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Constitutional Admissibility of Hearsay under the Confrontation Clause: Reliability Requirement for Hearsay Admitted under a Non-"Firmly Rooted" Exception - Idaho v. Wright

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NOTES

CONSTITUTIONAL ADMISSIBILITY OF HEARSAY UNDER THE CONFRONTATION CLAUSE: RELIABILITY REQUIREMENT FOR HEARSAY ADMITTED UNDER A NON-"FIRMLY ROOTED" EXCEPTION — *Idaho v. Wright*[1]

I. INTRODUCTION

Since 1845, the United States Supreme Court has held that the admission of hearsay statements against a criminal defendant does not necessarily violate the Confrontation Clause of the Sixth Amendment of the United States Constitution.[2] However, to be admissible under the Confrontation Clause, hearsay must meet two requirements:[3] (1) the declarant is unavailable to testify, and (2) the declarant's statement "[bears] adequate indicia of reliability."[4] The reliability prong of the test is satisfied when out-of-court statements fit within a "firmly rooted" hearsay exception.[5] Otherwise, the statements not fitting within a firmly rooted exception are inadmissible absent a showing of "particularized guarantees of trustworthiness."[6]

What evidence constitutes particularized guarantees of trustworthiness for hearsay not within a firmly rooted exception remained unclear until the recent United States Supreme Court de-

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

2. Mattox v. United States, 156 U.S. 237 (1895)(applies to the Sixth Amendment); *Pointer v. Texas*, 380 U.S. 400 (1965) (incorporates the Sixth Amendment Confrontation Clause into the Fourteenth Amendment).

3. These two requirements are only applicable after the hearsay is determined to be admissible under an exception to the general rule excluding hearsay. Ohio v. Roberts, 448 U.S. 56 (1980).

4. *Id.* at 65.

5. *Id.* at 66.

6. *Id.*

cision of *Idaho v Wright*.[7] The *Wright* court held that particularized guarantees of trustworthiness can only be supported by evidence of the circumstances surrounding the declarant's making of the hearsay statement.[8] In so holding, the court determined that corroborative evidence cannot be used to contribute to the trustworthiness of out-of-court statements fitting within such exceptions as the residual hearsay exception.[9] Though the Court's decision clarifies the standard of reliability required for "non-firmly rooted" hearsay to be admissible, it establishes a double standard of reliability.

This note discusses the facts of *Idaho v. Wright*, examines the history of the admissibility of hearsay under the Confrontation Clause, and analyzes the *Wright* decision. This note concludes that by excluding the use of corroborative evidence in determining the trustworthiness of non-firmly rooted hearsay, the Court enhances Confrontation Clause protection for criminal defendants, but perhaps at the expense of some crime victims, such as sexually abused children.

II. THE CASE

In 1986, the State of Idaho jointly charged Laura Lee Wright (Wright), respondent in this case, and Robert L. Giles, a male companion of Wright's, with two counts of lewd conduct with a minor.[10] The minors allegedly involved were Wright's two daughters, ages 5½ and 2½ at the time.[11] The 5 ½ year old was the daughter of Wright and her ex-husband Louis Wright (Louis), while the 2 ½ year old was the daughter of Wright and Giles.[12]

The allegations of sexual abuse surfaced when the 5 ½ year old told Louis' female companion (Goodman) that Giles had sexual intercourse with her while her mother held her down and covered her mouth.[13] She also said that she watched them do the same thing to Kathy, the 2½ year old.[14] Goodman notified the police

7. 110 S. Ct. 3139.
8. 110 S.Ct. at 3150.
9. *Id.*
10. *Id.* at 3143. The governing statute was IDAHO CODE § 18-1508 (1987).
11. *Id.*
12. *Id.*
13. Idaho v. Wright, 110 S. Ct. 3139 (1990). Louis and Wright had and informal agreement that each would have custody of the 5½ year old six months out of the year. *Id.* The allegations arose during Louis' custody. *Id.*
14. *Id.*

who subsequently took the younger daughter from her parents and placed her in custody for protection and examination.[15]

Medical examinations of the two young girls by Dr. John Jambura, "a pediatrician with extensive experience in child abuse cases," revealed evidence of sexual abuse.[16] The physical condition of the 2½ year old was strongly indicative of " 'sexual abuse with vaginal contact', occurring approximately two to three days before the examination."[17]

Dr. Jambura also conducted a counseling interview with Kathy to determine the cause of the alleged sexual abuse.[18] After initial questioning designed to relax Kathy and make her comfortable, Dr. Jambura delved into the subject of abuse by asking four questions: (1) " 'Do you play with Daddy?' "; (2) " 'Does Daddy play with you?' "; (3) " 'Does Daddy touch you with his pee-pee?' "; (4) " 'Do you touch his pee-pee?' "[19] According to Jambura, Kathy responded in the affirmative to the first three questions but did not wish to answer the fourth.[20]

Through the testimony of Dr. Jambura at a joint trial of Wright and Giles, the above questions and Kathy's responses were admitted into evidence under one of Idaho's residual hearsay exceptions, rule 803(24).[21] Both Wright and Giles were each convicted on two counts of lewd conduct with a minor.[22]

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15. *Id.*

16. *Id.*

17. *Id.*

18. Idaho v. Wright, 110 S. Ct. 3139, 3144 (1990).

19. *Id.*

20. *Id.* In declining to elucidate on the fourth question, Kathy spontaneously stated - in the words of Jambura- "[D]addy does this with me, but he does it a lot more with my sister than with me." *Id.*

21. *Id.* Though IDAHO R. EVID. 803(24) makes availability of declarant immaterial, the parties agreed that Kathy was not capable of communicating to the court. *Id.* IDAHO R. EVID. 803 states in relevant part:

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

22. Idaho v. Wright, 110 S. Ct. 3139, 3145 (1990).

Both Wright and Giles appealed. The Idaho Supreme Court affirmed Giles' conviction,[23] but reversed Wright's conviction as to Kathy.[24] As to Wright, the Idaho Supreme Court stated that even though Dr. Jambura's testimony was admissible under the residual hearsay exception, it was inadmissible under the Confrontation Clause of the Sixth Amendment.[25]

The United States Supreme Court granted a writ of certiorari to the State of Idaho,[26] and subsequently affirmed the Idaho Supreme Court's reversal of Wright's conviction.[27]

III. BACKGROUND

The admissibility of incriminating out-of-court statements against a criminal defendant has been the subject of evidentiary and constitutional debate in the United States Supreme Court since 1895.[28] This is exemplified both by the historical development of the admissibility of hearsay under the Confrontation Clause and by the use of corroborative evidence in evaluating the reliability of hearsay.

A. The Confrontation Clause and Hearsay

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against [him]."[29] Interpreted literally, the plain meaning of the Confrontation Clause bars all hearsay statements.[30] However, this interpretation was rejected in *Mattox v. United States* under the rationale that exceptions to the "technical letter" of constitutional provisions is warranted by the necessity to protect the public and to prevent "a manifest failure of justice."[31]

The incorporation of the Confrontation Clause into the Four-

23. State v. Giles, 772 P.2d 191 (Idaho 1989). Unlike Wright, Giles had not appealed to the Idaho Supreme Court based on his right to confrontation. *Id.*

24. State v. Wright, 775 P.2d 1224 (Idaho 1989). The Idaho Supreme Court's rationale for reversing the decision was that Kathy's out of court statement fell under a nontraditional hearsay exception and that the interview of Kathy lacked procedural safeguards such as videotaping. *Id.* at 1226.

25. *Id.*

26. Idaho v. Wright, 493 U.S. 1041, 110 S.Ct. 833 (1990).

27. *Wright*, 110 S.Ct. at 3153.

28. *See* Mattox v. United States, 156 U.S. 237 (1985).

29. U.S. CONST. amend. VI.

30. *Wright*, 110 S.Ct. at 3145; *Mattox*, 156 U.S. at 340.

31. *Mattox*, 156 U.S. at 340.

teenth amendment in 1965 and the enactment of exceptions to the hearsay rule seemingly induced the United States Supreme Court to distinguish between admissibility of hearsay under an exception to the hearsay rule and admissibility under the Confrontation Clause.[32] The Court established that even though the hearsay rules and Confrontation Clause protect similar values, the two are not mirror images of one another.[33] Evidence admissible under an exception to the hearsay rule nonetheless may be prohibited by the Confrontation Clause.[34] Generally, the Court required that hearsay possess significant indicia of reliability in order to comport with the Confrontation Clause.[35]

In 1980, the evolution of admissibility standards for hearsay continued. That year the Court enunciated a "two-prong" test for determining when hearsay statements incriminating to a criminal defendant are admissible under the Confrontation Clause.[36] The first prong requires that "the prosecution either produce or demonstrate the unavailability of, the declarant whose statement it wishes to use against defendant."[37] The second prong requires that the statement also bear "adequate 'indicia of reliability'."[38] This second prong, which will be referred to as the reliability requirement, also has two components. First, when the hearsay falls within a "firmly rooted" hearsay exception the reliability of the statement is inferred or presumed without any proof.[39] Second, when the hearsay fits within a non-"firmly rooted" hearsay exception, e.g., residual exception, it is inadmissible absent proof of reliability.[40] The proof required is known as a "showing of particularized guarantees of trustworthiness."[41]

Wright does not discuss the unavailability prong.[42] Rather, the

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32. *See* California v. Green, 399 U.S. 449 (1970); Bruton v. United States, 391 U.S. 123 (1968).

33. *Green*, 399 U.S. at 155-156.

34. *Id.*

35. *E.g.* Dutton v. Evans, 400 U.S. 74 (1986).

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

37. *Id.* However, this unavailability requirement is not applicable to hearsay statements of nontestifying coconspirators. United States v. Inadi, 475 U.S. 387 (1986).

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

39. *Id.*

40. *Id.*

41. *Id.*

42. Idaho v. Wright, 110 S. Ct. 3139, 3147 (1990). (assumes that the 2 ½ year old declarant was unavailable within the meaning of the Confrontation Clause

Wright Court focused on the reliability prong, particularly on the issue of what constitutes "particularized guarantees of trustworthiness" for out-of-court statements not fitting within a firmly rooted hearsay exception.[43]

B. Hearsay Exceptions

For purposes of the Confrontation Clause, hearsay exceptions are categorized into two groups: "firmly rooted" and - for lack of a better description - "non-firmly rooted." The phrase "firmly-rooted" was coined in *Ohio v. Roberts* and vaguely defined as "those hearsay exceptions [which] rest upon such solid foundations that virtually any evidence within them comports with the 'substance of the constitutional protection' " provided by the Confrontation Clause.[44] Hearsay exceptions within this category include statements by a co-conspirator,[45] dying declarations,[46] former testimony (previously cross-examined),[47] properly administered business and public records,[48] excited utterances,[49] and statements for purposes of medical treatment.[50] The *Wright* court stated further that firmly rooted exceptions are those that share a tradition of reliability based on "longstanding judicial and legislative experience in assessing the trustworthiness" of hearsay.[51]

By contrast, non-firmly rooted exceptions may be defined as those hearsay exceptions that do not share the same tradition of reliability.[52] The most common examples of such exceptions are the residual or "catchall" exceptions.[53] Whether the exception requires that the declarant be unavailable or not is irrelevant, since what are commonly referred to as rules 803(24) and 804(b)(5) are essentially identical.[54] Most states have residual exceptions similar

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since the parties in effect agreed that she was incompetent to testify).

43. *Id.*

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

45. Bourjaily v. United States, 483 U.S. 171, 182 (1987).

46. *Roberts*, 448 U.S. at 66 n. 8.

47. *Id.*

48. *Id.*

49. *See* Idaho v. Wright, 110 S. Ct. 3139, 3149 (1990).

50. *Id.*

51. *Id.* at 3147. Because of the phrase "tradition of reliability," "traditional" will be used interchangeably with "firmly rooted," and "nontraditional will be used interchangeably with "non-firmly rooted."

52. *Id.*

53. *E.g.* FED. R. EVID. 803(24) and 804(b)(5).

54. Huff v. White Motor Corp., 609 F.2d 286, 291 n.4 (7th Cir. 1979); 4 D.

to those found in the Federal Rules of Evidence.[55]

Another hearsay exception that is not found in the Federal rules, but that is becoming more common in state evidentiary rules, is the child sexual abuse hearsay exception.[56] As of 1987, twenty-seven states had enacted a child hearsay exception.[57] Generally, these exceptions allow state courts to admit into evidence the hearsay statements of children who are unavailable to testify - because of their young age, for example - when the statements exhibit trustworthiness based on corroborating and other types of evidence.[58] The relative novelty of this exception indicates that it too is not firmly-rooted.[59]

C. Reliability of Hearsay: Corroborative Evidence[60] as an Indicator

Prior to *Wright*, the United States Supreme Court, federal courts, and state courts used corroborating evidence as an indicium for determining the reliability of hearsay in criminal cases.

1. United States Supreme Court Usage

In *Dutton v Evans*,[61] the Court examined and approved the reliability of a hearsay statement (made by one of defendant's accomplices) that implicated defendant as being responsible for several murders. For Confrontation Clause purposes, one of the four factors the Court used as indicia of reliability of the statement was corroborative in nature: that the declarant had "personal knowledge of the identity and role of other participants" in the murders.[62]

In *Lee v. Illinois*,[63] the Court reversed the conviction of a de-

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LOUISELL AND C. MUELLER, FEDERAL EVIDENCE 922 (1980) [hereinafter LOUISELL AND MUELLER].

55. *See* LOUISELL AND MUELLER, *supra* note 53.

56. *See* J. MYERS, CHILD WITNESS LAW AND PRACTICE § 5.38 (1987) [hereinafter MYERS].

57. MYERS, *supra*, § 5.38, at 216 (supp. 1991).

58. *See Id.*

59. *Id.* § 5.38.

60. Corroborating evidence is "[e]vidence supplementary to that already given and tending to strengthen or confirm it;[a]dditional evidence of a different character to the same point." *Black's Law Dictionary* 311 (5th ed. 1979).

61. Dutton v. Evans, 400 U.S. 74, 77 (1986).

62. *Id.* at 88-89.

63. 476 U.S. 528 (1986).

fendant. The Court determined that a co-defendant's out-of-court confession was not shown to be sufficiently reliable either from circumstances surrounding the statement or from the interlocking nature of the defendant's confessions.[64] The court concluded that though some of the facts in the co-defendant's confession interlocked with facts in defendant's statement, there were enough discrepancies to question the trustworthiness, motive and accuracy of the co-defendant.[65] However, the court did not rule out the use of other types of corroborative evidence. It merely dealt with the use of interlocking confessions as evidence of the reliability of hearsay.[66] The court even indicated that interlocking confessions would be proper indicia of reliability if discrepancies were not significant.[67]

Finally, *Cruz v. New York*[68] recognized the legitimate role corroborative evidence can play in bolstering the reliability of hearsay statements. In reference to the interlocking nature of confessions, the Court concluded that when the co-defendant's confession "confirms essentially the same facts as the defendant's own confession it is more likely to be true."[69] Thus, the Court affirmed the utility of corroborating evidence in evaluating the reliability of hearsay required by the Confrontation Clause.

2. *Federal Usage*

Of the Federal Courts of Appeal that have grappled with the admissibility of residual hearsay against a criminal defendant, many have utilized corroborating evidence as one indicator of reliability. The Fourth, Fifth, Eighth and Ninth Circuits are examples.

The fourth circuit allowed hearsay in the form of prior grand jury testimony to be admitted as residual hearsay in at least two instances. First, in *United States v. West*,[70] the Court of Appeals

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64. *Id.* at 545. Confessions are considered to "interlock" to the extent the facts in each are similar. *See Id.* The interlocking is considered to be the corroborative evidence. *See Wright* 110 S.Ct. 3139.

65. Lee v. Illinois, 476 U.S. 528, 545 (1986).

66. *Id.*

67. *Id.*

68. 481 U.S. 186 (1987).

69. *Id.* at 192 (codefendant's out-of-court confession was admitted into evidence).

70. 574 F.2d 1131 (4th Cir. 1978) The hearsay, admitted under FED. R. EVID. 804(b)(5), related to defendant's heroin dealings. *Id.*

held that a significant factor of reliability enabling the hearsay to satisfy the Confrontation Clause was that the hearsay statements were corroborated by surveillance agents and audio recordings of drug deals. Second, *United States v. Garner*[71] upheld the admissibility of out-of-court statements because it was strongly corroborated by the testimony of another witness and "undeniable records."

The fifth circuit also admitted corroborative evidence in evaluating reliability of hearsay. One of the corroborating factors supporting the reliability of three co-offenders' statements made to the F.B.I., was the similarity of the statements.[72] Also the out-of-court confession of an alleged accomplice to the defendant was admissible against defendant under Fed. R. Evid. 803(24), in part because its reliability was "strongly corroborated by the testimony of [narcotics] agents who took the confession."[73]

Dealing with child declarants describing instances of sexual abuse, recent cases in the Eighth Circuit also assessed reliability of residual hearsay under Rule 803(24) by examining corroborative evidence. In *United States v. Renville*,[74] the fact that a child made essentially identical statements to medical personnel, foster parents and others contributed significantly to the reliability of an out-of-court statement by the child to a deputy sheriff. In a similar case, medical evidence of physical abuse contributed to the reliability of hearsay statements made to an F.B.I. Agent and a social worker.[75]

Finally, in *United States v. Nick*,[76] the Ninth Circuit evaluated the reliability of a three year old's out-of-court statement to

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71. 574 F.2d 1141, 1146 (4th Cir. 1978), *cert. denied* 434 U.S. 936 (1978).

72. United States v. Leslie, 542 F.2d 285, 289 (5th Cir 1976), *reh'g denied* 545 F.2d 168 (5th Cir. 1976)(approving the admissibility of incriminating statements under FED. R. EVID. 803(24) as substantive evidence in prosecution for car thefts).

73. United States v. Barnes, 586 F.2d 1052, 1054 (5th Cir. 1978) (approving the admissibility of the confession which implicated both the declarant and the defendant).

74. 779 F.2d 430, 439 (8th Cir. 1985)(statement identifying the defendant as the one who sexually abused her).

75. United States v. Cree 778 F.2d 474, 476 (8th Cir. 1985)(approved admissibility); *see also* United States v. Dorian, 803 F.2d 1439, 1445 (8th Cir. 1986)(allowing medical evidence to corroborate reliability of a child's statement concerning sexual abuse).

76. 604 F.2d 1199, 1204 (9th Cir. 1979). The statement identified the defendant as one who sexually abused the child: "[Nick] stuck his tutu in my butt." *Id.* at 1201.

his mother in terms of all the circumstances in the case. Though the statement was admitted as an "excited utterance," the Court of Appeals indicated that the proper measure of trustworthiness was a consideration of all probative evidence.[77] The Court of Appeals determined the statement to be reliable enough for the Confrontation Clause, because it was corroborated by physical evidence and the fact that the defendant had the opportunity to commit the abuse.[78]

However, contrary to the above referenced circuits, the Seventh Circuit has held that corroborative evidence is not a relevant consideration in determining whether hearsay is reliable enough to be admitted under a residual exception.[79]

3. *States' Usage*

The use of corroborative evidence in determining reliability of hearsay under nontraditional exceptions on the state level achieves greater status than on the federal level. The heightened status is more detectable in child sexual abuse exceptions to the hearsay rule.[80] As statutorily enacted, many of these exceptions require that corroborative evidence be used to assess the reliability of hearsay when the child declarant is unavailable to testify.[81]

In the context of residual exceptions, several state courts reasoned that reliability of hearsay must first be established to some degree by the circumstances in which the statement was made.[82]

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77. *Id.* at 1203.

78. *Id.* at 1204 (mother found semen in the child's underwear after picking him up from Nick, the defendant, who was babysitting the child).

79. Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979).

80. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1416 (1989); COLO. REV. STAT. § 18-3-4113 (1986); FLA. STAT. § 90.803(23) (1989); ILL. REV. STAT. Ch. 37, § 704-6(4)(C) (1989); IND. CODE § 35-37-4-6 (1988); MINN. STAT. § 595.02(3) (1988); S.D. CODIFIED LAWS § 19-16-38 (1987); UTAH CODE ANN. § 77-35-15.5 (1990); WASH. REV. CODE ANN. § 9A.44.120 (1987 supp.).

81. *Id.* The Washington statute permits the admissibility of out-of-court statements made by a child under the age of ten "describing any act of sexual contact performed with or on the child by another. . ." WASH. REV. CODE ANN. § 9A.44.120 (1987 supp.) Generally, the statement is admissible after a showing of circumstances that provide sufficient indicia of reliability. *Id.* However, as an additional requirement, "when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act." *Id.* The Washington statute served as the model for similar exceptions enacted by some of the other states. MYERS, *supra*, § 5.38.

82. *E.g.* State v. Allen, 755 P. 2d 1153, 1165 (Ariz. 1988); State v. Taylor, 704

Then, "corroborative evidence may be used to 'bolster' the reliability to the level sufficient to satisfy the residual exceptions."[83] The widespread use of corroborative evidence on the state level reveals the perception that corroboration "makes a statement more reliable because it increases the likelihood that the statement is true."[84]

IV. ANALYSIS

The issue facing the *Wright* Court was "whether the admission at trial of hearsay statements by a child declarant to an examining pediatrician violates a defendant's rights under the Confrontation Clause of the Sixth Amendment."[85] Under the facts of this case the Court determined the answer to be "yes."[86] Yet, the Court's opinion reveals that in fact patterns passing the reliability test proferred by the Court the answer may be "no." The purpose of this section is to analyze the holding and the Court's rationale, with primary emphasis on the Majority's formulation of a test for determining reliability of nontraditional hearsay under the Confrontation Clause.

A. *The Holding*

The *Wright* Court sought to clarify the Confrontation Clause requirement, as enunciated in *Roberts,* that incriminating hearsay admitted against a defendant bear "adequate indicia of reliability."[87] Primarily, the Court focused on this reliability requirement as it pertains to hearsay admitted under a non-firmly rooted exception; that is, the Court formulated a test for determining what evidence constitutes a "showing of particularized guarantees of trustworthiness" for nontraditional hearsay.[88]

The Court held that "particularized guarantees of trustworthiness" for hearsay are based on a consideration of the "totality of circumstances."[89] However, it limited the scope of consideration to

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P.2d 443,453 (N.M. 1985).

83. *Allen*, 755 P.2d at 1165.

84. *Id.*; *See* State v. Kuone, 757 P.2d 289 (Kan. 1988); State v. J.C.E., 767 P.2d 309 (Mont. 1988); State v. Robinson, 735 P.2d 801 (Ariz. 1987).

85. Idaho v. Wright, 110 S. Ct. 3139, 3143 (1990).

86. *Id.* at 3153.

87. *Id.* at 3148.

88. *Id.* Another significant holding of the court was in reaffirming the *Roberts* statement that firmly rooted hearsay is presumptively reliable without any offer of proof. *Id.* at 3147.

89. Idaho v. Wright, 110 S. Ct. 3139, 3148 (1990).

those circumstances that "surround the making of the [hearsay] statement and that render the declarant particularly worthy of belief."[90] The Court rejected the state of Idaho's contention that the totality of circumstances should also include other evidence at trial that corroborates the truth of the out-of-court statement.[91] Thus, the court held that in evaluating the reliability of residual hearsay, consideration of corroborative evidence violates a defendant's constitutional right to confront witnesses.[92]

The Court's rationale for excluding corroborating evidence from the reliability test for residual hearsay consists of two main elements:

(1) that corroborating evidence lacks the "inherent trustworthiness" needed to make cross examination of declarant superfluous;

(2) that corroborating evidence provides a danger of "selective reliability."

B. Inherent Trustworthiness

The Court declared that for hearsay evidence to be admissible under the Confrontation Clause it "must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."[93] The Court derived this conclusion from the idea that hearsay should only be admitted when it is so trustworthy that cross-examination of the declarant would add little to the statement's reliability.[94] According to the majority, indicia of trustworthiness stem only from the circumstances surrounding the making of the out-of-court statement.[95] The Court based its determination on the rationale behind firmly rooted hearsay exceptions and on selected legal precedent.[96]

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90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 3150.

94. Idaho v. Wright, 110 S. Ct. 3139, 3149 (1990) (citing 5 J. WIGMORE, EVIDENCE § 1420, P. 251 (J. Chadbourne rev. 1974) for the proposition that cross-examination is unnecessary if the hearsay statement offered "is free enough from the risk of inaccuracy and untrustworthiness. . . .").

95. *Id.*

96. *Id.*

1. *"Firmly Rooted" Hearsay Exceptions*

The Court reasoned that surrounding circumstances are the only appropriate measure for gauging trustworthiness of nontraditional hearsay by using firmly rooted hearsay exceptions as support for the proposition.[97] It reasoned that such exceptions are reliable because statements falling within them are made under circumstances that sufficiently eliminate the possibility of fabrication.[98] For example, the "excited utterance", "dying declarations" and "statements for purposes of medical treatment" exceptions are grounded in the belief that under circumstances such as pending death, declarants lack a motive to lie or fabricate.[99]

According to the Court, because the circumstances generally indicate reliability, traditional hearsay has attained a presumption of reliability.[100] Consequently, cross-examination is presumed to be of marginal utility for traditional hearsay.

However, an unexplained gap in the Court's decision is why the Court requires a greater degree of reliability for nontraditional hearsay than it does for traditional hearsay.

2. *Dual Standard of Reliability*

The potential error[101] with the Court's use of "firmly rooted" exceptions as the basis for excluding corroborative evidence is that it creates a dual standard of reliability.[102] On the one hand, traditional hearsay - that falling within a firmly rooted exception - is under the standard of "presumptive reliability;" it is admissible without the presentation of extrinsic proof of reliability.[103] On the other hand, nontraditional hearsay - that fitting within residual and child hearsay exceptions - is under the standard of "particularized guarantees of trustworthiness;" not only is it inadmissible without extrinsic proof, the extrinsic proof cannot consist of cor-

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97. *Id.*

98. *Id.*

99. Idaho v. Wright, 110 S. Ct. 3139, 3149 (1990).

100. *Id.*

101. The reason the "error" is only potential is because the Court may decide to reevaluate the presumption of reliability accorded some traditional hearsay. Raising the standard for traditional to be equal with the standard established for nontraditional will bring logical as well as Contitutional consistency to the meaning of "reliability."

102. MYERS, *supra* s 5.38 at 376 (1991 supp.).

103. *See* Idaho v. Wright, 110 S. Ct. 3139, 3149 (1990).

roborative evidence to any extent.[104] Thus, traditional hearsay is more likely to be admitted, whether actually reliable or not,[105] while nontraditional hearsay is less likely to be admitted, regardless of how reliable.

In essence, the dual standard clouds the meaning of the term "reliability," thereby forcing the courts into time consuming line drawing.[106] Evidence of this point is the fact that "reliability" for purposes of hearsay exceptions no longer has the same definition for each hearsay exception. For example, as a prerequisite to admissibility, the Federal Rules of Evidence require residual hearsay, such as, rules 803(24) and 804(b)(5)) to satisfy five criteria.[107] One criterion is that the hearsay have "circumstantial guarantees of trustworthiness equivalent" to the other specified exceptions.[108] Thus, once the residual hearsay satisfies the five criteria, it is supposedly equivalent to, i.e. as reliable as, firmly rooted hearsay.[109] Yet *Wright* not only requires a showing of further proof for nontraditional hearsay, it also sharply limits the evidence that can constitute such proof by excluding corrobative evidence,[110] such as medical evidence supporting the declarant's story.

As a result, "reliability is reliability is reliability" would not be a proper expression of the *Wright* court's reliability standard, in so far as criminal cases and hearsay are concerned. The Court stated that the higher standard of reliability for hearsay to be admitted under Confrontation Clause - as opposed to under the hearsay rule - is justified.[111] This may be true, but arguably the standard should

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104. *Id.*

105. *See* Stanley A. Goldman, *Not So "Firmly Rooted:" Exceptions to the Confrontation Clause*, 66 N.C.L. REV. 1 (1987) [hereinafter Goldman].

106. MYERS, *supra* s 5.38 at 376.

107. United States v. Renville, 779 F.2d 430, 439 (8th Cir. 1985). The other four criteria are:

> (2) the statement must be offered as evidence of a material fact;
>
> (3) the statement must be more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts;
>
> (4) the general purposes of the Federal Rules and the interests of justice must be served by admission of the statement into evidence;
>
> (5) The proponent of the evidence must give the adverse party the notice specified within the rule.

Id.

108. *Id.*

109. *Id.*

110. Idaho v. Wright, 110 S. Ct. 3139, 3149 (1990).

111. *Id.* at 3146.

be the same for all types of hearsay. It is inconsistent to sharply increase the stringency of the trustworthiness standard for non-traditional hearsay, while permitting traditional hearsay to maintain a lower standard, i.e., a presumption of reliability.[112] (That is, if the Confrontation Clause requires a discernible degree of reliability rather than a sliding scale.)

After all, the presumption of reliability for certain firmly rooted hearsay exceptions is not beyond reproach. For example, out-of-court statements of co-conspirators are presumptively reliable without the need for any fact specific showing of surrounding circumstances, simply because they fit within a traditional exception.[113] However, in an age where plea bargaining and witness immunity are persuasive tools for gathering incriminating evidence against a defendant, a co-conspirator may have a motive to fabricate incriminating statements. Yet, under the *Wright* reliability test, such statements continue to go untested.

Another result of the dual standard is that it blurs the province of judicial discretion in the area of admissibility of evidence. As discussed above, a judge's determination of when residual hearsay possesses equivalent guarantees of trustworthiness to firmly rooted hearsay, is no longer adequate when the hearsay is being used in criminal cases.[114] Consequently even when a judge concludes that the four dangers of hearsay[115] are remote enough to make residual or child hearsay sufficiently reliable for admission, his judgment may lack Sixth Amendment adequacy under *Wright*.

3. *Legal Precedent*

As support for its holding that inherent trustworthiness of statements is not shown by corroborating evidence, the *Wright* majority utilized selected legal authority. First, the court adopted the Seventh Circuit's viewpoint: the specific exceptions to the hearsay rule are based on the guarantees of trustworthiness that existed at the time the statement was made and " 'not those that may be added by using hindsight.' "[116] The Court adopted the

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112. *See* MYERS, *supra* note 102.

113. Bourjaily v. United States, 483 U.S. 171, 182 (1987).

114. *Supra* note 109.

115. LOUISELL AND MUELLER, *supra* § 472 (describes the four hearsay dangers as being the possibility of the declarant's misperception, faulty narration, inaccurate memory and insincerity).

116. Idaho v. Wright, 110 S. Ct. 3139, 3149 (quoting Huff v. White Motor

viewpoint as one that applies to "particularized guarantees of trustworthiness" in the Confrontation Clause context as well.[117]

Second, the *Court* attempted to bolster its holding by citing to *Lee v. Illinois* for the proposition that corroborative evidence does not contribute to reliability.[118] In *Lee*, the Court concluded that the reliability of a co-defendant's confession was inadequate even though it "interlocked" with the defendant's confession.[119] Also, the Court cited a case from the State of Washington[120] which similarly held that indicia of reliability for the hearsay at issue could only be formed from surrounding circumstances and not subsequent corroboration of the criminal act.[121]

Though the Court cited the above cases as being agreeable with its holding, it is possible that the majority stretched the precedents and ignored prevalent legal precedents in support of using corroborating evidence.[122] As to stretching of precedent, the Court took *Lee v. Illinois* and *State v. Ryan* out of context.[123] The Court in *Lee* ultimately determined that the co-defendant's confession did not interlock enough to contribute to particularized guarantees of trustworthiness.[124] However, it also recognized that there could be instances where fewer discrepancies would permit the interlocking nature of confessions to be used in conjunction with surrounding circumstances as indicia of reliability.[125] Even to the extent that *Lee* might be interpreted as discounting the propriety of the "interlocking" nature of confessions, that Court made no assertion that other forms of corroborative evidence lack relevance in the evaluation of trustworthiness.[126]

As the dissent pointed out, the *Wright* majority also took *State v. Ryan* out of context.[127] First, *Ryan* interpreted the Wash-

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Corp., 609 F.2d 286, 292 (7th Cir. 1979).

117. *Id.*

118. *Id.*

119. Lee v. Illinois, 476 U.S. 528, 544 (1986).

120. State v. Ryan, 691 P.2d 197, 204 (Wash. 1987).

121. Idaho v. Wright, Ill. S. Ct. 3139, 3149 (1990).

122. *Id.* at 3153 (Kennedy, J., dissenting). Justice Kennedy is joined by Chief Justice Rehnquist, Justice White, and Justice Blackmun. *Id.* However, it is well recognized that the United States Supreme Court is not constitutionally bound to follow either state or federal precedents.

123. *Id.*

124. Lee v. Illinois, 476 U.S. 528, 544 (1986).

125. *Id.*

126. *Id.*

127. Idaho v. Wright, 110 S. Ct. 3139, 3154 n.2 (Kennedy, J., dissenting).

ington statute establishing a child hearsay exception for statements related to physical abuse, and not the Confrontation Clause.[128] Secondly, the majority neglected to address the fact that the same Washington statute actually requires corroborative evidence when the child declarant is unavailable to testify.[129] According to the Washington Court of Appeals, the statute's corroboration "requirement provides additional protection against fabricated or imagined allegations in situations when the defendant will be unable to cross-examine the declarant."[130] Thus, as an aggregate, the law of Washington recognized that corroborative evidence is probative in bolstering the reliability of non-firmly rooted hearsay.

The Court also chose not to acknowledge pervasive legal precedents supporting the use of corroborating evidence in evaluating the reliability of nontraditional hearsay. As discussed above, the United States Supreme Court, Federal Courts of Appeal, and State Courts utilized corroborative evidence as one of several factors in determining the reliability of nontraditional hearsay. For example, the United States Supreme Court used it in *Dutton v. Evans*, a plurality opinion.[131] Though the majority admitted to the *Dutton* Court usage of corroborating evidence as a factor in assessing reliability of hearsay, it decided not to follow suit. The Court dismisses the *Dutton* analysis by stating that the use of corroborating evidence at trial "more appropriately indicates that any error in admitting the [hearsay] might be harmless rather than [a basis] for presuming the declarant to be trustworthy."[132]

However, the dissent established that the majority's interpretation is misplaced, by providing a 1987 precedent to the contrary. Justice Kennedy quoted from *Cruz v. New York* for its proposition that the admission of corroborative evidence pertains to reliability of hearsay, and not a determination of harmless error in the admission of hearsay.[133]

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128. *See* State v. Ryan, 691 P.2d 197, 202 (1987).

129. WASH. REV. CODE ANN. § 9A.44.120 (1988).

130. State v. Hunt, 741 P.2d 566, 571 (Wash. 1987).

131. 400 U.S. 74, 88 (1986) (interlocking nature of confessions by co-defendants).

132. Idaho v. Wright, 110 S. Ct. 3139, 3150 (1990).

133. *Id.*, at 3155 (Kennedy, J., dissenting). The full quote is:

"Quite obviously, what the 'interlocking' nature of the codefendant's confession pertains to is not its harmfulness but rather its reliability: If it confirms essentially the same facts as the defendant's own confession it is

Far from dissuading their courts in the use of corroboration, many states statutorily recognized a legitimate role for corroborative evidence in assessing the trustworthiness of hearsay.[134] States with child sexual abuse exceptions often go so far as to require the use of corroborating evidence when the declarant is unavailable to testify.[135] As shown by the discussion of state usage above, the role of corroborative evidence in states requiring it is supplemental.[136] Only after a certain degree of reliability is established by surrounding circumstances can corroborative evidence be used as further indicia of reliability.[137] This practice strikes a balance that does not rely on corroborative evidence, but rather gives it a justifiable supporting role. Arizona and Washington courts justify the role with the common sense perception that corroborative evidence confirms or bolsters reliability by increasing the likelihood that the hearsay is true.[138]

Pointing out the existence of legal authority to the contrary of the Court is not intended to say that the Court is constitutionally bound to "follow the crowd." It is not. However, in the context of hearsay and the Confrontation Clause, the *Wright* Court itself stated that firmly rooted hearsay presumptively satisfies the constitutional requirement of reliability because of the great weight accorded " longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements."[139] By contrast, the Court did not accord the same weight to longstanding judicial and legislative experience in the area of non-firmly rooted exceptions. The majority's doublespeak led the dissent to conclude that the Court's misgiving about the weight to be given corroborative evidence unjustifiably led it to "wholesale elimination of such evidence from consideration, in derogation of

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more likely to be true."
Cruz v. New York, 481 U.S. 186, 192 (1987).

134. These states include Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Maryland, Minnesota, Mississippi, New Jersey, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, and Washington. *Wright*, 110 S. Ct. at 3154 n.2 (Kennedy, J., dissenting).

135. *Supra* note 78.

136. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1416 (1989); WASH. REV. CODE ANN. § 9A.44.120 (1988).

137. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1416 (1989); WASH. REV. CODE ANN. § 9A.44.120 (1988).

138. State v. Allen, 755 P.2d 1153, 1164 (Ariz. 1988); State v. Hunt, 741 P.2d 566, 571 (Wash. 1987).

139. *Wright*, 110 U.S. at 3147.

overwhelming judicial and legislative consensus to the contrary."[140]

4. Factors of Reliability

In excluding corroborative evidence from an evaluation of trustworthiness, the Court limited the evaluation to circumstances surrounding the making of the out-of-court statement.[141] Therefore, in order to clarify what circumstances were constitutionally appropriate for consideration, the Court listed several factors of reliability for hearsay statements made by sexually abused children: spontaneity and consistent repetition; the mental state of the child at time of the statement; the use of terminology unexpected of a child of similar age; and the lack of motive to fabricate.[142] These factors were given by way of illustration and are not exhaustive.[143] According to the court, "the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made."[144]

However, the Court did not discuss why trustworthiness is exhibited only by factors surrounding the making of the statement. In other words, the Court did not explain why the incident of making the statement must be viewed in isolation from all other events constituting the whole of the environment in which the child was situated. The dissent responded, "[i]t is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence."[145]

Aside from the common sense rationale offered by the dissent, another reason for permitting the use of corroborating factors in determining reliability of nontraditional hearsay is the severe lack of evidence in offenses such as child sexual abuse.[146] This proposition is supported by the fact that child abuse, especially sexual abuse, is a crime committed in secret.[147] The lack of witnesses, the submissive, vulnerable, and perhaps guilty feelings of a child

140. *Id.* at 3154 (Kennedy, J., dissenting).
141. *Id.* at 3148.
142. *Id.*
143. *Id.* Other appropriate factors may include: whether the statement was elicited by questioning, and age and maturity of declarant. MYERS, *supra* § 5.38 at 207 (1991 supp.).
144. Idaho v. Wright, 110 S. Ct. 3139, 3150 (1990).
145. *Id.* at 3153 (dissenting).
146. Morgan v. Foretich, 846 F.2d 941, 943 (4th Cir. 1988).
147. Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987).

abused by a loved one, and the "hidden scars" of abuse may all contribute to the difficulty in detecting and prosecuting the crime.[148] Thus, the inability to utilize a child's out-of-court statements can jeopardize prosecution for the victims who have little physical evidence to prove that they were abused.[149]

For example, the Court excludes corroborating factors which nevertheless may enhance the reliability of child hearsay.[150] According to Myers, an expert on child witnesses, such corroborating factors include: medical evidence of physical abuse; abnormal alterations in the child's behavior (e.g., bedwetting); more than one person overheard the child's statement; the child reduced the statement into writing or a drawing; there is more than one victim with the same story and the victims did not collaborate; an eyewitness testifies to the abuse described in the child's statement; defendant had the opportunity to commit the act; a confession or admission by the defendant; and the defendant has a history of the misconduct described by the child.[151] However, with the Court's holding, the presence of any of these factors in a child abuse case is irrelevant as they may relate to the reliability of a child's out-of-court statement.

C. *Selective Reliability*

Finally, another reason for the Court's malaise with corroborative evidence, as stated by the *Wright* majority, was that such evidence presents a danger of "selective reliability."[152] This concern focuses on the idea that a jury will infer that an entire hearsay statement is trustworthy, even though only a portion of the statement is corroborated by evidence.[153]

At first glance this rationale appears to exhibit a lack of trust in the jury on the issue of weighing evidence. The jury has been a cornerstone in the English and American legal systems;[154] its roots

148. *Morgan*, 846 F.2d at 943.

149. *Id.*

150. MYERS, *supra* § 5.37B, at 215 (1991 supp.).

151. *Id.*

152. Idaho v. Wright, 110 S. Ct. 3139, 3151 (1990).

153. *Id.* For example, a child's statement may contain allegations of sexual abuse and may identify the abuser. However, medical evidence that corroborates the abuse allegation, has no bearing on the reliability of the portion identifying the abuser. *Id.*

154. MCCORMICK ON EVIDENCE, § 244, p. 579 (Edward W. Cleary et. al., eds., 2nd Ed. 1972).

in common law are traceable to the 9th century A.D.[155] The province of the jury as the trier of fact is to give weight to evidence based on its own collective experience and judgment. Theoretically at least, the fact that the task of weighing evidence is difficult at times should not diminish the province of the jury.

However, the Court's rationale on this point should not be given short shrift. The Court may be recognizing the fallibility of the legal fiction that limiting instructions prevent the jury from giving inordinate weight to certain evidence.

Perhaps another way of solving potential problems of selective reliability is to exclude those portions of a hearsay statement that are not corroborated by evidence or are not otherwise trustworthy. Such a solution would permit reliable and probative evidence to be admitted without a manifest injustice caused by wholesale exclusion.[156] Also cross-examination may be used by the defendant to bring to light what it is that corroborative evidence actually corroborates.[157]

CONCLUSION

Logically, it would seem that factors should not be viewed in isolation of one another. To use an analogy, the picture of a jigsaw puzzle is more readily identifiable when all the pieces to the puzzle are used and connected. By the same token, the reliability of a hearsay statement may be determined by examining the interrelationship of all circumstances, rather than dissecting a select few in isolation, while ignoring the existence of the rest.

The *Wright* Court did not adhere to this viewpoint. The Court held that corroborative evidence cannot be used to evaluate the reliability of nontraditional hearsay. As a result, the Court increased the stringency of the reliability standard for some hearsay exceptions, while continuing to presume the reliability of others. Consequently, a dual standard of reliability is left in tact from the 1980 *Roberts* decision. Should the Court reevaluate the presumption of reliability maintained by firmly rooted hearsay exceptions, such as "statements by a co-conspirator," then the Confrontation Clause standard of reliability proferred by the Court might be con-

155. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 109 (5th ed. 1956).

156. *See* Mattox v. United States, 156 U.S. 237 (1895).

157. *See* Idaho v. Wright, 110 S. Ct. 3139, 3155 (1990) (Kennedy, J., dissenting).

sistent. If it does, the trend toward enhancing the criminal defendant's right to confront witnesses begun by *Wright* will continue, perhaps with continued detriment to sexually abused child declarants.

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