimately determines that a child has been sexually abused.⁷³ Conflating the therapeutic and investigative roles fulfilled by MHPs, however, may interfere with the fair prosecution of alleged child sexual abusers. In short, delineating MHPs' dual roles is significant to the enhancement of both the therapeutic and investigative aspects of child sexual abuse cases.

⁶⁷ See CECI & BRUCK, *supra* note 16, at 289-92.

⁶⁸ *See id.*

⁶⁹ *See id.* at 289. Moreover, where a child's first disclosure is during a therapy session, a second professional should be enlisted immediately to undertake the forensic tasks of evaluation and investigation. *See id.* at 290.

⁷⁰ *See id.* at 290.

⁷¹ *Id.* at 291.

⁷² See Mason, *The McMartin Case Revisited*, *supra* note 47, at 392 ("The social worker as therapist . . . has a different goal and different training. Concerns about suggestibility may inhibit the therapist's need to communicate with the child. The therapist must deal with the child's subjective reality. Pushing for the facts may be detrimental to the process of therapy in some cases.")

⁷³ See generally HECHLER, *supra* note 45, at 255 (arguing that publicly-funded therapy should be made available to alleged child victims whether or not abuse is found).

C. The Forensic Investigative Role

Even assuming that therapeutic and professional roles of mental health professionals are properly delineated as separate, MHPs charged with the task of validating an allegation of abuse must engage in a decision-making process somewhat foreign to their traditional practice.⁷⁴ A MHP ordinarily does not think in such dichotomous terms, but is asked to do so in conducting a validation assessment.⁷⁵ Distinctive goals exist in forensic practice that impact upon the validation of sexual abuse, each of which may conflict with a MHP's other aims.⁷⁶ A MHP fulfilling a forensic role must ascertain whether sexual abuse actually occurred, despite the inherent difficulties in developing or proving the accuracy of such a conclusion.⁷⁷

⁷⁴ See Jon R. Conte, *Has This Child Been Sexually Abused?: Dilemmas for the Mental Health Professional Who Seeks the Answer*, 19 CRIM. JUST. & BEHAV. 54, 55 (1992).

⁷⁵ See *id.* According to Conte:

Few other aspects of mental health practice place the professional in the position of directly confronting, challenging, and perhaps even invalidating a client's statements and experiences during the intake/assessment process. The mental health professional asked to determine whether a child has been sexually abused is inherently in the position of potentially denying or questioning the child's sense, understanding, or memory of reality.

Id. at 57.

⁷⁶ See *id.* at 59, 63-72. Conte articulates four competing goals:

1. To help a child report events that may or may not have taken place
2. To make the process of evaluation as non-traumatic to the child and significant others as possible
3. To develop a psychological understanding of the case that may inform the legal processing of a case (e.g., the trier of fact)
4. To render a report that is useful to the legal processing of the case.

Id. at 59. The fourth goal itself demands the examination of three or more issues involving the usefulness of a mental health professional's evaluation or expert opinion in the legal process:

1. What is the level of training, knowledge, and expertise of the professional?
2. To what extent has the evaluation process been adequately described, employed proven processes and procedures, and made a reasonable connection between the case facts and evaluation conclusion or expert opinion?
3. To what extent has the evaluator and the evaluation maintained objectivity?

Id. at 63, 64, 70. Benjamin Saunders cites with approval:

The tone of therapeutic work with children is acceptance, support and advocacy. Investigative interviewers, while they may present to the child as warm, empathetic, accepting, and supportive must remain objective, skeptical, and open to all information and alternative explanations. They must pursue details, attempt to learn from the elements of the crime, gently quiz the suspected victims, and refrain from advocacy. I submit that this is a very difficult shift for [a] CSA [child sexual abuse] therapist to make.

Benjamin E. Saunders, 6 VIOLENCE UPDATE 5, 8 (July 1993). While I would agree with the above statement that the transition from a therapeutic role to a forensic role is difficult for MHPs, I would argue that the task is not insurmountable, as long as the professional is not asked to fulfill both roles at once.

⁷⁷ See Conte, *supra* note 74, at 58-59 (explaining behaviors such as fearfulness,

It is the position of this Comment that MHPs may effectively fulfill the role of a forensic investigator, provided that certain steps are taken to ensure the reliability of the investigative interview. MHPs' testimony will satisfy the Confrontation Clause when it is based on reliable, non-therapeutic interviews of suspected child sexual abuse victims.⁷⁸

The noted discord between these roles has prompted one commentator to posit that "the role conflicts between investigator and therapist are so profound that mental health professionals should avoid the investigative process altogether."⁷⁹ It is my position, however, that properly-trained MHPs can play a valuable investigative role, grounded in their extensive expertise in the field,⁸⁰ provided that care is taken to ensure

somatic complaints, and acting younger than one's age, although sometimes exhibited by abused children, may also be indicative of generalized stress; likewise, sexualized behaviors, despite their noted association with abuse, can be shown by non-abused children).

⁷⁸ As noted, the expertise of MHPs in assessing child sexual abuse is not universally recognized. For instance, MHPs have been said to "possess no significant truth-determining abilities unique to their clinical skills and practices." Thomas M. Horner et al., *The Biases of Child Sexual Abuse Experts: Believing is Seeing*, 21 BULL. AM. ACAD. PSYCHIATRY L. 281, 288-89 (1993). MHPs have been shown to be no better than judges and juries in determining whether a particular set of facts proved indicative of child sexual abuse. See *id.* at 287. Judicial caution is recommended with respect to MHPs' expert testimony - much as lay witnesses are generally not allowed to introduce hearsay testimony or conclusory statements, experts primary value is in providing a richer array of facts by which the judge or jury may formulate a more informed decision. See *id.* at 288-89 ("By virtue of their . . . technical expertise, experts may provide avenue toward facts that courts do not inherently possess . . ."). If they are unable to add value to the investigation, MHPs are no different than laymen on the stand. By contrast, Fallor defends the expertise of MHPs by claiming that "[t]here appears to be a fair amount of consensus among mental health professionals about both the strategy and the criteria for deciding whether a child has been sexually victimized." FALLOR, *supra* note 35, at 15. Despite these conflicting viewpoints about MHPs' expertise, it is clear they "make judgments about sexual abuse every day." 1 MEYERS, *supra* note 3, at 529.

⁷⁹ Gary Melton, *Doing Justice and Doing Good: Conflicts for Mental Health Professionals*, THE FUTURE OF CHILDREN, Summer/Fall 1994, at 102, 106.

⁸⁰ Doris and other researchers at the Family Life Development Center at Cornell University thoughtfully respond to Melton:

Although one may agree with Melton that role conflict is a major cause for concern, it can be argued that automatically ruling out the participation of mental health professionals in the investigation of child sexual abuse would greatly reduce the expertise available for such investigations. Training mental health professionals to function in the strictly defined role of investigator in many instances would be more economical than providing a police investigator or even a CPS worker with the in-depth knowledge of child development and the extensive background in interviewing children that is likely to be possessed by the child clinician. In a field in which expertise is limited in comparison to the need, there is much to be said for a pragmatic approach to the use and development of resources.

John Doris et al., *Training in Child Protective Services: A Commentary on the Amicus Brief of Bruck and Ceci (1993/1995)*, 1 PSYCHOL. PUB. POL'Y & L. 479, 489 (1995).

the reliability of the investigative interview.⁸¹

This Comment asserts that MHPs can effectively engage in an investigative role in child sexual abuse cases. What is undoubtedly necessary, however, is proper training for MHPs who do fulfill this role in conducting interviews,⁸² as well as an enhancement of the forensic investigation process and a refining of the investigative role.⁸³ Correspondingly, MHPs who fulfill only an investigative role in an enhanced system for forensic investigation may offer testimony based on the hearsay statements and behaviors of alleged child sexual abuse victims, without the real danger of unreliability that exists when such professionals engage in a therapeutic relationship with children. As such, the admission of MHPs' hearsay testimony will not trammel defendants' constitutional rights under the Confrontation Clause.

In Part IV, this Comment examines in detail the current doctrine under the Confrontation Clause as it relates to the introduction of children's hearsay statements by MHPs in the courtroom and a number of specific "firmly rooted" and special child hearsay exceptions. It is this Comment's view that if MHPs are to be called upon to testify to children's hearsay statements and behaviors suggesting child abuse, any analysis under the hearsay doctrine cannot ignore the danger of unreliable reports of sexual abuse where investigative interviews are conducted improperly, nor deny the incompatibility of the therapeutic role with the generation of reliable child reports of abuse.

IV. HEARSAY TESTIMONY - THE INTRODUCTION OF CHILDREN'S HEARSAY BY MENTAL HEALTH PROFESSIONALS IN COURT

An examination of the application of Confrontation Clause jurisprudence to child sexual abuse cases is useful in understanding how prosecutors have sought to gain the admission of MHPs' testimony based on children's hearsay statements and in critically assessing when admission of such testimony should be permitted. Of particular salience in this inquiry is the Supreme Court's reliability requirement for the admission of hearsay testimony under the Confrontation Clause of the Sixth Amendment, first articulated in *Ohio v. Roberts*.⁸⁴ The

⁸¹ See discussion *supra* Part II.B.

⁸² See discussion *infra* Part V.A.2.

⁸³ See discussion *infra* Part V.A.4.

⁸⁴ See 448 U.S. 56 (1980). In *Roberts*, the Supreme Court first delineated a two-prong standard designed for the purpose of ascertaining the admissibility of an out-of-court statement given the limited stipulations of the Confrontation Clause. First, the prosecution must either "produce, or demonstrate the unavailability of, the de-

Court has later interpreted the *Roberts* reliability requirement to mean that where a hearsay statement fits under a "firmly rooted" hearsay exception, it is considered sufficiently reliable by default, whereas if the out-of-court statement falls outside of such specified categories it is presumptively unreliable and inadmissible for Confrontation Clause purposes⁸⁵ and "must be excluded, at least absent a showing of particularized guarantees of trustworthiness."⁸⁶ The Court has offered little concrete guidance, however, in actually applying the reliability requirement where such application is in fact mandated.⁸⁷

clarant whose statement it wishes to use against the defendant." *Id.* at 65. Second, where the declarant is said to be unavailable, the out-of-court statement is only to be introduced "if it bears adequate 'indicia of reliability.'" *Id.* It is the reliability analysis (prong 2) which is most relevant to this Comment's inquiry.

Roberts' production requirement (prong 1), on the other hand, has become less significant over time. Subsequent to *Roberts*, the Court curtailed the application of the production requirement (prong 1) somewhat in *United States v. Inadl*, finding that it does not apply when a prosecutor seeks to introduce hearsay statements that fall under the rubric of Federal Rule of Evidence 801(d)(2)(E), the co-conspirator exception. See 475 U.S. 387 (1986); see also 2 MYERS, *supra* note 8, at 394. Likewise, Myers surmises that the Court's decision in *White v. Illinois*, 502 U.S. 346 (1992), means that the unavailability analysis, or the production requirement, is only applicable when the hearsay statements sought to be admitted were made during an earlier judicial proceeding. See *id.* at 395. In other cases, the evidence must be excluded absent a showing of "particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66. The *White* Court also declined to hold that this requirement be applied to the excited utterance and medical diagnosis or treatment hearsay exceptions. See *White*, 502 U.S. at 354. Other courts have interpreted the Confrontation Clause as requiring the production of hearsay declarants only where the exception sought is not firmly rooted. See, e.g., *Miller v. State*, 472 S.E.2d 74, 78 (Ga. 1996) ("[S]hould the hearsay evidence not fall within a firmly rooted exception, the unavailability of the hearsay declarant must be established.").

The *White* Court left open the question whether residual and special child abuse exceptions demand a showing of unavailability. See Josephine A. Buckley et al., *Key Evidentiary issues in Child Sexual Abuse Cases*, in A JUDICIAL PRIMER ON CHILD SEXUAL ABUSE 63, 85 (Josephine Buckley & Claire Sandt eds., 1994). A number of the special child hearsay exceptions passed by states do require a finding of unavailability if the child does not testify, although seven such statutes do not. See *id.* Residual exceptions do not require a demonstration of unavailability. See *id.*

It is clear from the Court's opinion in *Roberts*, that when the production requirement is germane, it necessitates a bonafide effort on the part of the prosecutor to ensure that the statement's declarant is physically present for trial. See 2 MYERS, *supra* note 3, at 396 n.1262 (discussing *Barber v. Page*, 390 U.S. 719 (1968), *Mancussi v. Stubbs*, 408 U.S. 204 (1972) and *United States v. Ortiz*, 35 M.J. 391, 393-94 (C.M.A. 1992)). The *White* decision, however, is not likely to dramatically effect the real-world practice of prosecutors or defense attorneys. Prosecutors generally prefer to have a child witness testify and *White* does not preclude the testimony of an available child. See Buckley et al., *supra*, at 85.

⁸⁵ See *Bourjaily v. United States*, 483 U.S. 171, 183 (1986) (defining a firmly-rooted hearsay exception as one in which hearsay is usually reliable).

⁸⁶ *Roberts*, 448 U.S. at 66.

⁸⁷ See *Idaho v. Wright*, 497 U.S. 805, 818 (1990) (stating without further clarification that procedural safeguards "may in many instances be . . . unnecessary to a determination whether a given statement is sufficiently trustworthy for Confrontation Clause purposes").

Moreover, despite the Court's apparent acknowledgment of the significance of the investigative interview in *Wright*,⁸⁸ it has not examined how the particular roles fulfilled by MHPs are likely to impact the reliability of their hearsay testimony based on interviews with children.

Traditional hearsay exceptions, as well as residual and state "tender years" hearsay exceptions, are commonly invoked in an attempt to gain admission of MHPs' testimony based on the hearsay statements and behaviors of alleged child victims of sexual abuse.⁸⁹ The traditional hearsay exceptions that are most frequently invoked with success in sexual assault cases are statements for the purpose of medical diagnosis or treatment and excited utterances. The meaning of each exception, however, has been inappropriately stretched when applied to admit hearsay testimony by MHPs in child sexual abuse cases.⁹⁰ Alternatively, sometimes a federal or state residual hearsay exception is invoked, as exemplified by Federal Rule of Evidence 807,⁹¹ although such an exception is often criticized as being extremely vague and over-broad, inviting misapplication in child sexual abuse cases.⁹² Finally, recognizing the unique difficulties in child sexual abuse prosecutions and the imperfections inherent in traditional and residual hearsay exceptions, many states have chosen to include a reliability analysis in their own specialized hearsay exceptions.⁹³

⁸⁸ See *id.*

⁸⁹ In addition, a child's out-of-court statement might also be admitted as non-hearsay if found to be a consistent statement made in order to defend the witness against recent or false accusations that seek to weaken that witness' credibility. See *Tome v. United States*, 513 U.S. 150, 167 (1995).

⁹⁰ See, e.g. *Commonwealth v. Smith*, 586 A.2d 957, 964 (Pa. Super. Ct. 1991) (holding that hearsay exceptions were improperly allowed to buttress child's inconsistent testimony).

⁹¹ The Rule reads as follows:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of 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

FED. R. EVID. 807.

⁹² See *WHITCOMB*, *supra* note 1, at 85.

⁹³ See *id.* app. at 91 tbl.4 (examining state hearsay exceptions). For a complete chart of the state exceptions, see 2 PAUL DEROHANNESIAN II, *SEXUAL ASSAULT TRIALS* 1031 app. (1998). Many state statutes encompass similar concepts with regard to child hearsay exceptions. Washington State's statute exemplifies the basic hearsay exceptions found in most state codes. See Wash. Rev. Code Ann. §9A.44.120 (West 1988). One commentator has summarized the Washington Statute:

[The] child must either testify or be unavailable; if [the] child [is] unavailable, such [a] statement may be admitted only if there is corroborative evidence of

It is my contention that when prosecutors seek to introduce MHPs' hearsay testimony as evidence of sexual abuse in criminal cases, courts should demand a reliability analysis, even where the testimony might seemingly fit under the rubric of one of the firmly rooted hearsay exceptions. Such a reliability analysis should always include both a critical examination of the nature of the investigative interview as well as an evaluation of the role(s) fulfilled by the MHP. Testimony by MHPs who have engaged in a therapeutic, as opposed to a forensic, relationship with an alleged child victim should not be admitted into evidence because of its potential unreliability, regardless of the hearsay exception invoked.

*A. Admission of Hearsay Via Traditional Hearsay
Exceptions—Statements Made for the Purpose of
Medical Diagnosis or Treatment.*

Courts in child sexual abuse cases have sometimes inappropriately extrapolated the hearsay exception governing statements made for the purpose of medical diagnosis or treatment⁹⁴ to statements made to MHPs in furtherance of psychological diagnosis and/or treatment.⁹⁵ It is my view that the firmly rooted medical diagnosis and treatment exception should not be utilized to allow the admission of hearsay testimony by MHPs based on their interviews with allegedly abused children, regardless of whether the MHP fulfills a

the act which is the subject of the statement. [The statute] requires the court finding, after a hearing conducted outside the presence of the jury, that the time, content and circumstances of the statement provide sufficient indicia of reliability; [it] requires [that the] proponent make known to [the] adverse party [the] intention to offer statement and particulars of statement sufficiently in advance of [the] proceedings to provide [a] fair opportunity to prepare to meet the statement.

2 DEROHANNESIAN, *supra*, at 1051 app.; see also Diane B. Lathi, Comment, *Sex Abuse, Accusations of Lies, and Videotaped Testimony: A Proposal for a Federal Hearsay Exception in Child Sexual Abuse Cases*, 68 U. COLO. L. REV. 507, 538 (1997) (examining the efficacy of Colorado's special "tender years" statute).

⁹⁴ See FED. R. EVID. 803(4) ("Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.").

⁹⁵ See, e.g. *State v. Figured*, 446 S.E.2d 838 (N.C. Ct. App. 1994) (affirming that the trial court properly admitted testimony of a social worker and two psychologists under the state medical diagnosis or treatment exception, N.C. GEN. STAT. § 8C-1, which adopted the language of FED. R. EVID. 803(4)); *State v. Valentine*, No. 71301, 1997 Ohio App. LEXIS 3094 (Ohio Ct. App. July 17, 1997) (hearsay statements made to a social worker by a child were properly admitted under 803(4)); *State v. Nelson*, 406 N.W.2d 385 (Wis. 1987) (finding that a psychologist could introduce a three-year-old child's hearsay statements in the courtroom under the medical diagnosis and treatment exception since the child viewed the psychologist as an authority figure and a provider of treatment).

therapeutic or an investigative role. The *Wright*⁹⁶ reliability analysis should not be circumvented by the misapplication of the medical diagnosis or treatment exception. As discussed in detail in Part III, therapeutic and investigative roles fulfilled by MHPs are inherently incompatible; thus, a therapist cannot reliably engage in forensic investigation of suspected sexual abuse and should not be permitted to offer hearsay testimony obtained through treatment of a child. Moreover, the medical diagnosis or treatment exception should not be extended to allow the admission of hearsay testimony by an MHP whose only relationship to an alleged child victim is that of a forensic investigator and who provides no treatment of that child. MHPs should not be granted permission to offer expert testimony that is inapplicable to the treatment or diagnosis of sexual abuse under an expanded rubric of Rule 803(4).

1. *The Practical Danger of Over-Extending Rule 803(4)*

Considerable concern exists regarding the significant extension of the medical diagnosis and treatment hearsay exception to permit admission of MHPs' hearsay testimony based on their psychological diagnosis and/or treatment of alleged child sex abuse victims.⁹⁷ Critics of the unmitigated expansion of the exception's scope argue that young children may not realize that the MHP to whom they disclose information is offering treatment.⁹⁸ Moreover, the application of this exception to psychological diagnosis and treatment could encompass every statement made to a MHP, potentially rendering the exception meaningless.⁹⁹

⁹⁶ See *Idaho v. Wright*, 497 U.S. 805 (1989).

⁹⁷ See WHITCOMB, *supra* note 1, at 86.

⁹⁸ See Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257, 281 (1989) [hereinafter Mosteller, *Child Sexual Abuse*]; see also *United States v. Siroky*, 42 M.J. 707, 713 (A.F.C.M.R. 1995) ("There is scant evidence supporting any inference that [the alleged child victim] understood her emotional health depended on her truthful statements to [her therapist]."); *United States v. Quarles*, 25 M.J. 761, 772-73 (N.M.C.M.R. 1987) ("[The] record fails to demonstrate that the children knew why they were taken to [the psychologist] or that their truthful answers to his questions were necessary for their treatment.")

⁹⁹ One commentator has explained the dangers of expanding the medical diagnosis exception to include psychological diagnosis and treatment in greater detail:

The successful prosecution of child sexual abuse cases should not be permitted to distort the hearsay exception for medical diagnosis or treatment. Almost anything is relevant to the diagnosis or treatment of psychological well being, and far too many untrustworthy statements are relevant to preventing repetition of the abuse. Federal Rule of Evidence 803(4) should remain restricted to statements pertinent to physical medical diagnosis or treatment.

Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual*

Robert Mosteller proposed a solution to the hearsay problem in which he endorses a limited invocation of the medical diagnosis and treatment hearsay exception in order to curtail the exception's unmitigated expansion.¹⁰⁰ He would assess the admissibility of a child's hearsay statements to a MHP by extrapolating the traditional rationales for introducing those statements, such as whether (1) the statement indicates the child's "selfish interest" in obtaining treatment; or (2) the statement provides the evidentiary support for a mental health expert's¹⁰¹ diagnosis or treatment of the child declarant.¹⁰² In cases where a child's hearsay statement is to be introduced under the second rationale (assuming the child is available to testify), Mosteller recommends that before such evidence may properly be admitted, the expert should be mandated to testify to the relevance of the statements to the formation of her opinion.¹⁰³

Mosteller's model is flawed, however, because it would admit the unreliable hearsay testimony of a MHP having a therapeutic relationship with an alleged child victim.¹⁰⁴ Contrary to Mosteller, I contend that the supportive role undertaken by a MHP involved in a therapeutic relationship with an alleged child sexual abuse victim is wholly inconsistent with the admission of the child's hearsay statements under

Abuse Prosecutions: The State of the Relationship, 72 MINN. L. REV. 523, 529 n.26 (1988).

¹⁰⁰ See Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 799 [hereinafter, Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine*].

¹⁰¹ Labeling a MHP as an expert here is significant. Under Federal Rule of Evidence 703, the basis of an expert's opinion may be based on "facts or data . . . [that are] not . . . admissible in evidence," such as hearsay. As Federal Rule of Evidence 701 makes clear, a lay witness' ability to offer opinion testimony is much more limited.

¹⁰² See Mosteller, *Child Sexual Abuse*, *supra* note 988, at 291. Mosteller mentions the constitutional dangers of the exception generally:

[T]he exception for medical diagnosis or treatment is used as a way to manufacture and present evidence against the defendant. This is particularly true given the broad categories of experts who may qualify, many of whom are part of child abuse trauma teams heavily invested in enforcement of sexual abuse laws. When the content of the statement concerns fault or identity, the challenges to the values protected by the Confrontation Clause are too great to ignore. The important issues should not be avoided by simply declaring that the entire exception under the Federal Rules model is firmly rooted.

Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine*, *supra* note 100, at 799.

¹⁰³ See Mosteller, *Child Sexual Abuse*, *supra* note 988, at 291. In instances in which the child is unavailable to testify, however, Mosteller would admit the child's hearsay statements only if they conformed to the requirements of the "selfish interest theory", thereby demonstrating a real connection to a goal of diagnosis or treatment. See *id.* at 292.

¹⁰⁴ See Mosteller, *Child Sexual Abuse*, *supra* note 988, at 291.

either rationale of this newly-expanded exception.

2. *Constitutional Issues Surrounding 803(4) and Child Hearsay Statements and Behaviors.*

Constitutional concerns under the Confrontation Clause also seriously impact the admission of child hearsay statements to MHPs under Federal Rule of Evidence 803(4).¹⁰⁵ After the Supreme Court's pronouncement in *California v. Green*¹⁰⁶ that availability for cross-examination at trial suffices under the Confrontation Clause, the Sixth Amendment may only be a barrier to the introduction of a child's hearsay statements in the event that a child fails to testify or is deemed unavailable by the court.¹⁰⁷ Although it is not readily apparent whether the Court demands the production of the child declarant for admission of hearsay statements under any Rule 803 exception,¹⁰⁸ Mosteller posits that the Court might require a showing of unavailability when mental health experts seek to introduce hearsay statements under 803(4) as the foundation for their diagnostic- or treatment-related opinions.¹⁰⁹ According to Mosteller, even when a child does testify in a sexual abuse case to the satisfaction of the Confrontation Clause, a mental health expert should be required to explicate how the child's hearsay statements are to be used as the basis for her opinion and to testify to such information before the statements' admission.¹¹⁰

Mosteller's approach identifies a dangerous trend in the case law involving Rule 803(4): MHPs serving as experts have not been confined to offering their opinions pertinent to the treatment or diagnosis of child sexual abuse.¹¹¹ He warns that "[s]imply because the expert is one who typically gives opinions related to psychological condition and because the

¹⁰⁵ See *id.* at 285-90.

¹⁰⁶ See 399 U.S. 149 (1970).

¹⁰⁷ See Mosteller, *Child Sexual Abuse*, *supra* note 988, at 286-87 (discussing *Green*). Mosteller also cites *United States v. Owens*, 484 U.S. 554 (1988), for its proposition that a witness' inability to recall certain details involving her prior statement would not be problematic under the Confrontation Clause. See *id.*

¹⁰⁸ For a complete analysis of the Court's availability jurisprudence, see Mosteller, *Child Sexual Abuse*, *supra* note 988, at 285-87.

¹⁰⁹ See *id.* at 285 n.109. Mosteller notes that if an unavailability requirement must in fact be fulfilled, a broad legislative pronouncement that trauma is inherent in children's testimony will likely be unsuccessful. See *id.* at 286 n.111; see also *Coy v. Iowa*, 487 U.S. 1012 (1988) (holding that the Confrontation Clause prohibits the use of a screen to shield the testifying child from the defendant; the preference for face-to-face confrontation cannot be abdicated without an individualized showing of likely trauma).

¹¹⁰ See Mosteller, *Child Sexual Abuse*, *supra* note 988, at 291.

¹¹¹ See *id.* at 283.

expert is competent to form an opinion relevant to some aspect of the case should not be sufficient reason to receive the statement [under 803(4)].¹¹² An expert may wrongly be permitted to introduce statements concerning the identity of the perpetrator under Rule 803(4), thereby expanding the “firmly rooted” exception while neglecting a reliability analysis of the identification.¹¹³ A trial court will typically permit MHPs to introduce testimony that the professed child victim displays symptoms consistent with past sexual abuse in order to explain away any of the child witness’ potential credibility-damaging behaviors.¹¹⁴ Courts have nonetheless failed to hold that a mental health expert may usurp the jury’s role in assessing credibility directly.¹¹⁵ As a result, a defendant’s right to a jury trial and to due process under the Constitution remain protected.¹¹⁶

*State v. Wetherbee*¹¹⁷ illustrates the difficulty in delineating a bright line separating expert testimony regarding whether a child’s behavior is characteristic of abused children from an impermissible assessment of credibility.¹¹⁸ The *Wetherbee*

¹¹² *Id.*

¹¹³ See Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine*, *supra* note 100, at 708.

¹¹⁴ See Mosteller, *Child Sexual Abuse*, *supra* note 988, at 283 n.104.

¹¹⁵ See, e.g., *State v. Wetherbee*, 594 A.2d 390 (Vt. 1991) (holding that testimony by an expert psychologist involving the believability of a three-year old child’s hearsay statements about her alleged abuse misled the jury and therefore constituted reversible error); *Allison v. State*, 353 S.E.2d 805, 808 (Ga. 1987) (“The jury, having the benefit of extensive testimony . . . that this child exhibited several symptoms that are consistent with Child Sexual Abuse syndrome, was fully capable of deciding—upon their own— whether the child *in fact* was abused, and, if so, whether [the defendant] did it.”). Cf. *Montana v. Harris*, 808 P.2d 453, 456 (Mont. 1991) (“Because [the child’s] credibility was not called into question by defendant, the District Court committed reversible error by allowing the psychotherapist to comment directly on his trustworthiness.”). See generally Mary Ann Mason, *A Judicial Dilemma: Expert Witness Testimony in Child Sex Abuse Cases*, 19 J. PSYCHIATRY & L. 185 (1991) [hereinafter, Mason, *A Judicial Dilemma*] (analyzing an appellate court decision in which expert testimony regarding the characteristics of sexually abused children was challenged).

¹¹⁶ See *State v. David*, 1992 Ohio App. LEXIS 4794, at *9-11 (Ohio Ct. App. Sept. 15, 1992) (finding that the trial court impermissibly admitted social worker’s testimony involving the credibility of the child witness in violation of the defendant’s rights to due process and a fair trial); *State v. Whitt*, 589 N.E.2d 492 (Ohio Ct. App. 1991) (holding that the trial court’s acceptance of expert testimony by a social worker involving the general credibility of an abuse accusation, the credibility of the child’s accusation of abuse, and the likelihood that the abuse did in fact happen violated the defendant’s due process right to a fair trial).

¹¹⁷ 594 A.2d 390 (Vt. 1991).

¹¹⁸ According to *Wetherbee*:

We permit mental health experts to help jurors understand “the emotional antecedents of the victim’s conduct” so that they “may be better able to assess the credibility of the complaining witness.” There is a danger, however, when this “help” in understanding the symptomology of abused children in general is

Court cautioned that the nature of the "special relationship" between the expert psychologist and the alleged child victim may lead to an assumption by jurors that the expert found the child's account believable, thereby impermissibly compromising the defendant's constitutional rights to both due process and a fair trial, as well as eroding her presumption of innocence.¹¹⁹

Wetherbee illustrates the necessity of bifurcating MHPs' therapeutic and investigative roles in child sexual abuse cases.¹²⁰ Even Mosteller's more limited suggestion to use the medical diagnosis and treatment hearsay exception where the MHP must explicitly delineate the basis for her hearsay testimony and link it to psychological treatment and/or diagnosis¹²¹ would reduce defendant's constitutional due process protections. Mosteller asserts that in order to preserve the original intention of the medical diagnosis and treatment exception, an expert should only utilize the child's hearsay statements to form the basis of an opinion directly implicating the medical treatment of that child (assuming that the child testifies in court).¹²² What Mosteller's model does not

offered by an expert who has examined the particular child victim. If the jury knows the psychologist has examined the victim, his or her comments are taken in a different light.

594 A.2d at 394 (citation omitted).

¹¹⁹ The *Wetherbee* court declined to admit the child's hearsay statements as the basis of the psychologist's opinion without specifically mentioning Rule 803(4) or a similar exception, noting:

We have previously expressed our concern that an expert may lend an improper "aura of special reliability and trustworthiness" to a complainant's testimony (citation omitted). In cases like this one, the effect of that aura can be subtle to detect because it results, not only from the psychologist's expertise, but also from his special relationship with the victim.

.....

Moreover, the mental health professional's interview with the victim has therapeutic as well as investigative goals. Emphasis is placed on establishing a relationship with the victim, encouraging the victim to trust the mental health professional. Throughout the interviewing process, the mental health professional is not simply an investigator, but a sympathetic member of a helping profession and a healer. As a result of the complex and special relationship that the expert has with the victim before the case comes to trial, what the jury ends up seeing is . . . a concerned therapist who has examined the child, believed her, and is probably currently engaged in her recovery process.

Id. at 394-95 (citations omitted).

¹²⁰ See discussion *supra* Part III.A (arguing that it is inappropriate to combine in one person the competing roles of forensic investigator and therapist); see also Mason, *The McMartin Case Revisited*, *supra* note 47, at 393 ("A social worker may be trained to become an investigator, as might anyone else who has a basic understanding of child development. However, it is a questionable practice to use the same person as both investigator and therapist.")

¹²¹ See Mosteller, *Child Sexual Abuse*, *supra* note 988, at 291-94.

¹²² *Id.* When the alleged child victim is unreliable, however, Mosteller would only admit the child's hearsay statements of behaviors under his "selfish interest theory."

appreciate, however, is that the testimony of a MHP, where directly linked to the medical diagnosis or treatment of the alleged child victim, may put an impermissible imprimatur of credibility upon the hearsay statements of that child. A MHP who has been in a therapeutic relationship with an alleged child sex abuse victim should not be permitted to offer hearsay testimony under either Rule 803(4) or any other exception.¹²³

Where a MHP fulfills an investigative, rather than a therapeutic, role, her testimony must be derived from a properly conducted interview, one that does not compromise the defendant's constitutional right to due process. Expert testimony from a MHP acting in a purely investigative capacity, however, is not admissible under the medical diagnosis and treatment exception to the hearsay rule. That exception requires that the interview be in furtherance of some therapeutic end.¹²⁴ Moreover, when a child fails to testify and a defendant's rights under the Confrontation Clause are at issue, the logic for denying the application of the medical diagnosis and treatment exception to MHPs' testimony applies with even greater force.

When a child declarant does not testify, the *Roberts* requirement that hearsay statements reflect sufficient "indicia of reliability" in order to meet the demands of the Confrontation Clause becomes particularly salient.¹²⁵ The Confrontation Clause demands that a hearsay statement be rightly categorized as a "firmly rooted hearsay exception" or possess "particularized guarantees of trustworthiness."¹²⁶ Professor Mosteller asserts that where a statement is to be introduced as the foundation for an expert opinion under an expanded interpretation of 803(4), neither of these requirements is met; instead, a clear nexus between the child's self treatment interest and the statement must be shown.¹²⁷ As argued above, even assuming that a child does in fact have a demonstrated understanding that her relationship with a therapist is in-

See id.

¹²³ See discussion *infra* Part IV.B-C.

¹²⁴ See FED R. EVID. 803(4); see also *State v. Short*, 1992 Ohio App. LEXIS 3536, at *7-8 (Ohio Ct. App. 1992) ([T]he child's statements to [a social worker] were not made for purposes of medical diagnosis and treatment Accordingly, the statements were not admissible under Evid. R. 803(4) as exceptions to the hearsay rule.).

¹²⁵ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); see *supra* Part IV (discussing the *Roberts* reliability requirement); see also Mosteller, *Child Sexual Abuse*, *supra* note 988, at 288-90 (stating that "when a statement is offered as substantive evidence exclusively on the basis that a medical expert has relied upon it to form her opinion, the statement is not within a firmly rooted hearsay exception" as required by *Roberts*).

¹²⁶ *Idaho v. Wright*, 497 U.S. 805, 814-15 (1990).

¹²⁷ See Mosteller, *Child Sexual Abuse*, *supra* note 988, at 292-93.

tended to enhance her psychological well-being, the caregiving norms intrinsic to the therapeutic role call into question the reliability of the expert's testimony in court. An investigating MHP's testimony, albeit potentially more reliable, would clearly on its face fall outside the rubric of the treatment-based rationale of the "firmly rooted" medical diagnosis and treatment exception and therefore would be inadmissible under 803(4) in child sex abuse cases. There are, however, other "firmly rooted" hearsay exceptions that may appear to allow such testimony. However, given that by definition firmly rooted exceptions do not require a reliability analysis, no such exception should be involved to gain the admission of MHPs' testimony based on children's hearsay statements.

B. *Excited Utterance Exception*

The excited utterance exception¹²⁸ is sometimes applied to hearsay testimony garnered from MHPs' interviews of alleged child victims.¹²⁹ This "firmly rooted" exception, however, should not allow into evidence MHPs' hearsay testimony gleaned from either therapeutic or investigative interviews with suspected victims. Neither investigative nor therapeutic interviews by MHPs satisfy the necessary criteria for the excited utterance exception. Moreover, since this exception does not include a reliability analysis of MHP testimony, its application cannot ensure that testimony's truthfulness.

Three provisions must be satisfied to admit hearsay testimony under the excited utterance exception: "(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."¹³⁰ In the past, the exception required that the statement be contemporaneous¹³¹ with the occurrence of the event; now, however, the key question is whether any delay enabled the declarant to fabricate his statement.¹³² The use of this exception in the context of child sexual abuse often proves problematic, necessitating stretching the exception beyond its

¹²⁸ See FED. R. EVID. 803(2) ("A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.").

¹²⁹ See, e.g., *State v. Wagner*, 508 N.E.2d 164, 168 (Ohio App. 1986) (deeming admissible a detective's hearsay statement as to the child's effort to explain what happened to him using anatomical dolls).

¹³⁰ WHITCOMB, *supra* note 1, at 87.

¹³¹ See *id.*

¹³² See *id.* at 87-88.

originally-intended parameters.¹³³ For instance, the demonstration of the requisite spontaneity is frequently a significant barrier to the use of this exception since children may be unaware that sexual abuse is wrong, thereby making their comments seem offhand and indifferent.¹³⁴ Conversely, the child may in fact be anxious, but unwilling or unable to convey her concern without sufficient questioning.¹³⁵ Nevertheless, because of the unique barriers to the successful prosecution of child sexual abuse cases, some courts have been willing to stretch and warp the excited utterance exception somewhat beyond its intended parameters.¹³⁶

The excited utterance exception should not be invoked to allow MHPs' testimony based on children's hearsay statements and behaviors where MHPs and their child clients engage in an ongoing therapeutic relationship. When an alleged child victim makes a report of abuse during a therapeutic session, this circumscribed exception is unlikely to apply, as its "spontaneous reaction" requirement is likely unsatisfied. Moreover, because this traditional hearsay exception does not require a reliability analysis, the excited utterance exception should not allow admission of hearsay testimony even where a child's report of abuse to a purely investigative MHP is arguably spontaneous.

The excited utterance exception is not, however, the final word on the admissibility of MHP testimony in child sexual abuse cases. The residual and state tender years exceptions' effect on the admissibility of such testimony must be examined before the ultimate conclusion on admissibility may be established.

C. Residual and State Tender Years Hearsay Exceptions

It is beyond the scope of this Comment to fully explore the numerous constructions of existing state child hearsay statutes and the countless permutations of viable alternatives. It suffices to say, however, that when either a residual or a state tender years hearsay exception is sought to be invoked

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See, e.g., *State v. Celestino*, 1993 Ohio App. LEXIS 1544, at *35 (1993) ("While we recognize the trend to liberalize the time requirements in child abuse cases because of the unique nature of children, the statements of the child in this case cannot be admitted as excited utterances."); Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine*, *supra* note 100, at 706 n.68 ("With children, the time period between the exciting event and the hearsay statement is often expanded dramatically . . .").

by a prosecutor in a child sexual abuse case to admit the hearsay statements of an unavailable child victim,¹³⁷ *Wright* prescribes that such statements must possess "particularized guarantees of trustworthiness" in order to satisfy the mandates of the Confrontation Clause.¹³⁸ It is my view that regardless of the exact construction of a given residual or state tender years hearsay exception, the analysis of whether an MHP's hearsay testimony based on interviews with a suspected child victim possesses particular guarantees of trustworthiness should be the same. Such an analysis must encompass a critical examination of the nature of the investigative interview and the role—therapeutic or investigative—fulfilled by the MHP in conducting the interview. MHPs acting as therapists for children believed to have been sexually abused cannot, by definition, offer objective, reliable hearsay testimony.¹³⁹

In *Wright*, the Court examined whether the out-of-court statements of an alleged child victim in response to a doctor's leading questions are admissible under a "residual", rather than a "firmly rooted" hearsay exception. The Court held that

¹³⁷ See Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine*, *supra* note 100, at 720-23 (discussing the availability requirement); see also Fed. R. Evid. 804(a):

- "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 the declarant's statement; or
 - (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
 - (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
 - (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
 - (5) is absent from the hearing and the proponent of his statement has been unable to procure the declarant's attendance . . . by process or other reasonable means.

Mosteller also notes additional common grounds for unavailability asserted in child sexual abuse cases, such as incompetence of the witness and the child's likely trauma from testifying. See Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine*, *supra* note 100, at 702-05. The Supreme Court has not yet addressed a case in which the issue presented was the definition of psychological unavailability. The District of Columbia Court of Appeals, however, in *Warren v. United States*, outlined four relevant considerations: (1) the probability of psychological injury as a result of testifying; (2) the degree of anticipated injury; (3) the expected duration of the injury; (4) whether the expected psychological injury is substantially greater than the reaction of the average victim of rape, kidnapping, or terrorist act. See 436 A.2d 821, 830 n.18 (D.C. 1981). See generally JoEllen S. McComb, *Unavailability and Admissibility: Are a Child's Out-of-Court Statements About Sexual Abuse Admissible if the Child Does Not Testify at Trial?*, 76 KY. L. J. 531 (1987) (examining the significance of the availability requirement).

¹³⁸ See *Idaho v. Wright*, 497 U.S. 805, 813 (1989).

¹³⁹ MHPs acting only as forensic investigators may be able to offer such testimony, assuming that the interviewing techniques used were reliable. See discussion *supra* Part III.C.

such statements were unreliable and could not be introduced "because the totality of the circumstances did not indicate that the child's statements contained [the requisite] 'particularized guarantees of trustworthiness.'"¹⁴⁰ Neither corroborating evidence,¹⁴¹ such as the results of a physical exam, nor statements made by another witness, nor the opportunity for the defendant to actually engage in the alleged abuse, were judged to be relevant to the making of the hearsay statement and were considered unsuitable for an assessment of reliability.¹⁴²

Rather than providing specific guidance in assessing the reliability of MHPs' hearsay testimony based on children's out-of-court statements and behaviors, the Court in *Wright* stated that the "totality of circumstances" surrounding the making of the statement should be thoroughly examined.¹⁴³ The relevant factors include: spontaneity, consistent repetition, the mental state of declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate.¹⁴⁴ The Court's stipulation of trustworthiness should

¹⁴⁰ Younts, *supra* note 22, at 701 (citation omitted) (discussing the Court's analysis of the reliability of excerpts of some of the leading questions utilized by the doctor and the corresponding responses offered by the allegedly abused child).

¹⁴¹ Although corroborating evidence is irrelevant to a showing of the "particularized guarantees of trustworthiness", see *Wright*, 497 U.S. at 826, special state tender years hearsay exceptions often require corroborative evidence in addition to a demonstration of the reliability of the out-of-court statement where the child does not testify. See, e.g., COLO. REV. STAT. § 13-25-129(1) (1987) (noting that reliability is assured when the child is unavailable to testify and there is corroborative evidence of the act which is the subject of the statement).

¹⁴² See WHITCOMB, *supra* note 1, at 93, 94, 99 (discussing *Idaho v. Wright*).

¹⁴³ This "totality of circumstances" test described by the Court in *Wright* did not include corroborating evidence. See *Wright*, 497 U.S. at 819-22.

¹⁴⁴ See *id.* at 821-22; see also WHITCOMB, *supra* note 1, at 94 (discussing the importance of *Wright*). Whitcomb refers to *State v. Ryan*, 691 P.2d 197, 205 (Wash. 1984), in which the Supreme Court of the State of Washington, prior to *Wright*, enumerated several factors relevant to assessing the reliability of children's hearsay statements in child sexual abuse cases:

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.

WHITCOMB, *supra* note 1, at 94. At least one commentator has argued that *Wright*'s standard of trustworthiness for a child's hearsay statements should apply whether or not the child is available to testify. See Younts, *supra* note 22, at 703-04 (discussing *Idaho v. Wright*).

apply regardless of whether the child's testimony is sufficient to satisfy the Confrontation Clause of the Sixth Amendment—even vigorous cross-examination may not upset the child's version of the event(s) if her cognitive memory has been molded in an overly-suggestive interview.¹⁴⁵

A special tender years statute¹⁴⁶ may offer greater procedural protections than a broader, more vague residual hearsay exception.¹⁴⁷ For example, based on his analysis of existing state statutory hearsay exceptions, one commentator has recommended a model tender years statute which classifies hearsay statements according to their reliability, striking a balance between the needs of prosecutors in child sexual abuse cases and the constitutional rights of defendants.¹⁴⁸ In

¹⁴⁵ See Younts, *supra* note 22, at 704.

¹⁴⁶ See, for example, Colorado's special tender years statute, which applies a hearsay exception if:

- (a) [t]he court finds in a *hearing* conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and (b) the child either: (I) Testifies at the proceedings; or (II) Is unavailable as a witness and there is *corroborative evidence* of the act which is the subject of the statement.

COLO. REV. STAT. 13-25-129(1) (1987) (emphasis added). The statute requires that a *jury instruction* be issued by the court directing the jury to determine the weight and credit to give the out-of-court statement and that "in making the determination, the jury shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." *Id.* (emphasis added).

¹⁴⁷ See Clay Edwards, Note, *The Reliability of Out-of-Court Statements by Child Victims of Sexual Abuse: Evaluating Consistency via the Process of Disclosure*, 33 U. OF LOUISVILLE J. OF FAM. L. 685, 691 (1995) ("Because authors of the residual exceptions never intended to create formal class exceptions, applying the exceptions to child hearsay statements as a group would be improper. Moreover, the nonexistence of specific standards defining 'circumstantial guarantees of trustworthiness' creates the potential for judicial abuse of discretion.") (footnotes omitted).

¹⁴⁸ See Robert G. Marks, Note, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207, 246-52 (1995). Marks assesses the viability of the existing special child hearsay exceptions, ultimately proposing his own Model Statute which combines features of a number of existing exceptions which he finds efficacious. The Model Statute incorporates a four-tier structure for the admission of children's hearsay testimony, from the most reliable to the least reliable. *See id.* The first tier includes the hearsay statements considered to be the "most trustworthy," such as the spontaneous declaration or the medical diagnosis or treatment exceptions. *See id.* at 247. The second tier includes five requirements pertaining to reliability, all of which must be satisfied:

- It must (1) have been made immediately after the offense or have been accompanied by a delay determined by the court to be consistent with truth, (2) not have been made in preparation for a legal proceeding, (3) have been the first statement about the offense to a person eighteen or older other than the defendant, (4) have been made prior to the defendant's arrest, and (5) not concern a parent or significant other of the parent if the statement was made when the parent or significant other of the parent was divorced, separated, or in a similar dispute with the child's other parent or significant other of the parent.

Id. at 250-51 (citations omitted). The third tier:

the Model Statute, the most reliable statements, i.e. those that fall under traditional hearsay exceptions, are admitted even if the child does not testify, without requiring corroborative evidence.¹⁴⁹ The least reliable statements—those made long after the alleged abuse—are not admitted even if the child does testify.¹⁵⁰ Although the model statute rightly underscores the salience of reliability to the admission of children's hearsay statements, several of its features pose difficulties in ensuring the introduction of only trustworthy testimony of MHPs. As discussed above, the traditional, firmly-rooted hearsay exceptions included in Tier One would need to be inappropriately stretched in order admit MHPs' testimony.¹⁵¹ The admission of psychological testimony under the medical diagnosis and treatment hearsay exception is particularly inappropriate given the questionable reliability of testimony garnered from a professional engaged in therapy with a child.¹⁵² On the other hand, admission of reliable investigative MHP testimony that would otherwise satisfy the Confrontation Clause would effectively be prevented where the child does not testify under Tier Two's requirement.¹⁵³ Commonly, the first individual to interview a child suspected to have been sexually abused initiates the report of the abuse.¹⁵⁴ This person is unlikely to be a trained MHP, unless the possible abuse is first suspected during therapy.¹⁵⁵

In Part V, I offer a proposal designed to address the twin

[A]ccepts any statement that satisfies all of tier two's requirements except that the statement either was not the first statement about the offense, was made after the defendant's arrest, or concerns a parent or a significant other of the parent if the statement was made when the parent or significant other of the parent was divorced, separated, or in a similar dispute with the child's other parent or significant other of the parent Hearsay in tier three is admissible only if the child testifies and is subject to cross-examination at the proceeding or by means of a videotaped deposition or closed circuit television. Corroborative evidence of the act does not help determine whether the child was persuaded to make the accusation. Only cross-examination of the child tests the reliability of the child's identification of the perpetrator.

Id. at 251-52 (citations omitted). Tier Four includes the least reliable hearsay statements, that is "those not made immediately after the offense or those made in preparation for a legal proceeding." *See id.* at 252 (articulating the suggested Model Statute). None of these statements are admissible, regardless of whether the child declarant testifies. *See id.*

¹⁴⁹ *See id.* at 247.

¹⁵⁰ *See id.* at 252.

¹⁵¹ *See supra* Part IV.A-B for a discussion of the admission of psychological testimony under the traditional hearsay exceptions.

¹⁵² *See supra* Part IV.A for a discussion concerning the courts' use of the medical diagnosis and treatment exception to admit children's hearsay statements to MHPs.

¹⁵³ Under this requirement, the child's testimony must be her first statement concerning the alleged offense. *See Marks, supra* note 148, at 250-51.

¹⁵⁴ *See Mason, The McMartin Case Revisited, supra* note 47, at 393.

¹⁵⁵ *See id.*

problems of the debatable reliability of children's reports of sexual abuse, as discussed in Part II, and the conflict of investigative and therapeutic roles fulfilled by mental health professionals, as examined in Part III. This proposal argues that firmly-rooted hearsay exceptions are inappropriately invoked where MHPs seek to offer testimony based on children's hearsay statements and behaviors. A residual or special tender years hearsay exception may be properly utilized to allow the admission of such testimony, however, provided that a reliability analysis is conducted to safeguard the constitutional rights of accused child sex offenders. The reliability analysis must incorporate an examination of the investigative process, as well as the therapeutic or investigative role fulfilled by the MHP who wishes to offer hearsay testimony.

V. A PROPOSAL FOR ENSURING RELIABLE HEARSAY TESTIMONY OF MENTAL HEALTH PROFESSIONALS BASED ON CHILDREN'S HEARSAY STATEMENTS AND BEHAVIORS

When a mental health professional seeks to introduce an alleged child victim's hearsay statements that have been drawn from one or many interviews, the reliability inquiry inherent in *Wright's* "particularized guarantees of trustworthiness" requirement¹⁵⁶ should not be bypassed. Thus, the invocation of a "firmly rooted" hearsay exception, in which such an analysis is not required, is inappropriate. Instead, whatever the exact contours of the chosen residual or special child hearsay exception, the reliability analysis under *Wright* should be undertaken and should include an examination of (1) the particular role assumed by the MHP and (2) the nature of the investigative process.¹⁵⁷ The first inquiry is dispositive: therapists who have an ongoing relationship with an alleged victim, in contrast to short-term, investigating MHPs, should not be allowed to introduce the child declarant's out-of-court statements. A finding that the relationship between the child declarant and the MHP was not a therapeutic one, however, does not necessarily signal admissibility. Courts should consider the second inquiry probative of trustworthiness - an improperly conducted and particularly egregious interview, assuming it is conducted by a neutral professional, will automatically warrant exclusion of the hearsay statements or

¹⁵⁶ See *Idaho v. Wright*, 497 U.S. 805, 814-15 (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

¹⁵⁷ The focus on the roles fulfilled by mental health professionals and the investigative process is not meant to suggest that other factors are not to be considered under *Wright's* totality of circumstances standard.

behaviors. The following sections offer some specific suggestions for implementing my general proposal, including: (1) the proper delineation of forensic and therapeutic roles; (2) improving investigative interviews; (3) the invocation of the Due Process Clause where interviews are particularly egregious; (4) enhancing the forensic investigation process and refining the investigative role; and (5) making room for the provision of therapy and the investigation of abuse.

A. *The Proper Delineation of Forensic and Therapeutic Roles*

An important step toward assuring the admissibility of reliable hearsay statements made to MHPs is to clearly outline the separate roles of therapists and forensic investigators.¹⁵⁸ Judges should use their broad power to serve as gate keepers of the admissibility of evidence in order to absolutely prohibit the introduction of hearsay testimony offered by a therapist who has maintained an ongoing relationship with an alleged child victim.¹⁵⁹ As the Supreme Court of Montana commented in *State v. Harris*, “[i]n general, the circumstances in which a therapist hears a child’s statement about sexual abuse are not such that a hearsay statement by the therapist will possess circumstantial guarantees of trustworthiness.”¹⁶⁰ In *Harris*, the court would not admit hearsay testimony by a therapist concerning the identity of the perpetrator or the nature of the alleged abuse, although the expert was able to speak to whether the particular child involved displayed general characteristics of children who have been sexually abused.¹⁶¹ In so holding, however, the *Harris* court failed to apply its sound analysis concerning the inappropriateness of admitting children’s hearsay statements made to therapists to the admissibility of expert testimony made by the same biased therapist.

Mental health professionals serving as forensic investiga-

¹⁵⁸ See Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027, 2092 (1994) (“In contrast to the role of the child’s therapist, it is the job of the evaluator to look for the objective truth by collecting extensive data from all parties in the case without concern for the psychological impact of his or her testimony on the parties.”).

¹⁵⁹ See FED. R. EVID. 104(a) (“Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . .”).

¹⁶⁰ 808 P.2d 453, 459 (Mont. 1991) (emphasis added).

¹⁶¹ See *id.* (“[W]e conclude that only in an extraordinary case will hearsay testimony by a therapist concerning the . . . sufficient circumstantial guarantees of trustworthiness to be admissible into evidence.”). Compare the analysis in *Harris* with that of the Supreme Court of Vermont in *Wetherbee*, discussed *supra*, notes 1177, 1188 and accompanying text.

tors in child sexual abuse cases should be allowed to offer testimony based on children's hearsay statements where such interviews were conducted properly and their reliability has been ensured. For instance, subsequent to *Harris*, the Supreme Court of Montana in *State v. Mayes*¹⁶² drew a sensible clear line between the admissibility of a therapist's testimony based on hearsay statements and behaviors garnered from a therapeutic interview, and the permissibility of an investigating social worker's testimony concerning similar statements and behaviors drawn from an investigative interview.¹⁶³ In *Mayes*, two young girls ages five and three were, according to their own admissions and the eyewitness testimony of a hotel maid, sexually assaulted by their father in a hotel room.¹⁶⁴ The day following the alleged incident, after a report was made to the police, the girls were interviewed by a social worker (and a criminal analyst).¹⁶⁵ The girls' association with the investigators was short-lived and directed solely at the ascertainment of evidence.¹⁶⁶ Distinguishing *Harris*, the court judiciously reasoned:

In *State v. Harris* the psychotherapist knew and treated [the alleged abused children] over a substantial period of time during which the children opened up and identified the perpetrator. In the present case the children gave their testimony, including the identification of their father as the perpetrator, the very next day In contrast to *State v. Harris*, in this case the children volunteered their statements spontaneously with regard to sexual knowledge without suggestiveness on the part of the interviewers. We . . . conclude that the primary concern of *State v. Harris* with regard to testimony by a treating therapist is not present in this case and the rationale attributable to the treating therapist is not present with regard to either of the witnesses.¹⁶⁷

Consistent with the approach taken by the Supreme Court of Montana in *Harris* and in *Mayes*, MHPs who have had an ongoing therapeutic relationship with an alleged child victim of sexual abuse, should not, under any hearsay exception, be permitted to offer testimony based on the hearsay statements

¹⁶² 825 P.2d 1196 (Mont. 1992) (holding that the social worker's introduction of hearsay testimony gained from a limited number of investigative interviews was permissible under Mont. R. Evid. 804(b)(5), a "catch-all exception" to the hearsay rule).

¹⁶³ The Montana Supreme Court invoked the persuasive authority of *State v. Ryan*, 691 P.2d 197, 205 (Wash. 1984), in which the Washington Supreme Court listed the relationship of the interviewer to the child as one of the factors indicative of the reliability of the child's hearsay statements. See *id.* at 1203-04.

¹⁶⁴ See *id.* at 1198-200.

¹⁶⁵ See *id.* at 1200.

¹⁶⁶ See *id.* at 1201.

¹⁶⁷ *Id.* Despite its sound analysis overall, the *Mayes* court failed to address the potential problem presented by the interviewers' use of anatomical dolls and drawings.

and behaviors of such children. Such testimony should be considered *per se* unconstitutional because of the likely taint caused by the therapeutic relationship. MHPs serving in an investigative capacity, however, could be permitted to offer such hearsay testimony, provided that certain safeguards are implemented.

2. *Improving Investigative Interviews*

Effective interviewing techniques are critical in order to ensure the reliability of children's statements.¹⁶⁸ Any MHP conducting an investigative interview should be trained and experienced in the area of child sexual abuse and in proper interviewing techniques. Assuming that a neutral, well-trained professional conducts the investigation, the following suggestions may enhance the reliability of an investigative interview. First, interviewers should establish ground rules for the duration of the interview and develop rapport with the child in order to enhance accurate recall.¹⁶⁹ Additionally, interviewers should use age-appropriate language and should avoid biasing techniques, repeating questions in a given interview, and recurrent questioning.¹⁷⁰ Furthermore, although leading questions may aid young children's recall, they should be used sparingly, as they could compromise the accuracy of children's reports of abuse.¹⁷¹ Finally, anatomical dolls and other non-verbal aids should not be used outside the therapeutic context because their reliability has not been conclusively determined.¹⁷² If these suggestions are not followed, interviewers of alleged child sexual abuse victims may fall prey to due process challenges.

3. *Invoking the Due Process Clause in Particularly Egregious Interviews*

Where proper interview techniques are not utilized, the Due Process Clause of the Fourteenth Amendment prohibits MHPs' hearsay testimony.¹⁷³ One commentator has suggested

¹⁶⁸ See discussion *supra* Part II.A; see also McGough & Warren, *supra* note 21, at 13 ("[I]n terms both of protecting and securing reliable testimony from child witnesses, all the touted trial reforms of the last two decades pale dramatically in significance if investigative interviews are not skillfully conducted.").

¹⁶⁹ See McGough & Warren, *supra* note 21, at 14-16.

¹⁷⁰ See *id.* at 17-22.

¹⁷¹ See *id.* at 16-17.

¹⁷² See *id.* at 17; see also discussion *supra* at Part II.B.

¹⁷³ U.S. CONST. amend. XIV, §1 ("No State shall make or enforce any law which shall . . . deprive any person of life, liberty or property, without due process of

that the difficulties inherent in interviewing alleged victims of child sexual abuse demand, for the defendant's protection, additional scrutiny under the Due Process Clause of the Fourteenth Amendment.¹⁷⁴ Extending due process protection appears to balance the competing interests of the criminal justice system: to convict individuals who are guilty of child sexual abuse, and to prevent a miscarriage of justice for an innocent defendant. Even the Supreme Court in *Wright* recognized the critical importance of achieving an untainted investigative interview, although it declined to mandate that "witnesses who testify as to children's out-of-court statements have no prior knowledge of the allegations at the time of their interviews, use no leading questions, and videotape their interviews," as they "are not inherent indicators of the reliability of a child's statements."¹⁷⁵ John Myers also notes that "[t]o make out a constitutional violation [under the Due Process Clause], a defendant must prove that an interview was so unnecessarily suggestive that it very likely rendered a child's statements unreliable."¹⁷⁶ Where a child's hearsay statements are in fact found inadmissible under the Due Process Clause, "the child may nevertheless be permitted to tes-

law . . .") (emphasis added).

¹⁷⁴ See Clifton M. Dugas, II, Note, *State of New Jersey v. Michaels: The Due Process Implications Raised in Interviewing Child Witnesses*, 55 LA. L. REV. 1205 (1995) (claiming that courts should recognize that suggestive and coercive pretrial interviews are subject to a due process 'fairness' claim, and that courts should exclude this evidence, especially in cases of obvious and egregious prosecutorial abuses). Where slight impropriety exists and sufficient evidence from other sources is available to substantiate the allegations, the reliability standard from *Manson v. Braithwaite*, 432 U.S. 98 (1977) may be used. See *id.* at 1222 (discussing *Manson* and its "reliability" rationale that says, regardless of the suggestiveness of the interviews, that evidence derived from them should be admitted if it is found to be reliable).

¹⁷⁵ WHITCOMB, *supra* note 1, at 99 (discussing the *Wright* decision). Selkin also addressed this issue:

To automatically disqualify an interviewer because he has "a preconceived idea of what the child should be disclosing" will, in all probability, eliminate the use of nearly *all* statements made by young children to medical doctors, psychologists or social workers. That result is certainly not required by the confrontation clause

SELKIN, *supra* note 544, at 316 (quoting *Idaho v. Wright*, 497 U.S. 805, 818 (1989)).

¹⁷⁶ I MYERS, *supra* note 33, at 452. Myers has also argued that taint hearings, as allowed under the *Michaels* decision, are disadvantageous:

Taint hearings have serious disadvantages [They] are likely to perpetuate . . . unwarranted skepticism [T]hey are likely to be overused [T]here is no principled basis for confining such hearings to children [E]xtending such hearings to other classes of witnesses will make it more difficult to protect society's weakest and most vulnerable citizens.

John E.B. Myers, *New Era of Skepticism Regarding Children's Credibility*, 1 PSYCHOL. PUB. POLY & L. 387, 397 (1995). Although Myers' criticisms are admittedly important, I propose that the advantages he recognizes outweigh the disadvantages; taint hearings will encourage the use of proper interviewing techniques, and such hearings protect defendants' right to a fair trial.

tify at trial 'if an independent basis for in-court [testimony] can be established that is untainted by the suggestive pretrial procedure.'¹⁷⁷

4. *Enhancing the Forensic Investigation Process and Refining the Role for Mental Health Professionals*

For a MHP to offer reliable testimony based on children's hearsay statements and behaviors, improvements in the forensic investigation process and a refining of the investigative role are necessary. Only limited guidance exists for MHPs fulfilling their unfamiliar role as forensic investigators.¹⁷⁸ A potential resolution to the conflict between therapeutic and investigative roles is the adoption of a seamless, multi-disciplinary process for investigating alleged cases of sexual abuse, thereby enhancing cooperation between all parties involved.¹⁷⁹ Congress expressed support for this idea in the Victims of Child Abuse Act of 1990, which advocated establishing counseling centers for "referring, interviewing, treating, and counseling child victims of sexual and serious physical abuse and neglect."¹⁸⁰

Some detractors from this approach, however, caution that creating such a multidisciplinary process encourages collusion between MHPs and law enforcement personnel in the prosecution of cases, thereby unfairly disadvantaging defendants and stripping them of their due process rights.¹⁸¹ As-

¹⁷⁷ 1 MYERS, *supra* note 33, at 453 (quoting *People v. Kurylczyk*, 505 N.W.2d 528, 534 (Mich. 1993)). For example, exigent circumstances may warrant the use of suggestive questioning to ensure the psychological well-being or physical safety of a child. *See id.*

¹⁷⁸ *See Askowitz & Graham, supra* note 158, at 2092-93. The authors note that neither the *Ethical Principles of Psychologists* (guidelines of the American Psychological Association) nor the *Guidelines for the Clinical Evaluation of Child and Adolescent Sexual Abuse* (published by the American Academy of Child and Adolescent Psychiatry) provide guidance in testifying as an expert witness. *See id.* at 2092. Only a joint committee of the American Psychology-Law Society and Division 41 of the American Psychological Association promulgated relevant guidelines (Specialty Guidelines for Forensic Psychologists) that address proper professional protocol for forensic practice. *See id.* at 2092-93.

¹⁷⁹ *See id.* at 2093; Meredith Felise Sopher, Note, "The Best of All Possible Worlds": *Balancing Victims' and Defendants' Rights in the Child Sexual Abuse Case*, 63 *FORDHAM L. REV.* 633, 658-61 (1994) (discussing in detail the interdisciplinary approach used by some communities for the investigation of child sexual abuse).

¹⁸⁰ WHITCOMB, *supra* note 1, at 139 (quoting Victims of Child Abuse Act of 1990, 42 U.S.C. § 13002(b)(2)(B) (1994)).

¹⁸¹ *See Sopher, supra* note 179, at 662. Few studies have examined whether multi-disciplinary teams would benefit either the defendant or the prosecution. *See id.*; *see also* 1 MYERS, *supra* note 33, at 72-76 (reviewing the limited research available concerning the use of multi-disciplinary teams for child abuse investigations, noting that too little data is available to indicate whether the existence of the centers

suming, however, that roles are properly delineated (especially those of therapists and forensic investigators), the streamlined process is likely to enhance the reliability of a child's report of sexual abuse, as the number of interviews is reduced and their effectiveness enhanced.¹⁸² Training in proper investigative techniques, which are essential to generating reliable child reports,¹⁸³ may also be more efficiently provided if the agencies involved in child sexual abuse cases cooperate.¹⁸⁴ The streamlined forensic investigation demanded by the criminal justice system must, however, be effectively combined with access to needed therapeutic services for alleged sexually abused children.

5. *Making Room for the Provision of Therapy and the Investigation of Abuse*

High-quality therapeutic services *must* be made available to children who are suspected victims of sexual abuse, independent of the necessary criminal investigations of such suspicions. Nevertheless, a number of procedural safeguards may serve to ensure both that allegedly abused children receive therapy and that forensic interviews of such children remain reliable.

Even when therapists and forensic investigators play distinct roles and the investigative process is designed to improve the reliability of children's reports of abuse, the effect of mental health therapy on the reliability of children's sworn statements may still create admissibility problems.¹⁸⁵ The danger in such counseling is that young victims may discuss the alleged abuse with the therapist and impair the accuracy of future interviews.¹⁸⁶ Ceci and Bruck's suggestion that

affects prosecution outcomes).

¹⁸² See 1 MYERS, *supra* note 33, at 72-76.

¹⁸³ See *id.* at 459-61.

¹⁸⁴ See Doris et al., *supra* note 80, at 486-88 (discussing the importance of inter-agency coordination and the efficacy of multi-disciplinary teams to enhance training in child sexual abuse assessment).

¹⁸⁵ See 2 MYERS, *supra* note 8, at 333 (noting that mental health counseling before hearsay statements are made is one factor which courts might consider in assessing the statements' trustworthiness).

¹⁸⁶ See *id.* at 333 n.904 ("Abuse-specific therapy is a common and accepted mode of treatment with victims of child sexual abuse. During such therapy, the professional discusses abuse with the child."). Myers quotes the Washington Court of Appeals' treatment of this problem:

We recognize that a lapse of time and intervening counseling could affect the reliability of a child's statements regarding abuse . . . "[I]f there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness." *Idaho v. Wright*, 110 S. Ct. 3139 (1990). However, as the *Wright* court's careful lan-

MHPs serving as therapists refrain from using suggestive techniques such as "fantasy inductions, imagery play, and 'memory work' during therapy sessions conducted before the completion of forensic interviews," is a sensible solution to this conflict between abused children's need for therapy and the constitutional rights of criminal defendants.¹⁸⁷

In addition, the bifurcation of MHPs' therapeutic and investigative roles may prevent a child's testimony from being tainted by therapy in the period between an initial statement to an investigating MHP and the often-delayed criminal prosecution. Ceci and Bruck caution that therapists should not attempt to "crack" the case or to discover other aspects of abuse that may be helpful to the courts," given the "basic incompatibility between the goals of a forensic interviewer and those of a therapist."¹⁸⁸ As a possible solution, Ceci and Bruck recommend that when a child first discloses the alleged abuse to a therapist, rather than a forensic investigator, therapists should objectively report their therapeutic techniques such that the investigator can evaluate whether the therapist subjected the child to improper suggestion.¹⁸⁹

Finally, empirical research shows that interviews should be conducted as soon as possible in order to guard against the increasing decline of the young child's memory of the abusive event(s) before trial.¹⁹⁰ As a means of increasing the level of reliability of MHPs' testimony concerning alleged child abuse victims' statements and behaviors, Lorenzen suggests that investigative interviews by MHPs be videotaped (or at least audiotaped) on a routine basis.¹⁹¹ Although not an inherent indicator of reliability,¹⁹² video or audio recording of

guage makes clear, these factors will not affect reliability in all cases. *State v. Carlson*, 812 P.2d 536, 540 (Wash. Ct. App. 1991).

¹⁸⁷ CECI & BRUCK, *supra* note 16, at 289. According to the authors, "[p]rior to [the completion of forensic interviews], therapy should be restricted to working on everyday coping strategies that cannot be challenged by the defendant's counsel as creating false memories." *Id.*

¹⁸⁸ *Id.* at 290. The authors note that "[t]he primary and sole role of the forensic investigator is to collect the facts of the case. In therapy, however, there is an emphasis on 'helping' . . ." *Id.* Ceci and Bruck cite several professional organizations which offer guidelines recommending that forensic and clinical roles not be fulfilled by the same person, including the American Academy of Child and Adolescent Psychiatry and the American Professional Society on the Abuse of Children. *See id.*

¹⁸⁹ *See id.* at 290-91.

¹⁹⁰ *See* McGough & Warren, *supra* note 21, at 14.

¹⁹¹ *See* Dirk Lorenzen, Note, *Special Topics in the Law of Evidence: The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child*, 42 U. MIAMI L. REV. 1033, 1069-71 (1996) (asserting that the videotapes usually will not need to be played in court, but will only need to be seen in the event of a dispute about their contents).

¹⁹² *See* Mason, *The McMartin Case Revisited*, *supra* note 47, at 393 ("[L]egal status of videotaped testimony is unclear" under the Constitution's Sixth Amendment).

interviews, when combined with other noted procedural safeguards, can potentially play a part in ensuring the reliability of MHPs' accounts of children's reports of sexual abuse, and thereby dilute the problems created by a MHPs' dual role in the case.

It is essential to note that, in the long run, abused children will best be served by a greater commitment of extra-judicial resources toward remedying child sexual abuse. For now, given the unavoidable presence of child sexual abuse, an effective, sensitive balancing of the therapeutic needs of suspected victims and the constitutional rights of criminal defendants must be reached.

VII. CONCLUSION

The therapeutic and investigative roles fulfilled by MHPs in child sexual abuse cases are inherently incompatible. As such, a therapist who forges an ongoing relationship with a child victim should not be permitted to introduce testimony involving the child's hearsay statements or behaviors. Such hearsay should be considered *per se* unreliable; courts must protect defendants' constitutional rights to confrontation, due process, and the presumption of innocence when the reliability of children's hearsay statements is at issue. Properly trained MHPs who serve solely as investigators, however, should be able to introduce a child's hearsay statements and behaviors in court in order to further the prosecution of a sexual abuse charge, provided that such MHPs conduct interviews in a way conducive to the generation of reliable statements.

When the admissibility of MHPs' testimony based on children's hearsay statements and behaviors is at issue in a child sexual abuse case, courts must apply the *Idaho v Wright* reliability analysis. As a part of this analysis, courts must examine both the efficacy of the investigative process and the role fulfilled by the MHP seeking to offer hearsay testimony in order to ensure that defendants' constitutional rights under the Confrontation Clause of the Sixth Amendment are protected. Under this analysis, neither the traditional, firmly-rooted hearsay exceptions nor any variation of a special or residual hearsay exception justify the admission of MHPs' hearsay testimony in cases of child sexual abuse, where the MHP fulfills a therapeutic, as distinguished from an investigative, role.