Missouri Law Review

Volume 54
Issue 3 *Summer 1989*

Article 7

Summer 1989

Missouri's Hearsay Exception Statute for Victims of Child Sexual Abuse: Upheld by the Missouri Supreme Court

Thomas P. Dvorak

NOTES

MISSOURI'S HEARSAY EXCEPTION STATUTE FOR VICTIMS OF CHILD SEXUAL ABUSE: UPHELD BY THE MISSOURI SUPREME COURT

State v. Wright[1]

In *State v. Wright*, the Missouri Supreme Court upheld the constitutionality of a 1985 Missouri statute which enacted a new exception to the hearsay rule allowing as evidence the hearsay statements of young children who are alleged to be victims of sexual abuse. This note will examine the effect of the statute on the prosecution of alleged child molesters as well as the Constitutional questions posed by the statute and faced by the court in *Wright*. Initially, however, this Note will examine the extent of the child sex abuse problem and the difficulties often encountered in the prosecution of sex abuse cases.

The Extent of the Sex Abuse Problem and Difficulties in Prosecution

The sexual abuse of children, along with the broader category of physical and emotional child abuse generally, is a topic of growing social concern in the United States. The scope of the problem is large; estimates of the incidence of sexual abuse of children range from 250,000[2] victims to as

1. State v. Wright, 751 S.W.2d 48 (Mo. 1988).
2. S. O'Brien, Child Abuse: A Crying Shame 15 (1980).

many as 35 million victims annually.[3] Studies indicate that one in every four females will experience some form of sexual abuse by the time she reaches age eighteen.[4] The full extent of the problem remains difficult to measure. One commentator has pointed out that "by its very nature, sexual abuse is a problem that is concealed. Gathering statistics about it is a frustrating and precarious undertaking. So the cases actually uncovered may represent only a tip of an unfathomable iceberg."[5]

However extensive the problem, there has been a growing public recognition that something should be done about it.[6] Consequently, many state governments as well as the federal government have begun programs to educate government officials, teachers, and the public about child abuse—including sexual abuse—and have attempted to foster attitudes which encourage reporting of suspected cases.[7] Perhaps as a result of these efforts,

---

3. Cerkovnik, *The Sexual Abuse of Children: Myths, Research, and Policy Implications*, 89 DICK. L. REV. 691, 695 (1985) ("5 to 35 million victims each year"); *see also*, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 162, table 277 (1987) (Indicates the number of *reported* cases of sexual maltreatment of children in the U.S. has increased from 3.2 cases per 1000 children in 1976 to 13.3 cases per 1000 children in 1984); EXTENSION DIVISION, UNIVERSITY OF MISSOURI, MISSOURI CHILD ABUSE INVESTIGATOR'S MANUAL, 57 (R. Ruddle, ed. 1981) (48,412 cases of child abuse reported in Missouri in 1979. Ten percent of these were sexual abuse); MISSOURI DIVISION OF FAMILY SERVICES, ANNUAL REPORT '81-'82, at 77 (1983) (The Missouri Division of Family Services maintains a Child Abuse Hotline which received 33,606 calls in fiscal year 1982); Arnold, *Needs of Children*, 42 J. Mo. BAR 77 (1985) (The DFS Child Abuse Hotline continues to receive in the neighborhood of 40,000 calls annually). For a work on sexual abuse of children generally, *see* F. RUSH, THE BEST KEPT SECRET, SEXUAL ABUSE OF CHILDREN (1980). For an excellent source guide to materials on the sexual abuse of children, *see* OFFICE OF HUMAN DEVELOPMENT SERVICES, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, LITERATURE REVIEW OF SEXUAL ABUSE (D. DePanfilis 1986).

4. S. O'BRIEN, *supra* note 2, at 15.

5. Finkelhor, *How Widespread is Child Sexual Abuse?*, in U.S. DEPT. OF HEALTH AND HUMAN SERVICES, PERSPECTIVES ON CHILD MALTREATMENT IN THE MID-'80S, 24 (1984).

6. This attitude either stems from or is reflected in the large number of stories concerning child abuse which have flooded the media in recent years. The publicity surrounding the celebrated McMartin preschool child sex abuse case in California is only one example but one in which publicity has been particularly intense. *See, e.g.*, Gest, *Can the Abused Kids Be Believed?*, U.S. NEWS & WORLD REPORT, July 27, 1987, at 10; Hackett, *Child Abuse or Adult Paranoia*, NEWSWEEK, Dec. 15, 1986, at 43; Reese, *A Child-Abuse Case Implodes*, NEWSWEEK, Jan. 27, 1986, at 26; *The Youngest Witnesses*, NEWSWEEK, Feb. 18, 1985, at 72, 73; Los Angeles Daily Journal, Jan. 18, 1985, at 1, col. 6.

7. *See, e.g.*, 42 U.S.C. §§ 5101-06 (1982) (The Child Abuse Prevention and Treatment Act establishes the National Center on Child Abuse and Neglect to serve as a research facility and information clearinghouse on matters related to child abuse and to assist local agencies by providing them with the necessary technical information needed for the establishment of programs to prevent and treat child abuse). *See also* Mo. REV. STAT. §§ 210.110-.189 (1986) (Missouri Child Abuse

prosecutors have encountered an ever-increasing number of child sex abuse cases in recent years.[8]

Sexual abuse of children is rarely accompanied by beatings or other violence and, frequently, enough time has passed between the abuse and its reporting for any physical evidence to dissipate. Consequently, the testimony of the child victim may be the *only* evidence available.[9] Under these circumstances, the prosecutor is forced to rely almost entirely on the testimony of a child—in many cases a very young child—to obtain a conviction.

Testimony by the child victim raises several substantial difficulties for prosecutors. Obstacles such as the long-standing presumption against the competency of child witnesses and the difficulty, under traditional hearsay rules, of admitting the child's out-of-court statements concerning the abuse often place the prosecutor in a difficult position.[10] In addition, the child may accurately describe the abusive event under comforting circumstances prior to trial, but may refuse or be unable to do so in court when confronted by the defendant and a courtroom filled with threatening strangers.[11] Further, prosecutors in child sex abuse cases must also be cognizant of the child's welfare. The act of testifying may be so traumatic for the child that it constitutes a continuation of the abuse.[12] Parents and prosecutors

---

Reporting Statute); Krause, *Child Abuse and Neglect Reporting Legislation in Missouri* 42 Mo. L. Rev. 207 (1977). The state of Missouri also operates a 24-hour toll-free Child Abuse Hotline to facilitate reports by individuals with a statutory reporting mandate as well as by the general public. Missouri Division of Family Services, Annual Report '81-'82, at 77 (1983).

8. Under Mo. Rev. Stat. § 210.145 (1986) (part of the Missouri Child Abuse Reporting Statute), state officials are required to notify law enforcement officials and prosecutors upon receipt of child abuse reports. The actual number of cases referred to prosecutors is unknown, but the child abuse hotline described *supra* notes 3 and 7 receives in excess of 30,000 calls per year.

9. V. Fontana, The Maltreated Child 9 (4th ed. 1979); Comment, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 Colum. L. Rev. 1745 (1983). ("The crimes committed are predominantly nonviolent in nature and almost always occur in secrecy with the child usually being the only witness.") *Id.* For a general treatment of the indicia of child abuse, *see* Myers and Carter, *Proof of Physical Child Abuse*, 53 Mo. L. Rev. 189 (1988).

10. For a discussion of the competency of child witnesses, *see generally*, Goodman, *Children's Testimony in Historical Perspective*, 40 J. of Soc. Issues 9 (1984), and Comment, *The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?*, 40 Miami L. Rev. 245 (1985).

11. *See generally* Mahady-Smith, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?* 89 Dick. L. Rev. 721 (1985).

12. Mahady-Smith, *supra* note 11, at 732. *See also*, Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 New Eng. L. Rev. 643 (1982). The seminal article on the protection of child witnesses is Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977 (1977) (Libai proposes a special "child courtroom" which separates the child victim from the jury and the perpetrator by one-way glass. Such a courtroom is now known in the literature as a "Libai courtroom.")

alike often have to balance the continuing traumatic effects of a court appearance against the goal of convicting guilty defendants.[13] Finally, even if the prosecutor can overcome these difficulties, the testimony of a very young child may simply be disbelieved by the jury.[14]

The context within which many child sexual abuse cases arise also presents difficulties. The offender is often a close relative or friend of the family.[15] In many cases, the child may be reluctant to testify against such a person or, as is common in incest cases, may even be under pressure from other family members not to do so.[16] When the accusation of sexual abuse occurs in the context of a divorce proceeding or as a result of visitation under a child custody order, it raises special credibility concerns—one parent may encourage the child's testimony of abuse by the other parent in order to gain custody or deny visitation rights.[17]

As a result of these difficulties, the conviction rate in cases of child sexual abuse has been low.[18] Consequently, many states have responded with statutory reforms designed to ease the burden of the prosecution of such cases and to reduce the level of stress placed on the young victims. These reforms have typically taken three forms: first, statutes which remove the presumption against competency for children alleged to be victims of sexual abuse[19]; second, statutes which create a new exception to the hearsay

---

13. Mahady-Smith, *supra* note 11, at 748. *See also*, Berliner and Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. OF SOC. ISSUES 125, 128 (1984).

14. Goodman, *The Child Witness: Conclusions and Future Directions for Research and Legal Practice*, 40 J. OF SOC. ISSUES 157, 170 (1984). For studies concerning the credibility of child testimony, *see generally* Berliner and Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. OF SOC. ISSUES 125 (1984); Goodman, *Children's Testimony in Historical Perspective*, 40 J. OF SOC. ISSUES 9 (1984); and Marin, Holmes, Guth, and Kovac, *The Potential of Children as Eyewitnesses*, 3 L. AND HUM. BEHAV. 295 (1979).

15. Typically, the assault is made by "a known and trusted adult, who use[s] indirect or nonviolent means of coercion to involve [the child] in repeated sexual activity." Berliner and Barbieri, *supra* note 13, at 128. "Approximately 70 percent of abusers are well known by their victims." Cerkovnik, *supra* note 3, at 694. *See also*, Schultz, *The Child Sex Victim: Social, Psychological, and Legal Perspectives*, 52 CHILD WELFARE 147, 148-9 (1973), and C. GUBERMAN AND M. WOLFE, NO SAFE PLACE: VIOLENCE AGAINST WOMEN AND CHILDREN 88 (1985).

16. Cerkovnik, *supra* note 3, at 704. *See also*, GUBERMAN AND WOLFE, *supra* note 15, at 95-99.

17. Comment, *supra* note 10, at 247 n.6.

18. "[A]ll too often the offender cannot be prosecuted because the principal witness, the child victim, is unable to testify under current rules of evidence." McGrath and Clemens, *The Child Victim in Sexual Abuse Cases*, 46 MONT. L. REV. 229, 243 (1985).

19. Such a competency statute has been enacted in Missouri. Mo. REV. STAT. § 491.060(2) (Supp. 1988). Approximately twenty other states have similar provisions. *See, e.g.*, Arizona, ARIZ. REV. STAT. ANN. § 12-2202 (1982); Arkansas, ARK. R. EVID. 601; Colorado, COLO. REV. STAT. § 13-90-106(1)(b) (1988); Con-

rule allowing as evidence the out-of-court statements of child sex abuse victims;[20] and finally, statutes which allow the child victim's testimony to be videotaped in order to reduce the number of traumatic court appearances.[21] Missouri adopted all three of these reforms in a comprehensive 1985 act which dealt with the question of child abuse generally.[22]

---

necticut, CONN. GEN. STAT. ANN. § 54-86h (West Supp. 1988); Delaware, DEL. R. EVID. 601; Florida, FLA. STAT. ANN. § 90.601 (West 1979); Maine, ME. R. EVID. 601; Maryland, MD. CTS. & JUD. PROC. CODE ANN. § 9-103 (Supp. 1986); Mississippi, MISS. CODE ANN. § 13-1-3 (1972); Nebraska, NEB. REV. STAT. § 27-601 (1985); New Mexico, N.M. R. EVID. 601; North Dakota, N.D. R. EVID. 601; Oklahoma, OKLA. STAT. ANN. tit. 12 § 12-2601 (West 1980); Oregon, OR. REV. STAT. § 40.310 (1985); Pennsylvania, 42 PA. CONS. STAT. ANN. § 5911 (Purdon 1982); Tennessee, TENN. CODE ANN. § 24-1-101 (Supp. 1986); Utah, UTAH CODE ANN. § 74-24-2 (Supp. 1986); Washington, WASH. REV. CODE ANN. § 5.60.050 (1963); Wisconsin, WIS. STAT. ANN. § 906.01 (West 1975); Wyoming, WYO. R. EVID. 601.

20. The Missouri hearsay exception is found in MO. REV. STAT. § 491.075 (1986). Other states with hearsay exception statutes are: Alaska, ALASKA STAT. § 12.40.110 (Supp. 1986); Arizona, ARIZ. REV. STAT. ANN. § 13-1416 (Supp. West 1987); Arkansas, ARK. CODE ANN. § 16-41-101, Uniform Rules of Evidence, Rule 803(23)(A) (1987); California, CAL. EVID. CODE ANN. § 1228 (West Supp. 1988) (Allows hearsay only in situations where the defendant has confessed and no other evidence is available); Colorado, COLO. REV. STAT. § 13-25-129 (1988); Florida, FLA. STAT. ANN. § 90.083(23) (Supp. 1988); Illinois, ILL. ANN. STAT. ch. 38 § 115-10 (Smith-Hurd Supp. 1988); Indiana, IND. CODE ANN. § 35-37-4-6- (Burns 1985); Kansas, KAN. STAT. ANN. § 60-460(dd) (1983); Minnesota, MINN. STAT. ANN. § 595.02(3) (West 1988); New York, N.Y. FAM. CT. ACT LAW § 1046(a)(vi) (McKinney 1988); South Dakota, S.D. CODIFIED LAWS ANN. § 19-16-38 (1987); Texas, TEXAS FAM. CODE §54.031 (Vernon 1975); Utah, UTAH CODE ANN. § 76-5-411 (Supp. 1988); Vermont, VT. STAT. ANN., VT. R. EVID. 804(a) (Supp. 1988); Washington, WASH. REV. CODE ANN. tit. 9A § 44.120 (1988).

21. Missouri's videotaping law is the "Child Victim Witness Protection Law," MO. REV. STAT. § 491.675-.705 (Supp. 1988). The following list of other states having such videotaping laws is taken from Comment, *Abandoning Trial By Ordeal: Missouri's New Videotaping Statute*, 51 MO. L. REV. 515, 518 (1986): Alabama, ALA. CODE § 15-25-2; Alaska, ALASKA STAT. § 12.45.047 (1984); Arizona, ARIZ. REV. STAT. ANN. § 13-4253 (1985); Arkansas, ARK. STAT. ANN. § 16-44-203 (1987); California, CAL. PENAL CODE § 1346 (West Supp. 1986); Colorado, COLO. REV. STAT. § 18-3-413 (1988); Connecticut, CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1988); Delaware, DEL. CODE ANN. tit. 11, § 3511 (Supp. 1985); Florida, FLA. STAT. ANN. § 92.53 (West Supp. 1986); Kentucky, KY. REV. STAT. ANN. § 421.350 (Michie/Bobbs-Merrill Supp. 1986); Maine, ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1986); Montana, MONT. CODE ANN. § 46-15-401 (1977); Nevada, NEV. REV. STAT. § 1423 (1985); New Hampshire, N.H. REV. STAT. ANN. § 517:13(a) (1985); New Mexico, N.M. STAT. ANN. § 30-9-17 (1984); New York, N.Y. CRIM. PROC. LAW § 190.32 (McKinney Supp. 1986); Rhode Island, R.I. GEN. LAWS § 11-37-13.1 (Supp. 1986); South Dakota, S.D. CODIFIED LAWS ANN. § 23A-12-9 (Supp. 1986); Texas, TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon Supp. 1986); Utah, UTAH CODE ANN. § 77-35-15.5 (Supp. 1986); Vermont, VT. STAT. ANN., VT. R. EVID. 807; Wisconsin, WIS. STAT. ANN. § 967.04(7) (West Supp. 1986).

22. 1985 MO. LAWS 605, 624-5 and 628-9. They are codified as MO. REV.

The Missouri videotaping provision, as embodied in the Child Victim Witness Protection Law,[23] was reviewed by a 1986 comment in the MISSOURI LAW REVIEW[24] and will not be discussed here. Nor will the competency provisions adopted in the 1985 act be discussed. This Note will deal solely with the hearsay provision of the 1985 Missouri act.

THE MISSOURI HEARSAY EXCEPTION FOR SEXUAL ABUSE OF CHILDREN

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.[25] Hearsay statements are considered unreliable and are inadmissible at trial because they pose problems of perception, memory, articulation, and sincerity. Furthermore, the jury has no opportunity to observe the demeanor of the hearsay declarant and the declarant is not subject to cross-examination by the opposing party.[26] Prior to the enactment of Missouri's new hearsay provision[27], the prosecutor who desired to get the out-of-court statement of the child sex abuse victim into evidence at trial had to rely on traditional hearsay exceptions. On occasion, it was possible to get such statements into evidence under the "excited utterance" or "present sense impression" hearsay exceptions. Conceivably, such evidence might also be admitted under the so-called "residual" hearsay exception embodied in the FEDERAL RULES OF EVIDENCE at Rules 803(24) and 804(b)(5).[28]

In order to examine the current state of the law regarding admissibility of hearsay in child sex abuse cases, it is useful to examine the facts of *State v. Wright.*[29] In doing so, this Note will consider the admissibility of the victim's out-of-court statements in *Wright* under traditional hearsay exceptions, the residual exception, and the hearsay exception for child sex abuse victims created by the 1985 act.

In *Wright*,[30] the victim, a six-year-old girl, was outside playing with her little brother and C.B., the son of her mother's live-in fiancee.[31] The defendant allegedly approached the little girl and asked C.B. if he could

---

STAT. § 491.060(2) (1988) (competency provision); MO. REV. STAT. § 491.075 (1988) (hearsay exception); and MO. REV. STAT. § 491.675-.705 (1988) (Missouri Child Victim Witness Protection Law—allows videotaped testimony).

23. MO. REV. STAT. § 491.675-.705 (Supp. 1988).

24. Comment, *Abandoning Trial By Ordeal: Missouri's New Videotaping Statute*, 51 MO. L. REV. 515 (1986).

25. E. CLEARY, MCCORMICK ON EVIDENCE, § 246 (1984).

26. *Id.* § 245.

27. MO. REV. STAT. § 491.075 (1986).

28. Missouri has no equivalent "residual" provision to the Federal provision codified at FED.R.EVID. 803(24).

29. *Wright*, 751 S.W.2d 48.

30. *Id.*

31. *Id.* at 50.

"have" her.[32] Despite C.B.'s protests, the defendant allegedly took the victim down an alley and into a basement where he first manually sodomized and then later raped the little girl.[33] While this was happening, C.B. notified his father and the victim's mother; they called the police and, in the course of searching for the girl, came upon the defendant leading her away by the hand.[34] Upon seeing her mother, the victim, who, according to her mother, looked "shocked, upset, scared [and] frightened,"[35] exclaimed that she had been raped by the defendant.[36] C.B.'s father held the defendant until the police arrived.[37] Later that same evening, in the course of the police investigation, police detective Paula Phelan interviewed the victim in a room specially-equipped with a hidden videotape camera.[38] Because the victim testified at trial, the videotapes themselves were not offered as evidence and were not a matter of controversy in the appeal.[39] Consequently, the propriety of the trial court's admission of the hearsay was the only matter on appeal.

Two statements made in the course of the alleged incident were introduced at trial in spite of their hearsay nature. The first of these was the victim's statement to her mother that she had been raped.[40] The second hearsay statement was officer Phelan's testimony regarding what the victim said to her during the course of the videotaped interview.[41] Officer Phelan, who had expertise in the police Sex Crimes Unit,[42] interviewed the victim and the other children in "a special interview room designed to be comfortable and calming."[43]

Under traditional hearsay rules, the initial statement of the victim to her mother saying she had been raped might be admissible under either the "present sense impression" hearsay exception[44] or the "excited utter-

---

32. *Id.*
33. Brief for Respondent at 3-4, State v. Wright, 751 S.W.2d 48 (Mo. 1988).
34. *Id.* at 4.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Wright*, 751 S.W.2d at 50.
39. *Id.* at 50-51.
40. Brief for Respondent at 4, State v. Wright, 751 S.W.2d 48 (Mo. 1988) (The statement was testified to at trial by the mother).
41. *Id.*
42. *Id.*
43. *Wright*, 751 S.W.2d at 52.
44. Missouri's position on the "present sense impression" exception to the hearsay rule relies on the wider "res gestae" exception to the hearsay rule for analysis. *See, e.g.*, State v. Pflugradt, 463 S.W.2d 566 (Mo. Ct. App. 1971),

> Res gestae refers to those exclamations and statements made by either the participants, victims, or spectators to a crime immediately before, during, or immediately after the commission of the crime, when the circumstances are such that the statements made were a spontaneous reaction or utterance

ance" hearsay exception.[45] The gist of both of these traditional hearsay exceptions is to allow into evidence testimony about out-of-court statements which are made while the declarant was still under the influence of the event in question. The statement may be made while the declarant was experiencing or perceiving the event as in the "present sense impression" exception,[46] or at a time "contemporaneous" with the event while the declarant is still "under the stress of excitement caused by the event or condition" as in the "excited utterance" exception.[47] The rationale is that statements made "in the heat of the moment" allow the declarant no time to reflect on the situation and to concoct a false or unreliable statement. The other hearsay dangers of memory, perception, and articulation are also reduced because the statements are made so close to the time of the actual event.

Because the present sense impression exception is meant to cover contemporaneous statements made while the declarant was experiencing the relevant event, the courts have been reluctant to extend it very far away in time from the perceived event. Consequently, in *Wright*, the victim's statement to her mother would probably not be admissible if the court determined it to be too remote in time from the event. Generally, the victim or declarant must say something within a period of about fifteen minutes after the perceived event for the statement to be admissible as a present sense impression.[48] Because the victim's statement in *Wright* followed the occurrence by an undetermined period, it is unclear whether it could come in under the "present sense impression" exception.

---

inspired by the excitement of the occasion and there was not opportunity for the declarant to deliberate and to fabricate a false statement.

Pflugradt, 463 S.W.2d at 572 (quoting WHARTEN CRIMINAL EVIDENCE, § 279 (12th ed. 1955)).

For a detailed discussion, *see also* W. KNOX, M. BERGER & R. DUNCAN, MISSOURI CRIMINAL PRACTICE AND PROCEDURE, § 450 (1985). The federal position is as follows: "The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness: (1) *Present Sense Impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." FED. R. EVID. 803(1).

45. The Missouri position on the "excited utterance" exception to the hearsay rule is again reflected by the "res gestae" approach. *See, e.g., Pflugradt*, 463 S.W.2d at 572. The federal position is as follows: "*Excited Utterance.* 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." FED. R. EVID. 803(2).

46. For a discussion, *see* CLEARY, *supra* note 25, §§ 288-98.

47. CLEARY, *supra* note 25, § 297.

48. Missouri's position is that the statement must come "immediately after" the event. *Pflugradt*, 463 S.W.2d at 572. *See also* Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 526 n.11 (1988). For a full discussion of the temporal limits on the "present sense impression" exception to the hearsay rule, see CLEARY, *supra* note 25, § 298.

Probably, however, because the victim's mother described her as appearing "shocked, upset, scared [and] frightened,"[49] her first statement would be allowed under the "excited utterance" exception. The statement appears to have been made in a spontaneous fashion by the child while still under the stress of the alleged occurrence.

It is clear that *neither* the "present sense impression" or "excited utterance" hearsay exceptions would allow admission of the statements made to Officer Phelan during her interview of the children. Those statements were made at a time too far removed from the actual incident to be admissible.

This review of the facts in *Wright* serves to illustrate the difficulty prosecutors of child sex abuse cases may have in admitting critical hearsay evidence at trial. The admissibility of such evidence under the traditional hearsay exceptions depends upon the declarant's statement being made close in time to the abusive event. This is not always the case, and many otherwise reliable out-of-court statements might be excluded under the traditional rules.[50] Where the child cannot testify, the inadmissibility of hearsay evidence may prove fatal to the prosecution's case.

Under Federal Rules, the so-called "residual" exception to the hearsay rule[51] may also be used to admit the out-of-court statements of child abuse victims into evidence. However, it, too, is of limited use. Under the "residual" exception, out-of-court statements with some level of reliability are allowed into evidence when justice requires. The "residual" exception, however, was never intended to open up new hearsay exceptions. Rather,

---

49. Brief for Respondent at 4, State v. Wright, 751 S.W.2d 48 (Mo. 1988).

50. Often, considerable time may elapse between the abusive event and the child's out-of-court statement concerning the event. FONTANA, *supra* note 9, at 9. Both of the hearsay exceptions mentioned in the text "excited utterance" and "present sense impression" assume the statement is made concurrent with or shortly following the event in question. CLEARY, *supra* note 25, §§ 297-98.

51. The FEDERAL RULES OF EVIDENCE created the "residual" exception at FED. R. EVID. 803(24) and 804(b)(5).

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

FED. R. EVID. 803(24). FED. R. EVID. 804(B)(5) is identical to FED. R. EVID. 803(24).

it was intended to be a supplement to the traditional exceptions.[52] Consequently, its use has been restricted and does not solve the problem for the prosecutor of a child sex abuse case.

In *Wright*, the court admitted the hearsay evidence under Missouri's statutory hearsay exception for statements made by the child victim of sexual abuse.[53] The new statutory hearsay exception is philosophically cut from the same cloth as the more traditional hearsay exceptions because, essentially, it determines the statements of young children regarding sexual abuse to have a high degree of reliability.[54] Thus, a hearsay exception applying to child victims of sexual abuse is a rational extension of existing hearsay doctrine because it remains true to the standard of reliability as the fundamental rationale behind hearsay exceptions.

The adoption of hearsay exception statutes for child sex abuse cases also represents a strong public policy statement that child sexual abuse will

---

52. *See* CLEARY, *supra* note 25, § 324.1.

53. MO. REV. STAT. § 491.075 (1986). The statute reads as follows:

1. A statement made by a child under the age of twelve relating to an offense under chapter 565, 566, or 568, RSMo, performed with or on a child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of this state as substantive evidence to prove the truth of the matter asserted if:

(1) The court finds, in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either;

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness.

2. Notwithstanding subsection 1 of this section or any provision of law or rule of evidence requiring corroboration of statements, admissions, or confessions of the defendant, and notwithstanding any prohibition of hearsay evidence, a statement by a child when under the age of twelve who is alleged to be a victim of an offense under chapter 565, 566, or 568, RSMo, is sufficient corroboration of a statement, admission, or confession regardless of whether or not the child is available to testify regarding the offense.

3. [requires prosecuting attorney to notify defense counsel of his intent to offer such a statement in evidence].

4. Nothing in this section shall be construed to limit the admissibility of statements, admissions or confessions otherwise admissible by law.

MO. REV. STAT. § 491.075 (1986).

54. *See* Comment, *supra* note 9, at 1749. McGrath and Clements note that reliability may be inherent in the stories told by children who have been sexually abused. "[O]ur experience and the literature support the proposition that children's statements about sexual matters are inherently reliable because very young children without actual sexual experience are unable to lie or fantasize about sexual experiences, especially in the explicit detail in which they often describe what has happened to them." McGrath and Clemens, *supra* note 18, at 240.

not to be tolerated. Such statutes have become widespread[55] and Missouri's statute is largely identical to the ground-breaking statute of the State of Washington, adopted in 1982.[56] Because any new hearsay rule which affects criminal defendants poses sixth amendment confrontation clause questions, legislators who wished to see the new exception prevail had to take care that they draft the new statute carefully.

CONFRONTATION CLAUSE IMPLICATIONS

The sixth amendment to the U.S. Constitution, as well as Article I, § 18(a) of the Missouri Constitution, guarantees to a criminal defendant the right "to meet the witnesses against him face to face."[57] Although the constitutional right of confrontation might at first glance seem to be a codification of the hearsay rule, the courts have never interpreted it as such.[58] Certain types of hearsay testimony were allowed at common law and the traditional hearsay exceptions were in existence at the time of the enactment of the sixth amendment. Most commentators believe the framers of the Sixth Amendment intended to leave these hearsay exceptions intact.[59] Consequently, the U.S. Supreme Court has been regularly called upon to define the exact protections given to defendants by the sixth amendment. The court has found the chief protections afforded by the confrontation clause to be the defendant's right to cross-examine opposing witnesses and the requirement that the prosecution show hearsay declarants to be effectively unavailable before their hearsay statements will be admitted at trial.[60]

In *Ohio v. Roberts*,[61] the U.S. Supreme Court set out a two-prong test to insure that the right to confrontation is protected. Before any hearsay testimony can be admitted, the court requires that, first, the prosecution show at trial that the hearsay declarant is unavailable despite "good faith" efforts to attain his appearance in court.[62] Second, the court requires that the prosecution also show the statement to have some ascertainable "indicia of reliability."[63] The reliability of a hearsay statement may be established if, by its nature, it falls into what the court terms a

---

55. *See supra* note 20 for a list of states having hearsay exception statutes. The list at note 20 does not include other states which have adopted similar procedures by case law.

56. WASH. REV. CODE ANN. § 9A-44-120 (1982).

57. MO. CONST. OF 1945, art. I, § 18(a) (1985). The federal version, found at U.S. CONST., amend. VI, reads as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST., amend. VI.

58. CLEARY, *supra* note 25, § 252.

59. *Id.* § 252, at 750.

60. *Id.* § 252, at 751. *Cf.* California v. Green, 399 U.S. 149 (1970).

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

62. *Id.* at 74.

63. *Id.* at 66.

"firmly rooted hearsay exception."[64] Otherwise, the proponent of the statement must establish its reliability by showing that other "particularized guarantees of trustworthiness" inure to the statement.[65] Whether the emotional stress placed on a child by testifying at a sexual abuse trial would be sufficient to make him "unavailable" for the purposes of the confrontation clause is uncertain. The Missouri Supreme Court did not directly address that question in *Wright*.[66]

The *Wright* court did, however, specifically uphold the constitutionality of the Missouri hearsay statute on the grounds that it satisfied the requirements of the confrontation clause:

> The language of § 491.075 mirrors those constitutional parameters [set out in *Ohio v. Roberts*] by requiring a showing that the "time, content, and circumstances of the statement provide sufficient indicia of reliability" and that the child either testify at the proceedings or be unavailable as a witness; thus the statute comports with the Confrontation Clause requirements described in *Roberts* and is not facially invalid.[67]

Equal Protection Implications

Wright also asserted on appeal that it was error for the trial court to admit Phelan's statements because the statute denied him equal protection under the law. Wright argued that the statute placed him, as an accused sex offender, in a "suspect class" and thereby denied his right to confront the witnesses against him—a right not denied to other criminal defendants.[68] Because a statutory scheme which "operates to the disadvantage of a

---

64. *Id.*

65. *Id.*

66. In *Wright*, the child victim *did* testify at the trial, so the Supreme Court did not decide the specific question posed by a hypothetical situation where the child is deemed "unavailable" and does not in fact testify.

> [T]he statute comports with the Confrontation Clause requirements described in *Roberts* and is not facially invalid. Further, we find no constitutional infirmity in its application in this case. The child testified at trial and was subjected to cross-examination, and the court conducted a careful and thorough hearing from which it concluded that the statements contained sufficient indicia of reliability.

Wright, 751 S.W.2d at 52.

Other states have dealt with the constitutional problems which occur when the child is unavailable. *See* State v. Slider, 38 Wash. App. 689, 688 P.2d 538 (1984); People v. Hise, 738 P.2d 13 (Colo. Ct. App. 1986) (There were two victims. One did not testify due to a speech defect. The court deemed this to make him "unavailable" for constitutional purposes.); State v. Bellotti, 383 N.W.2d 308 (Minn. App. 1986) (Two victims; one did not testify because deemed "unavailable for constitutional purposes" by the court.). However, the author is not aware of a case holding a child to be "unavailable" due to the trauma of testifying.

67. *Id.* at 52. *See also supra* note 53 (the Missouri hearsay provision).

68. Brief for Appellant at 21, State v. Wright, 751 S.W.2d 48 (Mo. 1988).

suspect class . . . receives strict scrutiny to determine whether the classification is necessary to a compelling state interest,"[69] Wright further argued that the hearsay statute should receive such strict scrutiny and be overturned.[70] The court noted that it had discussed the rationale for equal protection inquiries at great length in an earlier case, *State v. Williams*,[71] which was also a case of child sex abuse. In *Williams*, the court held that "in equal protection claims, the first step is to ascertain whether the statutory scheme 'operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution.'"[72] The court in *Williams* narrowly construed the meaning of "suspect class" to refer to "inherently suspect distinctions such as race, religion or alienage,"[73] and found that the defendant was not a member of such a "suspect class."[74] The defendant also asserted his equal protection rights were violated because the statute deprives him of his "fundamental right" to confront the witnesses against him.[75] The court in *Wright* did not decide whether the right of confrontation was such a "fundamental right" for equal protection considerations,[76] because, as the court stated, "[w]e need not decide whether the right of confrontation is one of those implicitly recognized as fundamental for the purposes of equal protection analysis, [citation to *Williams* omitted], because the statute here does not deny defendant the protections afforded by the Confrontation Clause."[77] In other words, the court struck down two birds with one stone by disposing of the confrontation clause and equal protection arguments in one fell swoop.

CONCLUSION

In *State v. Wright*, the Missouri Supreme Court upheld the constitutionality of the Missouri hearsay exception over challenges based on both the sixth amendment confrontation clause right and the fourteenth amendment equal protection clause.

It is important to recognize that the victim in *Wright* testified at the trial and the court left unanswered the question of whether the hearsay

---

69. *Wright*, 751 S.W.2d at 51.

70. *Id.*

71. State v. Williams, 729 S.W.2d 197 (Mo. 1987).

72. *Id.* at 200 (quoting San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 17 (1973)).

73. *Id.* at 201 (quoting New Orleans v. Dukes, 427 U.S. 297, 303 (1976)).

74. *Id.*

75. Brief for Appellant at pp. 18-24, State v. Wright, 751 S.W.2d 48 (Mo. 1988).

76. The U.S. Supreme Court first required that where a statute "infringes upon a fundamental right," the state must show that the statute was necessary to the accomplishment of some compelling state interest. Roe v. Wade, 410 U.S. 113, 155 (1973).

77. *Wright*, 751 S.W.2d at 51.

statements of an *unavailable* witness in a child sex abuse case will be allowed into evidence. Due to the undoubted trauma experienced in many cases by a child who must literally come face-to-face with the defendant, it is likely that we shall soon see another case along the lines of *Wright* where the child does *not* testify. Missouri's statute is nearly identical to the statutory hearsay exceptions for child victims of sexual abuse in Washington and Minnesota.[78] Both Washington and Minnesota, among other states, have dealt with the confrontation problems posed by the unavailability of the child declarant.[79] Each has upheld the statute's constitutionality so long as the *in camera* hearing prior to trial produces sufficient "indicia of reliability" based on the statutory language requiring an examination of the "time, content, and circumstances" of the statement.[80] Because the

78. WASH. REV. CODE ANN. tit. 9A § 44.120 (1988); MINN. STAT. ANN. § 595.02(3) (1988).

79. *See infra* note 80.

80. MO. REV. STAT. § 491.075 (1986). Washington has, perhaps, the longest experience with a child sex assault hearsay provision. Several decisions regarding it are of note. In *State v. Slider*, 38 Wash. App. 689, 688 P.2d 538 (1984), a two and a half-year-old child had been molested, and by the time of trial, the child could not adequately remember the incident and was deemed "unavailable" by the court. *Slider*, 38 Wash. App. at 693-94, 688 P.2d at 541. The trial court's careful adherence to the pre-trial hearing on indicia of reliability established sufficient "particularized guarantees of trustworthiness" to enable the child's hearsay statement into evidence even though the child was unavailable at trial. *Slider*, 38 Wash. App. at 696, 688 P.2d at 543. In *State v. Justiniano*, 48 Wash. App. 572, 740 P.2d 872 (1987), the court held that the child had been competent when making a previous out-of-court statement, even though the child was deemed "unable to express in words the memory of the occurrence, and [was] thus unable to testify at trial . . . ." *Justiniano*, 48 Wash. App. at 574, 740 P.2d at 874. The court noted that "the focus of the determination of competency should be on the competency to make the challenged statement," not the competency of the child to testify in open court. *Justiniano*, 48 Wash. App. at 577, 740 P.2d at 875. The unavailability of the child did not a violate the defendant's confrontation rights since the court had established "particularized guarantees of trustworthiness" by adhering to the statutory preliminary hearing for indicia of reliability. *Justiniano*, 48 Wash. App. at 582, 740 P.2d at 878. However, in *State v. Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (1984), the court overturned the conviction because the prosecution did not adequately establish the unavailability of the child declarant. *Ryan*, 103 Wash. 2d 165, 691 P.2d 197.

Minnesota's experience has been similar. In *State v. Bellotti*, 383 N.W.2d 308 (Minn. App. 1986), only one of two child victims was deemed competent and available to testify. Because the state had made a "good faith effort" to produce both witnesses by producing them at the preliminary hearing, the unavailability requirement was met. *Bellotti*, 383 N.W.2d at 314. To determine the reliability of the out-of-court statements, the court looked to time, content, and circumstances of the statements and determined they possessed sufficient indicia of reliability. *Bellotti*, 383 N.W.2d at 312-13. Additionally, the appellate court found no violation of the confrontation clause. The court in *State v. Carver*, 380 N.W.2d 821 (Minn. App. 1986) *rev'd on other grounds*, 390 N.W.2d 431 (Minn. Ct. App. 1986), noted that "[w]hen a child is available as a witness, the trial court may admit his or

Missouri statute was carefully drafted to fall well within the rule outlined in *Ohio v. Roberts*,[81] and because it is so similar to the Washington and Minnesota statutes, it is probable that a Missouri court would uphold its constitutionality even where the child declarant is unavailable.

The due process concerns raised by the defendant in *Wright* were also raised in *Williams* and have now been dealt with by the court in two situations involving child sex abuse defendants.[82] It is unlikely this will prove a fruitful avenue of appeal in future cases.

In the end, the most important aspect of the court's decision in *Wright* may simply be that it has ratified the will of the legislature and given Missouri prosecutors a new and constitutionally effective device for prosecuting child sex abuse offenders.

THOMAS P. DVORAK

---

her hearsay statements if it finds that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide 'sufficient indicia of reliability.'" *Carver*, 380 N.W.2d at 825 (quoting MINN. STAT. ANN. § 595.02(3)(a) (West 1988)). This is required by the Minnesota statute when the child is unavailable and, further, it requires corroboration of the statement by other evidence. *Carver*, 380 N.W.2d at 826. In this respect, the Minnesota statute differs from both the Washington and Missouri statutes.

81. *Roberts*, 448 U.S. 56.

82. The Utah courts have also dealt with the equal protection argument against the Utah hearsay exception which is codified at UTAH CODE ANN. § 76-5-411 (Supp. 1988). *See* State v. Loughton, 747 P.2d 426 (Utah 1987).