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Courtney S. Bedell

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Vulnerable Victims: Guaranteeing Procedural Protections to Child and Developmentally Disabled Victims in Establishing Probable Cause for Search and Arrest Warrants

Courtney S. Bedell*

Abstract

Congress has enacted legislation delineating the rights of child victims and witnesses during formal trials. In limiting its protections to this context, however, Congress ignores the reality that much of the child testimony upon which the legal system relies takes place outside of court during the pre-trial stages of an investigation. Further, Congress has failed to consider the growing numbers of children who are diagnosed with developmental disabilities and the issues that arise when these children are victims or witnesses of crime.

The federal approach to these issues currently consists of a mishmash of standards that vary from circuit to circuit. This Comment argues that, to reduce this unpredictability and inconsistency, Congress should adopt a clear federal standard to evaluate the sufficiency of child testimony to establish probable cause for search and arrest warrants. Such a standard would also balance the vulnerability of child victims, including those with developmental disabilities, against the constitutional protections afforded to criminal defendants. The proposed legislation consists of three major elements: (1) a flexible factor test to determine the sufficiency of the child's testimony; (2) a provision eliminating corroboration requirements; and (3) an exception from the rule against

* J.D. Candidate, Penn State University, The Dickinson School of Law, 2014; B.A., University of Virginia, 2011. I would like to thank my family and friends for their constant support and encouragement throughout my academic career, especially my fiancé Mike Averbach, who patiently listens to complaints and helps to celebrate successes. I would also like to thank my colleagues on the Penn State Law Review for making my experience these past two years both enriching and enjoyable. Lastly, I am grateful for my experience as an intern at the U.S. Attorney's Office for the Western District of Pennsylvania during the summer of 2012, which served as the inspiration for this Comment.

hearsay. Justice is not served by discounting the testimony of victims merely due to youth or disability, and a concise federal standard would ensure that the federal system adequately serves these vulnerable victims.

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I. INTRODUCTION

Imagine a six-year-old child with attention deficit hyperactivity disorder ("ADHD").[1] He struggles to sit still for longer than a few seconds; he is easily distracted; he has a hard time listening when either adults or other children address him; he struggles to follow instructions; and he talks nonstop, frequently blurting out inappropriate comments. This near-constant state of distraction causes him to miss and forget details.[2]

Imagine that because of his ADHD, he is unable to focus in a normal classroom setting, so he receives special education.[3] One day at school, the boy tells his teacher that his middle-aged neighbor touches the boy's private parts, takes pictures of the boy when he is not wearing any clothes, and uses a computer to show the boy pictures of other boys without any clothes. The teacher then reports this to the authorities, which results in a forensic interview.[4]

Following the forensic interview, a police officer completes an affidavit[5] of probable cause,[6] including details of the boy's statements at the forensic interview, and a magistrate grants a search warrant[7] for the neighbor's house. Agents find files containing child pornography on the

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1. *See Attention Deficit Hyperactivity Disorder (ADHD)*, NAT'L INST. MENTAL HEALTH, http://1.usa.gov/1b6YO0F (last visited Jan. 25, 2014) (describing symptoms of ADHD, including frequent distraction, inattention to details, forgetfulness, boredom with tasks after only a few minutes, difficulty focusing, impulsivity, and fidgeting).

2. *See id.*

3. *See Special Education*, NAT'L DISSEMINATION CENTER FOR CHILD. WITH DISABILITIES, http://bit.ly/TV4ffk (last updated Mar. 2013) ("Special education is instruction that is specially designed to meet the unique needs of a child with a disability. . . . [It] can consist of[] an individualized curriculum that is *different* from that of same-age, nondisabled peers.").

4. *See* Lindsay E. Cronch et al., *Forensic Interviewing in Child Sexual Abuse Cases: Current Techniques and Future Directions*, 11 AGGRESSION & VIOLENT BEHAV. 195, 196 (2006) (defining a forensic interview in the context of a child sexual abuse case as an interview conducted by law enforcement officers, child protective services personnel, or specialized interviewers, often with the participation of medical and mental health professionals, "to elicit as complete and accurate a report from the alleged child or adolescent victim as possible in order to determine whether the child or adolescent has been abused").

5. BLACK'S LAW DICTIONARY 66–67 (9th ed. 2009). An "affidavit" is "[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths." *Id.* A "search-warrant affidavit" is "[a]n affidavit, usu[ally] by a police officer or other law-enforcement agent, that sets forth facts and circumstances supporting the existence of probable cause and asks the judge to issue a search warrant." *Id.*

6. *Id.* at 1321 (defining "probable cause" as "[a] reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime"); *see also infra* Part II.B.

7. *Id.* at 1470 (defining "search warrant" as "[a] judge's written order authorizing a law-enforcement officer to conduct a search of a specified place and to seize evidence").

neighbor's computer. A federal grand jury returns an indictment against the neighbor, charging him with possession with intent to view child pornography.

Further imagine that, as trial approaches, the neighbor's defense counsel files a motion to suppress[8] the child pornography files found on the neighbor's computer. Counsel argues that the child's age and ADHD render his testimony inherently unreliable, and that probable cause for a valid search was never established. The defense prevails on this argument, and all evidence found on the neighbor's computer during the search must be excluded, as unreliable testimony cannot provide an adequate basis for probable cause.[9] Because no valuable evidence remains, the charges against the neighbor are dismissed, and he walks free.[10]

Most would agree that this hypothetical result is disturbing, and that a child should not be considered inherently unreliable merely because he is young and has a developmental disability. But without a consistent federal standard, such determinations of reliability remain largely within a judge's individual discretion, resulting in a lack of clarity and predictability in federal courts across the country.[11] Without a clear, national standard, otherwise valid evidence may be withheld from trials, as illustrated by the hypothetical scenario above. As is, child and developmentally disabled victims of sexual assault "tend to underreport these events to law enforcement."[12] Exclusion of such testimony may have the practical result of further depriving this class of particularly vulnerable victims from the protection of federal statutes criminalizing sex acts committed against children.[13]

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8. *Id.* at 1110 (defining "motion to suppress" as "[a] request that the court prohibit the introduction of illegally obtained evidence at a criminal trial").

9. *See, e.g.*, United States v. Harris, 403 U.S. 573, 582 (1971) (stating that the inquiry in determining probable cause is "always . . . whether the informant's present information is truthful or reliable").

10. *See* Government's Response to Defendant's Motion to Suppress Evidence at 1–4, United States v. Kofalt, No. 11-155 (W.D. Pa. July 17, 2012) (describing similar facts to the hypothetical described above).

11. *See, e.g.*, United States v. Shaw, 464 F.3d 615, 624 (6th Cir. 2006) (stating that the uncorroborated hearsay testimony of a three-year-old boy is insufficient to establish probable cause). *But see* Marx v. Gumbinner, 905 F.2d 1503, 1506 (11th Cir. 1990) (reaching the opposite result of *Shaw* upon similar facts).

12. DAVID FINKELHOR ET AL., U.S. DEP'T OF JUSTICE, SEXUALLY ASSAULTED CHILDREN: NATIONAL ESTIMATES AND CHARACTERISTICS 2 (2008), *available at* http://1.usa.gov/UL4sTW.

13. *See, e.g.*, Easton v. City of Boulder, Colo., 776 F.2d 1441, 1449 (10th Cir. 1985) ("To discount such testimony . . . would only serve to discourage children and parents from reporting molestation incidents and to unjustly insulate the perpetrator of such crimes from prosecution.").

Judges and lawmakers face a delicate task in striking a balance between the rights of these vulnerable victims and the constitutional protections guaranteed to accused criminals.[14] On the one hand, the United States' justice system should, within reason, grant child and developmentally disabled victims leniency in meeting legal standards such as probable cause due to their special vulnerabilities and circumstances.[15] On the other hand, the Constitution exists to ensure that false, malicious, or unreliable accusations do not result in deprivations of liberty without due process of law.[16]

Most federal attempts to strike this balance have dealt with testimony at the trial stage[17] without much focus on the need for a consistent, clear standard during pre-trial investigations. This Comment explores and synthesizes the existing body of law in order to develop proposed federal legislation that elucidates a clear, consistent standard for the use of child and developmentally disabled victims' testimony during pre-trial investigations to establish probable cause for search and arrest warrants. This Comment argues that such a standard is necessary to adequately and consistently balance the particular vulnerabilities of child victims, including those with developmental disabilities, against the constitutional protections afforded to criminal defendants.[18]

Part II will survey federal statutes and caselaw addressing probable cause and child testimony to establish a background for these issues. Part III will analyze the aforementioned statutes and caselaw by highlighting the strengths and weaknesses of each in order to determine which factors would be most useful in a workable federal standard. Ultimately, this Comment will propose federal legislation that provides a comprehensive, consistent standard to guide judges through the process of determining the validity of search and arrest warrants established by the testimony of child victims, including those with developmental disabilities.

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14. *See* Jennifer J. Stearman, *An Amendment to the Constitution of the United States to Protect the Rights of Crime Victims: Exploring the Effectiveness of State Efforts*, 30 U. BALT. L.F. 43, 61 (1999) ("Balancing the rights of victims with the rights of defendants has proved to be a challenge to our system of criminal justice and has stirred much debate.").

15. *See* Robert G. Marks, Note, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207, 208 (1995) ("A moral and just society should take extraordinary measures to protect its children from the horror of child sexual abuse.").

16. U.S. CONST. amends. V, XIV; *see also, e.g.*, Albright v. Oliver, 510 U.S. 266, 302 (1994) ("[The] Due Process Clause operates to protect the individual against the abuse of governmental power, by guaranteeing that no criminal prosecution shall be initiated except on a finding of probable cause.").

17. *See* 18 U.S.C. § 3509 (2006 & Supp. 2009) (codifying standards and protections for federal in-court testimony of child victims and witnesses).

18. *See infra* note 209.

II. PROBABLE CAUSE: A "FAIR PROBABILITY" OF CRIMINAL ACTIVITY

A. Relevant Terminology and Scope of Comment

This Comment will focus primarily on issues surrounding the testimony of children during the pre-trial stages of an investigation, and how to best resolve these issues into a workable, consistent federal standard. Although existing federal authority defines "child" as "a person who is under the age of 18,"[19] this Comment concerns very young children whose reliability is likely to be questioned. As such, the author intends for any use of the term "child" to refer to a young person between the ages of approximately three and eight years old. As will later be discussed, however, bright-line age cutoffs are inappropriate in this context,[20] so the statements of a two-year-old child or nine-year-old child, for example, would not definitively be excluded from inquiry under this Comment's proposed test.

This Comment will also address a secondary related topic: the testimony of children with developmental disabilities. Unfortunately, there is a dearth of federal law, either case or statutory, directly addressing the issue of developmentally disabled child victims and witnesses. As a result, law dealing with the testimony of young children will have to suffice as background. The term "developmental disability" as used in this Comment encompasses a broad range of disorders that may impair a child's normal functioning, behavior, and cognitive abilities. Such disorders include, but are not limited to, ADHD,[21] some autism spectrum disorders,[22] post-traumatic stress disorder ("PTSD"),[23] and anxiety disorders.[24]

The author intends the proposed test to cover only the testimony of developmentally disabled children who possess some communicative and behavioral capabilities. Thus, the proposed test should not be read to

19. 18 U.S.C. § 3509(a)(2) (2006 & Supp. 2009).

20. *See infra* Part III.B.1.a.

21. *See Attention Deficit Hyperactivity Disorder (ADHD)*, *supra* note 1.

22. *See A Parent's Guide to Autism Spectrum Disorder*, NAT'L INST. MENTAL HEALTH, http://1.usa.gov/1jP7b7a (last visited Jan. 25, 2014) (describing symptoms of autism spectrum disorders, including social impairment, communication difficulties, and repetitive and stereotyped behaviors).

23. *See Post-Traumatic Stress Disorder (PTSD)*, NAT'L INST. MENTAL HEALTH, http://1.usa.gov/19UEK6P (last visited Jan. 25, 2014) (describing symptoms of PTSD that typically manifest after a child sees or lives through a dangerous event, including flashbacks, bad dreams, frightening thoughts, emotional numbness, loss of interest in activities that were once enjoyable, and constant hyperarousal).

24. *See Anxiety Disorders*, NAT'L INST. MENTAL HEALTH, http://1.usa.gov/1jvQsbq (last visited Jan. 25, 2014) (describing symptoms of anxiety disorders, including panic attacks, obsessive-compulsive tendencies, exaggerated worry and tension without provocation, and insomnia).

include more severe disorders, such as childhood disintegrative disorder ("CDD")[25] and profound mental retardation,[26] both of which may cause children to become severely impaired and lose almost all communicative, behavioral, and social functioning.[27] While it is imperative that the federal legislative and judicial systems consider in more depth possible approaches to issues that may arise when severely developmentally disabled children become the victims of crimes, such approaches are beyond the scope of this Comment.

B. Probable Cause Generally

With regard to the testimony of competent adult witnesses and informants, the U.S. Supreme Court has set forth a standard conception of probable cause upon which all federal courts rely.[28] Although the Court adopted various tests throughout the years,[29] it ultimately settled on a fluid, "totality of the circumstances" approach in *Illinois v. Gates*,[30] which remains the controlling standard today.[31]

The probable cause standard, which is a prerequisite for any search or arrest warrant,[32] is far less stringent than the finding of "beyond a reasonable doubt" required for a conviction.[33] Probable cause is a fluid concept determined by the totality of the circumstances, and does not require definitive proof of a crime.[34] Rather, as indicated by its name, probable cause only requires a "fair probability" or "substantial chance"

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25. *See Autism Spectrum Disorders Health Center*, WEBMD, http://on.webmd.com/YQuVzP (last visited Jan. 24, 2014). CDD is the most debilitating of the autism spectrum disorders. *Id.* Symptoms include the loss of social, lingual, and intellectual abilities. *Id.*

26. *See Mental Retardation*, N.Y. TIMES HEALTH GUIDE, http://nyti.ms/gZGhkE (last visited Jan. 24, 2014) (describing symptoms of mental retardation that are more pronounced in the profoundly retarded, including infant-like behavior, decreased learning ability, and failure to meet the markers of intellectual development).

27. *See* sources cited *supra* notes 25–26.

28. *See* Illinois v. Gates, 462 U.S. 213, 230 (1983) (adopting a "totality-of-the-circumstances approach" to determinations of probable cause).

29. *See generally, e.g.*, Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

30. Illinois v. Gates, 462 U.S. 213 (1983).

31. Although an in-depth exploration of probable cause in the context of adult witnesses is beyond the scope of this Comment, a brief review of the standard serves as a general framework and point of comparison for the forthcoming discussion of probable cause vis-à-vis child and developmentally disabled witnesses.

32. *See* Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 977 & n.144 (2003) (noting that the same probable cause standard applies to both search and arrest warrants).

33. *See Gates*, 462 U.S. at 235 ("Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision.").

34. *See id.* at 230–31.

of criminal activity, such that it is likely that a search will yield evidence of a crime.[35]

In determining whether probable cause exists, the U.S. Supreme Court rejected complex, technical weighing tests[36] in favor of a "totality of the circumstances" approach.[37] A magistrate's task in reviewing an affidavit of probable cause to determine whether to issue a search warrant "is simply to make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."[38] In sum, *Gates* permits magistrates to employ a flexible inquiry in making probable cause determinations based on the factual circumstances of each case.

C. *Child Testimony Generally*

Both U.S. Supreme Court jurisprudence and statutory authority have long confirmed the proposition that a child witness's young age does not automatically render his testimony infirm or unreliable,[39] and that protections must be established with regard to such witnesses in order to incentivize the reporting of crimes for which the only witness is a child.[40] As mentioned previously, though, this authority focuses predominantly on child testimony in the trial setting, and fails to recognize the issues unique to victims and witnesses with developmental disabilities.[41]

1. *Wheeler v. United States*[42]

In *Wheeler v. United States*, the U.S. Supreme Court articulated the longstanding common law standard with respect to child testimony: the admission of such testimony is within the trial judge's discretion,

35. *See id.* at 243 n.13.

36. *See, e.g.*, Spinelli v. United States, 393 U.S. 410, 413 (1969) (describing a two-pronged test for probable cause determinations, requiring that the law enforcement officer seeking a search warrant must inform the issuing magistrate: (1) of the reasons to support the claim that the informant is credible and reliable; and (2) of the underlying circumstances relied upon by the informant).

37. *See Gates*, 462 U.S. at 230–31.

38. *See id.* at 238.

39. *See* Wheeler v. United States, 159 U.S. 523, 524 (1895) ("That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness is clear.").

40. *See* Easton v. City of Boulder, Colo., 776 F.2d 1441, 1449 (10th Cir. 1985) (stating that policies tending to discount child testimony "only serve to discourage children and parents from reporting molestation incidents").

41. *See* 18 U.S.C. § 3509 (2006 & Supp. 2009) (providing no terms for either pre-trial investigations or developmentally disabled victims and witnesses).

42. Wheeler v. United States, 159 U.S. 523 (1895).

depending on the circumstances of the case.[43] Although the Court did not delineate a precise test for determining the competency of a child witness, it did identify some factors that a trial judge may consider,[44] and emphasized that "there is no precise age which determines the question of competency."[45]

The Court concluded by stressing the policy behind admitting the testimony of children, stating that "to exclude [a child] from the witness stand . . . would sometimes result in staying the hand of justice."[46] Although many state courts and legislatures have adopted or enacted standards that either clarify or slightly diverge from *Wheeler*, this principle has retained its value over a century later.[47]

2. Child Victims' and Child Witnesses' Rights at Federal Trials

The federal Child Victims' and Child Witnesses' Rights statute, 18 U.S.C. § 3509 ("Section 3509"),[48] essentially codifies *Wheeler*'s holding by presuming the competency of child[49] witnesses.[50] The statute also establishes specific protections for child witnesses, but only in the context of trial.[51] Such protections include, but are not limited to: accompaniment of an adult, such as a parent, attorney, or guardian ad litem;[52] use of testimonial aids, such as anatomical dolls or puppets;[53] and live testimony via two-way closed circuit television.[54]

43. *See id.* at 524–26 (stating the proposition that youth does not, as a matter of law, automatically disqualify the testimony of a child).

44. *See id.* (identifying factors that trial judges may consider in determining a child witness's competency, including the child's capacity and intelligence, the child's appreciation of the difference between truth and falsehood, and the child's comprehension of the oath).

45. *See id.* at 524.

46. *See id.* at 526.

47. *See, e.g.*, MINN. STAT. § 595.02(n) (2008) (creating a rebuttable presumption that a witness under ten years of age is competent to testify); N.Y. CRIM. PROC. LAW § 60.20 (McKinney 2003) (creating a rebuttable presumption that a witness under nine years of age is not competent to testify); *see also* Julie Oseid, *Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases*, 69 MINN. L. REV. 1377, 1381 (1985) (addressing concerns about the competency of child witnesses in the context of Minnesota statutes and caselaw); Laurie Shanks, *Evaluating Children's Competency to Testify: Developing a Rational Method to Assess a Young Child's Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse*, 58 CLEV. ST. L. REV. 575, 581–83 (2010) (discussing various legislative and judicial standards for admissibility of child testimony at trial).

48. 18 U.S.C. § 3509 (2006 & Supp. 2009).

49. *See id.* § 3509(a)(2)(A)–(B) (defining "child" as "a person who is under the age of 18, who is or is alleged to be[:] (A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or (B) a witness to a crime committed against another person").

50. *See id.* § 3509(c)(2).

51. *See generally id.* § 3509 (providing no terms for pre-trial investigations, such as forensic interviews).

52. *See id.* § 3509(c)(5)(E).

While Section 3509 does not establish protections for child victims or witnesses during pre-trial investigations, it does demonstrate that Congress has, in the past, been willing to stand up for these vulnerable victims by creating a consistent federal standard in the context of trial.[55] Section 3509 also serves as a useful blueprint for crafting the legislation this Comment proposes.[56]

D. Sufficiency of Child Testimony to Establish Probable Cause

Several federal courts of appeals have directly addressed the issue of whether child testimony is sufficient to establish probable cause for a search warrant. A brief overview of these cases will develop a background on this area of law and help determine what elements future legislation should retain and discard.

1. *Easton v. City of Boulder, Colorado*[57]

Daniel Easton was arrested for two alleged sexual assaults of a child who lived in the same apartment complex as Easton, once in Easton's apartment and once in the complex's laundry room. The Boulder, Colorado, police conducted an investigation, but formal charges were never filed.[58] Subsequently, Easton filed a civil suit under 42 U.S.C. § 1983[59] ("Section 1983") against the city and individual police officers, alleging that the police had no probable cause for the arrest, and that the arrest therefore violated Easton's Fourth Amendment[60] right to be free from unreasonable seizures.[61] In determining whether the police acted recklessly during the course of the investigation and arrest, the issue arose as to whether the testimony of two children, aged three and five, was sufficiently reliable to establish probable cause for a valid search warrant.[62]

Upon review, the U.S. Court of Appeals for the Tenth Circuit held that the children's testimony was valid and more than adequate to

53. *See* 18 U.S.C. § 3509(*l*) (2006 & Supp. 2009).
54. *See id.* § 3509(b)(1).
55. *See generally id.* § 3509.
56. *See infra* Parts III.B–C.
57. Easton v. City of Boulder, Colo., 776 F.2d 1441 (10th Cir. 1985).
58. *See id.* at 1446.
59. 42 U.S.C. § 1983 (2006) (providing relief, in the form of monetary damages, to an individual whose constitutional rights have been violated by a state actor).
60. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .").
61. *See Easton*, 776 F.2d at 1447–48.
62. *See id.* at 1449.

establish probable cause for Easton's arrest.[63] Although the court did not set forth a formal test, it did identify some factors that contributed to the ultimate finding of probable cause.[64]

First, the court swiftly rejected Easton's assertion that, because the boys whose testimony was at issue were three and five years old, "their testimony was somehow suspect to begin with."[65] Much like the U.S. Supreme Court's reasoning in *Wheeler*,[66] the *Easton* court called the argument "an entirely unacceptable point of view" from a public policy standpoint, as child testimony is often the only tool to establish probable cause in cases of child abuse.[67] The court further explained that, in order to incentivize the reporting of such crimes, a bright-line age rule is inappropriate.[68]

Second, the *Easton* court did not automatically discount the children's testimony because of the presence of some inconsistencies; rather, it adopted what the author of this Comment will refer to as the "solid core" test.[69] So long as the "solid core" of a child's testimony remains consistent, minor contradictions will not render it invalid or unreliable.[70] The court noted that even adult witnesses and informants are granted some leniency in this regard, as "[a] certain amount of inconsistency in the evidence is almost inevitable."[71] Additionally, even in the more stringent context of a trial, testimony need not be infallible.[72]

Lastly, in finding the children's testimony credible, the court noted that their statements were spontaneous—that is, they were not the result of leading questions or suggestions posed by adults. The court further found the testimony credible because the children had knowledge of

63. *See id.* at 1451 ("Upon this record the arrest was clearly lawful.").

64. *See id.* at 1449–50.

65. *See id.* at 1449.

66. *See supra* Part II.C.1.

67. *See Easton*, 776 F.2d at 1449.

68. *See id.* ("To discount such testimony from the outset would only serve to discourage children and parents from reporting molestation incidents and to unjustly insulate the perpetrator of such crimes from prosecution.").

69. *See id.* at 1450.

70. *See id.* For example, in *Easton*, the "solid core" of the children's testimony was their identification of the apartment in which Easton resided and their description of the sexual assault that occurred in the laundry room, including the detail that the assault occurred in a "blanket tent" that Easton had constructed. *See id.* at 1443–44, 1450. Minor contradictions, which the court ultimately deemed excusable, included the boys' description of Easton's hair color and some details surrounding the sexual assault that allegedly occurred in Easton's apartment. *See id.* at 1444, 1449–50.

71. *See id.* (citing *In re* A.H.B., 491 A.2d 490, 495 (D.C. 1985)).

72. *See Easton*, 776 F.2d at 1450 ("We would indeed be amiss if we were to hold police officers and magistrates to a stricter standard [than trial judges] when evaluating evidence for a probable cause determination.").

things that children their age could not possibly know otherwise,[73] and their statements were corroborated by each other and adults.[74]

In sum, the *Easton* court advocated an "appropriately relaxed" probable cause standard for child victims and witnesses.[75] While testimony must meet the "solid core" test to ensure procedural protections for the accused, minor inconsistencies are excusable as a matter of public policy.[76]

2. *Stoot v. City of Everett*[77]

In *Stoot v. City of Everett*, a four-year-old girl, A.B., accused a 14-year-old male acquaintance, Paul, of sexually abusing her.[78] Although the charges were eventually dropped, Paul sued the city, alleging Fourth Amendment violations.[79] The issue arose as to whether A.B.'s testimony alleging molestation was sufficiently reliable to establish probable cause for Paul's arrest.[80]

Based on three factors, the *Stoot* court held that A.B.'s statements were not sufficiently reliable to establish probable cause:[81] (1) A.B. was only four years old at the time of the interview, during which she recounted events said to have occurred when she was three years old;[82] (2) A.B. changed answers throughout the interview;[83] and, (3) at one point, A.B. confused Paul with another boy, Preston.[84] The court concluded that "[t]hese three circumstances, considered together, point to the need for further investigation and corroboration to establish probable cause."[85]

The defendant, City of Everett, relied on *Easton* to support its proposition that police may rely on the somewhat inconsistent statements of child victims to establish probable cause.[86] The court responded by

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73. *See id.* at 1450.
74. *See id.* at 1449.
75. *See id.*
76. *See id.* at 1450.
77. Stoot v. City of Everett, 582 F.3d 910 (9th Cir. 2009).
78. *See id.* at 913.
79. *See id.* at 924; *see also supra* note 60 and accompanying text.
80. *See Stoot*, 582 F.3d at 918.
81. *See id.* at 919 ("[T]hree factors, taken together, compel the conclusion that the statements made by A.B. . . . were not sufficiently trustworthy or reliable to establish probable cause on their own.").
82. *See id.* ("Common experience counsels extreme caution in crediting detailed recollections of events said to have occurred at such an extremely young age, particularly those reported over a year later by a child still very young.").
83. *See id.* at 920.
84. *See id.*
85. *Stoot*, 582 F.3d at 920.
86. *See id.*

asserting that "*Easton* simply cannot bear the weight placed upon it by defendants in this case," identifying two factors present in *Easton* not present in *Stoot*: (1) "substantial evidence corroborating the victim's statements of alleged abuse"; and (2) the testimony of another child witness.[87]

Although, due to slightly distinguishable facts, the two cases are not irreconcilable, *Stoot* seems to be less sympathetic than *Easton* to child witnesses and victims whose testimony does not achieve perfect consistency.[88] Certain commonalities emerge from the two cases, however, and they provide a backdrop for further exploration of issues stemming from the use of testimony of child and developmentally disabled witnesses and victims.

3. Other Relevant Caselaw

Other federal courts of appeals have addressed the issue of the use of child testimony to establish probable cause for a search or arrest warrant.[89] Because these courts dealt with the issue in a similar manner to the *Easton* and *Stoot* courts, a short overview of this caselaw will suffice.

a. *United States v. Shaw*[90]

In *United States v. Shaw*, a three-year-old boy claimed that defendant Brendan Shaw "touched his pee-pee" and that Shaw's "pee-pee had touched his butt."[91] Following an investigation, Shaw was arrested and charged with child sexual abuse in a ten-count indictment, which eventually resulted in an appeal to the U.S. Court of Appeals for the Sixth Circuit on the issue of whether the boy's statements provided probable cause for Shaw's arrest.[92]

Ultimately, the *Shaw* court determined that the three-year-old boy's testimony was insufficient to establish probable cause.[93] In most circumstances, an eyewitness's statement that he or she was the victim of a crime suffices to establish probable cause.[94] The *Shaw* court, however, concluded that courts have never considered the uncorroborated hearsay

87. *Id.* at 921.
88. *See id.*
89. *See* United States v. Shaw, 464 F.3d 615 (6th Cir. 2006); Marx v. Gumbinner, 905 F.2d 1503 (11th Cir. 1990); Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987).
90. United States v. Shaw, 464 F.3d 615 (6th Cir. 2006).
91. *Id.* at 618.
92. *See id.* at 617.
93. *See id.* at 624.
94. *See id.* at 623.

statement[95] of a child as young as three, standing alone, sufficient to establish probable cause.[96] The court acknowledged that a three-year-old boy's testimony was considered credible in *Easton*, but distinguished it from this case on the basis that adults and a five-year-old boy corroborated that testimony, whereas here the child's testimony stood alone.[97] While the *Shaw* majority denied that its opinion created a bright-line test for the exclusion of testimony of children three and under,[98] the dissent reproached the majority for discounting otherwise valid testimony on that basis alone.[99]

b. *Marx v. Gumbinner*[100]

In *Marx v. Gumbinner*, a severely injured and traumatized four-year-old girl who had just been raped said, "'Daddy did this to me,' and 'Daddy left me outside to sleep in my nightgown, and he did this to me.'"[101] In a subsequent civil wrongful arrest lawsuit, the U.S. Court of Appeals for the Eleventh Circuit considered whether these statements were sufficient to establish probable cause for the victim's father's arrest.[102]

The court found that the victim's statements established probable cause for the father's arrest.[103] Citing *Easton*, the *Marx* court reiterated that "considering the statements of child sexual abuse victims to be inherently suspect is 'an entirely unacceptable point of view.'"[104] Supported by a Florida statute providing that the testimony of a sexual assault victim need not be corroborated,[105] the court held that officers were reasonable in relying on the child's testimony despite her age, injuries, and trauma.[106]

95. *See Shaw*, 464 F.3d at 624–25 (noting that police never interviewed the alleged child victim, and instead relied solely on the mother's repetition of statements that the child made to her).

96. *See id.* at 624.

97. *See id.*

98. *See id.*

99. *See id.* at 633 (Sutton, J., dissenting) ("I realize the majority disclaims announcing such a bright-line rule, but I cannot see any other reason for the decision.").

100. Marx v. Gumbinner, 905 F.2d 1503 (11th Cir. 1990).

101. *See id.* at 1504–05.

102. *See id.* at 1504.

103. *See id.* at 1506.

104. *See id.* (quoting Easton v. City of Boulder, Colo., 776 F.2d 1441, 1449 (10th Cir. 1985)).

105. *See Marx*, 905 F.2d at 1506 (citing FLA. STAT. § 794.022 (1990)).

106. *See id.* ("[W]e believe that [the child's] statements could not be disregarded and that her statements supported defendants' conclusion that probable cause existed.").

c. *Myers v. Morris*[107]

The *Myers v. Morris* court assessed "the consolidated appeals in eight civil rights lawsuits which grew out of a child sexual abuse investigation."[108] As a result of several key factors, the court determined that probable cause existed in each of the individual cases on appeal.[109]

Each arrest was based on the testimony of at least two children.[110] Further, the court noted that the declarants in question were between five and twelve years old, and courts generally consider children within this age range to be more reliable than younger children.[111] Lastly, a Minnesota statute, like the Florida statute mentioned above,[112] provides that the testimony of a juvenile victim in a sexual abuse prosecution need not be corroborated.[113]

Like nearly every other federal court of appeals that has dealt with probable cause in the context of child declarants, the *Morris* court emphasized that, as a policy matter, courts must not write off the testimony of children as *per se* unreliable.[114] This policy, combined with the factors listed above, allowed the *Morris* court to make a relatively straightforward finding of probable cause.[115]

E. State Statutory Approaches[116]

State legislatures have tackled issues related to the admissibility of testimony of the child and developmentally disabled victims of abuse in a variety of ways. Two important categories of state legislation that could inform a potential federal approach are anti-corroboration rules and hearsay exception rules.

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107. Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987).

108. *See id.* at 1440.

109. *See id.* at 1457.

110. *See id.* at 1456 ("In no case did an arrest occur on the basis of only one child's account . . . .").

111. *See id.*

112. *See supra* note 105 and accompanying text.

113. *See Morris*, 810 F.2d at 1456 (citing MINN. STAT. § 609.347 (1984)).

114. *See id.* at 1456–57 ("As for the suggestion that the age and particular vulnerabilities of young children should render their statements less credible, we reject the inference that law enforcement personnel are necessarily less entitled to rely on details of criminal activity described by children than those described by adults.").

115. *See id.* at 1457 ("In light of the facts and circumstances before the deputies, we conclude that their conduct in seeking and performing the arrests was objectively reasonable.").

116. Because this Comment focuses on a standard for testimony of children and those with developmentally disabilities at the federal level, a thorough exploration of state legislation is beyond its scope. A brief overview of pertinent state legislation, however, is useful in developing a potential federal approach.

1. Anti-Corroboration Rules

Sir Matthew Hale, an influential seventeenth century British jurist, famously claimed "that an allegation of rape is 'easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.'"[117] Fortunately this sentiment has dissipated over the centuries, but the legislative and judicial requirement that claims of rape be corroborated in order to secure a conviction remained largely in place until the 1970s, and was even adopted by the Model Penal Code.[118]

As one can imagine, this requirement proved problematic because instances of rape and sexual abuse, especially those of children, frequently occur in private with no witnesses other than the abuser and the victim.[119] Today, no state requires corroboration as a matter of evidentiary proof to secure conviction at trial,[120] which is reflected in state legislation and evidentiary rules.[121]

2. Hearsay Exception Rules

Recognizing the unique difficulties that child and developmentally disabled victims face when testifying in open court, most states[122] have enacted exceptions to the hearsay rule[123] for such testimony.[124] As a result of these exceptions, certain out-of-court statements by victims and witnesses that a court would otherwise exclude may be admitted at trial.[125] By recognizing the stress that testifying places on vulnerable

117. Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 985 (2008) (quoting SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (London Professional Books 1971) (1736)).

118. *See id.* at 986.

119. *See id.* at 1052.

120. *See id.* at 987.

121. *See, e.g.*, FLA. STAT. § 794.022(1) (1994) (establishing that the testimony of a victim need not be corroborated in sexual battery cases); MINN. STAT. § 609.347(1) (2010) (same).

122. *See, e.g.*, MICH. CT. RULE § 3.972(C)(2) (2007) (creating an exception to the hearsay rule for statements made by children under ten years old or incapacitated individuals under 18 years old with developmental disabilities); MONT. CODE ANN. § 46-16-221 (2007) (creating an exception to the hearsay rule if the declarant is an individual with a developmental disability who is the victim or witness of an alleged sexual offense or other crime of violence).

123. *See* FED. R. EVID. 801(c) (defining "hearsay" as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement"); *see also id.* 802 (stating that hearsay is generally not admissible unless a valid exception applies).

124. *See* Marks, *supra* note 15, at 237.

125. *See id.*

victims [126] and adapting the rules accordingly, such "tender years" hearsay exceptions incentivize children to testify against their abusers.[127] Further, the exceptions ensure that trustworthy, probative statements are not excluded from trial.[128]

III. PROPOSAL: A COMPREHENSIVE FEDERAL SOLUTION

A. A Lack of Consistency: Problems with the Existing "Patchwork" System

1. Failure to Address Developmental Disabilities

Neither the federal court system nor Congress has produced meaningful caselaw or legislation regarding the treatment of statements of child victims and witnesses with developmental disabilities during the pre-trial stages of an investigation.[129] Congress did enact a federal statute governing the use of child testimony at trial,[130] but it has yet to address the unique needs of developmentally disabled victims and witnesses.[131]

2. Inconsistency Among Circuits

As described above, a number of federal courts of appeals have addressed the issue of the sufficiency of child testimony to establish probable cause for a warrant.[132] Certain general principles have emerged from these cases: (1) corroboration of testimony increases the likelihood that a court will consider the testimony of a child sufficient to establish probable cause;[133] (2) courts express particular concern regarding the testimony of children aged three and younger;[134] (3) courts hesitate to endorse findings of probable cause based on the testimony of a child who is confused as to the identity of his or her abuser;[135] and (4) minor

126. *See id.* at 225 ("A number of researchers have suggested that some children are traumatized by the courtroom experience.").

127. *See id.*

128. *See id.* at 226.

129. *See supra* note 41 and accompanying text.

130. *See generally* 18 U.S.C. § 3509 (2006 & Supp. 2009).

131. *See supra* note 41 and accompanying text.

132. *See supra* Part II.D.

133. *See* Stoot v. City of Everett, 582 F.3d 910, 920 (9th Cir. 2009); United States v. Shaw, 464 F.3d 615, 624 (6th Cir. 2006); Marx v. Gumbinner, 905 F.2d 1503, 1506 (11th Cir. 1990); Myers v. Morris, 810 F.2d 1437, 1456 (8th Cir. 1987); Easton v. City of Boulder, Colo., 776 F.2d 1441, 1449 (10th Cir. 1985).

134. *See Stoot*, 582 F.3d at 919; *Shaw*, 464 F.3d at 624. *But see id.* at 633 (Sutton, J., dissenting) (arguing that the majority authorizes, in practice, an improper bright-line rule excluding the testimony of children three and under).

135. *See Stoot*, 582 F.3d at 920.

inconsistencies within a child's testimony are not fatal to a finding of probable cause.[136] These similarities suggest that future federal legislation can achieve a consistent rule across all 50 states.

Despite wide acceptance of these general principles, courts apply them inconsistently, and certain courts have valued or discounted evidence that other courts would likely have treated differently. The *Marx* court seemed prepared to deem the uncorroborated statements of a traumatized four-year-old child sufficient to establish probable cause.[137] The *Stoot* and *Shaw* courts, on the other hand, expressed more concern about the statements of very young children, tending to discount the uncorroborated statements of three- and four-year-old victims more readily than the *Marx* court.[138] These inconsistencies demonstrate the need for legislative intervention.

B. *A Federal Standard for the Testimony of Child and Developmentally Disabled Victims During Pre-Trial Stages of Investigation*

The variability of judicial standards between circuits regarding the sufficiency of child testimony and the virtual nonexistence of authority regarding the sufficiency of testimony of developmentally disabled child victims and witnesses create uncertainty and unpredictability for judges, practitioners of law, and members of the general public.[139] This uncertainty is especially problematic given the volume of federal criminal prosecutions that tend to rely on testimony provided by child and developmentally disabled victims.[140] Further, state and local sex

136. *See id.*; *Easton*, 776 F.2d at 1450.

137. *See Marx*, 905 F.2d at 1506 ("[W]e believe that [the four-year-old victim]'s statements could not be disregarded and that her statements supported defendants' conclusion that probable cause existed."). The court was not required to rule decisively on this issue, however, because other evidence was sufficient to establish probable cause. *Id.* at 1507.

138. *See Stoot*, 582 F.3d at 920 ("In cases involving very young child victims, the courts have repeatedly emphasized the need for some evidence in addition to the statements of the victim to corroborate the allegations and establish probable cause."); *Shaw*, 464 F.3d at 624 ("We are not aware . . . of any situation in which the uncorroborated hearsay statement of a child as young as three, standing alone, has been considered sufficient to establish probable cause."). Recall, however, that in *Shaw*, the police based their seizure of the suspect solely on a mother's report that her son had told her that the suspect had molested him, and that police did not conduct an interview with the child prior to the suspect's arrest. *See id.* at 625. *Shaw* is therefore distinguishable from *Marx* and the other cited cases based on this factor. *See id.* at 624–26.

139. *See, e.g.*, *supra* note 11 and accompanying text.

140. *See generally, e.g.*, Obscene Visual Representations of the Sexual Abuse of Children, 18 U.S.C. § 1466A (2006); Sexual Abuse of a Minor or Ward, *id.* § 2243 (2006 & Supp. 2007); Sexual Exploitation of Children, *id.* § 2251 (2006 & Supp. 2008); Certain Activities Relating to Material Involving the Sexual Exploitation of Minors, *id.* § 2252;

crime investigations often enter the federal court system by way of alleged abusers' suits against state and local authorities under Section 1983, claiming constitutional violations throughout such investigations.[141]

Absent a decision from the U.S. Supreme Court addressing these issues, which does not appear to be forthcoming, congressional legislation presents the best vehicle for an across-the-board federal standard. This proposal amalgamates strengths from existing federal caselaw[142] and statutory materials[143] into a concise, non-dispositive factor test that federal judges can easily and consistently apply. This proposal also incorporates concepts from various state corroboration [144] and hearsay exceptions,[145] and thus ensures that reliable, probative evidence is not wrongfully excluded.

1. Factor Test

Of the five federal cases examined above, only *Stoot* delineated a factor test detailing an organized approach to the issue of the sufficiency of child testimony to establish probable cause.[146] This test, however, consisted of only three factors: age of declarant, consistency of statements, and accuracy of identification.[147] As demonstrated by the other cases mentioned above, the *Stoot* test is inadequate, as additional factors may be useful to a court's ultimate determination of probable cause.

As a result, this Comment proposes a flexible test with six factors to guide federal judges in making such determinations. Nearly all federal courts that have dealt with the sufficiency of child testimony emphasized the notion that rigid tests, especially age cutoffs, do not mesh well with as fluid a concept as probable cause.[148] Likewise, a bright-line

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Certain Activities Relating to Material Constituting or Containing Child Pornography, *id.* § 2252A (2006 & Supp. 2009).

141. *See generally, e.g.*, *Stoot*, 582 F.3d 910 (alleging violations of suspected child molester's constitutional rights during investigation); Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987) (same); *Easton*, 776 F.2d 1441 (same).

142. *See Stoot*, 582 F.3d at 920; *Shaw*, 464 F.3d at 624; *Marx*, 905 F.2d at 1506; *Morris*, 810 F.2d at 1456; *Easton*, 776 F.2d at 1449.

143. *See* 18 U.S.C. § 3509 (2006 & Supp. 2009).

144. *See, e.g.*, FLA. STAT. § 794.022(1) (1994); MINN. STAT. § 609.347(1) (2010).

145. *See, e.g.*, MICH. CT. RULE § 3.972(C)(2) (2007); MONT. CODE ANN. § 46-16-221 (2007).

146. *See supra* notes 81–84 and accompanying text.

147. *See Stoot*, 582 F.3d at 919–20.

148. *See* Easton v. City of Boulder, Colo., 776 F.2d 1441, 1449 (10th Cir. 1985) ("To discount [the testimony of very young children] from the outset would only serve to discourage children and parents from reporting molestation incidents and to unjustly insulate the perpetrator of such crimes from prosecution."); *see also* Illinois v. Gates, 462

presumption against the testimony of children with developmental disabilities would be equally inappropriate, as reliability will depend on the disorder, symptoms, and circumstances of a particular child.[149] Under this proposed test, if more factors are present, it is more likely that a court will uphold a finding of probable cause. However, no one factor is dispositive to such a finding, thus maintaining the spirit of the comprehensive approach to probable cause determinations espoused by the U.S. Supreme Court in *Gates*.[150]

a. Age

It is undeniable that, generally, the younger a child is, the less capable he or she will be at relaying events and information reliably.[151] To say that the testimony of a child of a certain age is *per se* unreliable, however, contradicts the dual goals of prosecuting child abusers and guaranteeing justice for victims.[152]

In many child molestation cases, "the only available evidence that a crime has been committed is the testimony of children," so a *per se* age cutoff rule could have the perverse effect of incentivizing the abuse of very young children.[153] Making consideration of the victim or witness's age part of a factor test allows federal judges and other practitioners of law to realistically view the totality of the circumstances in order to reach a just result. For example, the testimony of a four-year-old child, alongside other factors, may be sufficient to uphold a finding of probable cause.[154] Conversely, the testimony of a three-year-old child as recounted by his mother, with little other evidence, may not be sufficient.[155]

When the child whose testimony is at issue has a developmental disability, age is still a valid and important factor to consider, but it must be viewed alongside the unique symptoms of the child's disorder. For example, while a child with normal cognitive development typically

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U.S. 213, 235 (1983) ("Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision.").

149. *See supra* notes 21–24.

150. *See Gates*, 462 U.S. at 230 (adopting a "totality-of-the-circumstances approach" to determinations of probable cause); *see also supra* Part II.B.

151. *See, e.g.*, Shanks, *supra* note 47, at 586–87 ("[R]esearchers . . . found that young children (under age eight) had more difficulty than older children and adults in distinguishing between imagined events and those that actually occurred.").

152. *See Easton*, 776 F.2d at 1449.

153. *Id.*; *see also* Shanks, *supra* note 47, at 580 ("Although some egregious cases of sexual abuse may involve vaginal or rectal tearing, many allegations of sexual abuse involve improper touching or fondling.").

154. *See* Marx v. Gumbinner, 905 F.2d 1503, 1506 (11th Cir. 1990).

155. *See* United States v. Shaw, 464 F.3d 615, 624 (6th Cir. 2006).

attends high school through the age of 18, public schools have a responsibility to provide services for children with autism spectrum disorders until the age of 22, demonstrating that children with developmental disabilities mature and progress differently than other children.[156] Thus, courts must evaluate how a developmentally disabled child's age affects the reliability of his testimony within the totality of the circumstances.[157]

b. Accuracy of Identification

Courts should also consider the accuracy with which child victims or witnesses identify suspected abusers. Given the fact that even adult victims and witnesses frequently misidentify suspects, leading to wrongful arrests and convictions,[158] courts should be wary of finding probable cause when a child victim or witness is unable to accurately or consistently identify a suspected abuser.[159] This factor should apply in largely the same manner regardless of the child's behavioral, cognitive, and communicative abilities. In many cases involving child victims or witnesses, this factor does not pose a problem, especially because "[t]he accused is often an intimate of the child, typically a family member, friend, or neighbor."[160] Similarly, children with developmental disabilities will often be able to identify their abusers accurately and without issue.[161] However, when a child or developmentally disabled victim or witness cannot consistently or accurately identify his or her abuser, the possibility of a wrongful arrest or conviction should concern the court due to the grave ramifications for persons who are wrongfully convicted.[162]

156. *See A Parent's Guide to Autism Spectrum Disorder*, *supra* note 22.

157. *See* Illinois v. Gates, 462 U.S. 213, 230 (1983).

158. Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 730–31 (2007).

159. *See* Stoot v. City of Everett, 582 F.3d 910, 919 (9th Cir. 2009) (stating that the child's inability to consistently name her abuser raised "serious concerns about the veracity and reliability of [her] allegation" (internal quotation marks omitted)).

160. Shanks, *supra* note 47, at 580.

161. *See, e.g.*, United States v. Kofalt, No. 11-155, 2012 WL 5398832, at *4 (W.D. Pa. Nov. 2, 2012) (describing instance in which a child with "severe behavioral problems" accurately and voluntarily identified the defendant as his abuser (citations omitted) (internal quotation marks omitted)).

162. *See* Daniel S. Kahn, *Presumed Guilty Until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes*, 44 U. MICH. J.L. REFORM 123, 129 (discussing obstacles that wrongfully convicted persons face if they are able to obtain their freedom, including debt and unemployment).

c. Presence or Absence of Corroborating Evidence

In every state, it is possible to secure a conviction against a defendant accused of rape without any corroborating evidence.[163] Because a finding of probable cause need not meet the stringent "beyond a reasonable doubt" standard required for a conviction, it follows that it is likewise possible to make a valid finding of probable cause without corroborating evidence.[164]

Despite this, every court whose opinion this Comment examines places a great deal of emphasis—arguably, too much emphasis—on the value of corroborating evidence.[165] While the presence of corroborating evidence will undoubtedly buttress a finding of probable cause, this proposal suggests that future federal legislation should formally adopt a corroboration exception similar to those adopted by Florida and Minnesota.[166] This aspect of the proposal will be discussed at length below.[167]

In a case where the court is evaluating the reliability of the testimony of a child with a developmental disability, corroborating evidence may prove to be especially important. Where there is concern due to the child's inability to remember details or focus during an interview due to a disorder such as ADHD, the presence or absence of corroborating evidence may be the tiebreaker that determines whether the testimony is sufficient or insufficient to establish probable cause.[168] Depending on whether the other factors of this test establish reliability, however, not all cases will require the corroboration of a developmentally disabled child's testimony.[169]

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163. *See* Klein, *supra* note 117, at 987.

164. *See, e.g.*, United States v. Shaw, 464 F.3d 615, 634 (6th Cir. 2006) (Sutton, J., dissenting) (quoting Ahlers v. Schebil, 188 F.3d 365, 370 (6th Cir. 1999)). Judge Sutton noted:

> In murder and rape cases, one does not need corroborating evidence at the probable-cause stage to support the testimony of someone who witnessed (or experienced) the crime. Eyewitness testimony alone will suffice, unless there is reason for "the officer to believe that the eyewitness was lying, did not accurately describe what he had seem, or was in some fashion mistaken regarding his recollection."

Id.

165. *See, e.g.*, Marx v. Gumbinner, 905 F.2d 1503, 1506–07 (11th Cir. 1990) (stating that the child victim's uncorroborated statements supported the conclusion that probable cause existed, but going on to list examples of corroborating evidence as well).

166. *See* FLA. STAT. § 794.022 (1990); MINN. STAT. § 609.347 (1984).

167. *See infra* Part III.B.2.

168. *See* United States v. Kofalt, No. 11-155, 2012 WL 5398832, at *9 (W.D. Pa. Nov. 2, 2012) (considering statements made to school officials by a six-year-old boy with ADHD to corroborate his testimony during a forensic interview).

169. *See* State v. Myers, 359 N.W.2d 604, 608 (Minn. 1984) (stating that corroboration of a child's testimony is only required if other evidence is insufficient).

d. Length of Time Between Alleged Abuse and Testimony

As with an adult, "a child's memory may have faded with the passage of time."[170] Therefore, courts may view statements made immediately after or shortly following abuse as presumptively more reliable than statements made months or years after abuse.[171]

That being said, a *per se* rule that automatically excludes testimony based on the length of time between the alleged abuse and the child's testimony would not serve the administration of justice. Although a child's recollection may well be reliable despite the passage of time,[172] children have unique difficulties with the concept of time that make it more challenging for them to definitively recall when an event occurred.[173] Thus, courts must approach this factor with caution; in situations where a child's testimony takes place some time after an alleged abusive incident, courts must be sure to carefully balance all six factors within the "totality of the circumstances."[174]

Depending on whether a child's developmental disability affects her capacity to retain long-term memories, courts may view a longer gap between the abusive incident and the child's testimony with greater skepticism.[175] Studies suggest, however, that many children with developmental disabilities have adequately functioning long-term

170. Lynn McLain, *"Sweet Childish Days": Using Developmental Psychology Research in Evaluating the Admissibility of Out-of-Court Statements by Young Children*, 64 ME. L. REV. 77, 98 (2011) (identifying problems that arise when there is a long delay between an abusive incident and testimony regarding that incident).

171. *Compare* Stoot v. City of Everett, 582 F.3d 910, 919–20 (9th Cir. 2009) ("Common experience counsels extreme caution in crediting [a four-year-old victim's] detailed recollections of events said to have occurred . . . eighteen months earlier, when she was three years old."), *with* Marx v. Gumbinner, 905 F.2d 1503, 1506 (11th Cir. 1990) (stating that police "acted properly in placing a reasonable amount of trust in the truth of [the four-year-old victim's] statements" when the statements were made immediately following the alleged abuse).

172. *See, e.g.*, Marcia K. Johnson & Mary Ann Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory*, 40 J. SOC. ISSUES 33, 35 (1984) ("[T]here is little evidence that children's lower recall reflects a defect in the memory system itself.").

173. *See* John E.B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 PAC. L.J. 801, 827 (1987) ("Young children have difficulty with the concept of time. The year, date or time-of-day when an event occurred may have no meaning or importance to a child." (footnote omitted)).

174. *See* Illinois v. Gates, 462 U.S. 213, 230 (1983); *see also Stoot*, 582 F.3d at 920 (suggesting that the passage of time does not render testimony *per se* unreliable, but instead demonstrates a "need for further investigation and corroboration to establish probable cause").

175. *See, e.g.*, *Stoot*, 582 F.3d at 920 (finding that the child's testimony was insufficient to establish probable cause due to an 18-month gap between the alleged abusive incident and child's testimony).

memories, so courts must consider this factor within the specific circumstances of each child's disorder and symptoms.[176]

e. Spontaneity of Statements

Younger children are generally "more vulnerable to the deleterious effects of an interviewer's misleading suggestions" than older children and adults.[177] In other words, a young child's memories may be altered or falsified by adults' suggestions, be they from parents or interviewers.[178] For this reason, courts generally favor a child's unprompted, spontaneous statements regarding an abusive incident over statements made upon the suggestion of an adult.[179] This sentiment applies to statements made by children with developmental disabilities as well.[180] Testimony prompted by adults' questioning, however, is often of crucial importance to ultimate findings of probable cause, especially due to its corroborative capacity, and thus also deserves the attention of the court.[181]

f. Experiential Nature of Statements

The sixth and final factor for the proposed "totality of the circumstances" test concerns whether a child's statements, including the statements of a child with a developmental disability, express events or vocabulary that he or she could only know through experience.[182] It is

176. *See, e.g.*, Sally Ozonoff & David L. Strayer, *Further Evidence of Intact Working Memory in Autism*, 31 J. AUTISM & DEV. DISORDERS 257, 257 (2001) (stating that, while prior studies have found "mixed evidence of working memory impairment in autism," the authors' study concluded that "working memory is not one of the executive functions that is seriously impaired in autism").

177. Livia L. Gilstrap & Michael P. McHenry, *Using Experts to Aid Jurors in Assessing Child Witness Credibility*, COLO. LAW., Aug. 2006, at 65, 68 ("Factors such as question repetition, use of yes/no questions, misleading questions, repeated interviewing, plausible suggestions, stereotyping, anatomical dolls, and invocation of peer conformity all have been associated with errors in children's reports to adult interviewers.").

178. *See* McLain, *supra* note 170, at 114.

179. *See* Easton v. City of Boulder, Colo., 776 F.2d 1441, 1443, 1450 (10th Cir. 1985) (upholding finding of probable cause based on victim's "spontaneous," unprompted statements to his stepfather indicating abuse by a neighbor).

180. *See* United States v. Kofalt, No. 11-155, 2012 WL 5398832, at *9 (W.D. Pa. Nov. 2, 2012) (considering statements made by a six-year-old victim with ADHD during a forensic interview to be more credible because they were consistent with spontaneous statements the child had previously made to school officials).

181. *See* Myers v. Morris, 810 F.2d 1437, 1442 (8th Cir. 1987) (detailing testimony acquired during interviews with victims of abuse that supported a finding of probable cause); *see also Kofalt*, 2012 WL 5398832, at *9 (noting that a subsequent forensic interview corroborated what the child victim with ADHD had told school officials).

182. *See Easton*, 776 F.2d at 1450-51 (upholding the magistrate's finding of probable cause due, in part, to the child victim's description of sexual assault that was beyond the scope of knowledge for a typical child of his age); *see also* Melinda Smith & Jeanne

important to note, though, that many children describe abusive incidents using age-appropriate vocabulary, so this factor will not apply in every case; it should rather be viewed as an exceptional "red flag" that is especially indicative of abuse.[183]

2. Corroboration Exception

State statutory provisions establishing that the testimony of a victim need not be corroborated in a sex crimes prosecution[184] provide a clear model for a similar federal provision permitting a finding of probable cause without corroboration. Courts have upheld such provisions during criminal trials where the most demanding "beyond a reasonable doubt" standard governs.[185] Thus, there is little doubt that courts would uphold an anti-corroboration provision to support a finding of probable cause during the pre-trial stages of a criminal investigation[186] where the governing standard is significantly more flexible.[187]

Of course, any statute must account for defendants' constitutional rights; police officers, magistrates, and judges must not take advantage of an anti-corroboration provision by finding probable cause in situations in which it is clearly not present.[188] In the trial context, criminal defendants commonly express concern that, without corroboration, evidence is insufficient to uphold a conviction.[189] To reiterate, however, the probable cause standard is less rigid than the "beyond a reasonable doubt" standard required at a criminal trial.[190]

Segal, *Child Abuse & Neglect: Recognizing, Preventing, and Reporting Child Abuse*, HELPGUIDE, http://bit.ly/5RHk2 (last updated Aug. 2013) (listing warning signs of sexual abuse in children, including a display of "knowledge or interest in sexual acts inappropriate to [the child's] age").

183. *See, e.g.*, United States v. Shaw, 464 F.3d 615, 618 (6th Cir. 2006) (recounting the child's use of the term "pee-pee" in his description of an abusive incident).

184. *See, e.g.*, FLA. STAT. § 794.022(1) (1994) (establishing that the testimony of a victim need not be corroborated in sexual battery cases); MINN. STAT. § 609.347(1) (2010) (same).

185. *See* State v. Myers, 359 N.W.2d 604, 608 (Minn. 1984) ("Corroboration of an allegation of sexual abuse of a child is required only if the evidence otherwise adduced is insufficient to sustain conviction.").

186. *See, e.g.*, State v. Pao Yang, No. A11-1910, 2012 WL 5476105, at *3 (Minn. Ct. App. Nov. 13, 2012) (upholding defendant's conviction for second-degree criminal sexual conduct, citing statutory provision eliminating corroboration requirement).

187. *See* Illinois v. Gates, 462 U.S. 213, 235 (1983) ("Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision.").

188. *See supra* note 60 and accompanying text.

189. *See, e.g.*, *Pao Yang*, 2012 WL 5476105, at *2–3 (rejecting defendant's argument that evidence is insufficient to uphold conviction without corroboration).

190. *See Gates*, 462 U.S. at 235.

Also, other measures already serve to ensure the sufficiency of evidence without an express requirement of corroboration. For example, various state courts have held that a victim's accurate identification of the defendant and positive testimony of sexual abuse are strong indicators of reliability, rendering corroborating testimony less necessary.[191] As stated by the Supreme Court of Minnesota, "[c]orroboration of an allegation of sexual abuse of a child is required only if the evidence otherwise adduced is insufficient to sustain conviction."[192] If the evidence is sufficient without corroboration, though, it does not serve the interest of justice to impose an antiquated corroboration requirement on the victim.[193] This same policy should apply to the testimony of all children, including those with developmental disabilities.

Implementing the "solid core" test from *Easton* is the best way to ensure the reliability of children's testimony without a corroboration requirement.[194] This test, which allows for minor irregularities within otherwise consistent testimony,[195] grants a necessary amount of leniency to child victims, including those with developmental disabilities, who may be forgetful or inconsistent due to trauma, disorder, or the passage of time. At the same time, the test retains the notion that probable cause requires a "fair probability" that a crime was committed.[196] So long as the "solid core" of a child's testimony remains consistent throughout an investigation, corroboration is not required to support a finding of probable cause.[197]

3. "Tender Years" Hearsay Exception

As previously discussed,[198] some states have enacted statutory provisions excepting children, including those with developmental disabilities, from the general rule against the admission of hearsay

191. *See* Saleem v. State, 773 So.2d 89, 89–90 (Fla. Dist. Ct. App. 2000) ("A victim's testimony concerning a sexual battery, if clear as to the identity of the perpetrator, is legally sufficient to sustain a conviction and requires no medical or other corroboration."); State v. Pirir, No. A10-1161, 2012 WL 896262, at *2 (Minn. Ct. App. Mar. 19, 2012) (upholding first-degree criminal sexual conduct conviction without corroboration because the victim gave positive, consistent testimony of sexual abuse).

192. State v. Myers, 359 N.W.2d 604, 608 (Minn. 1984).

193. *See* Klein, *supra* note 117, at 985-86 (discussing the history of the legislative and judicial requirement that claims of rape be corroborated, and noting the universal trend toward elimination of the corroboration requirement).

194. *See* Easton v. City of Boulder, Colo., 776 F.2d 1441, 1450 (10th Cir. 1985); *see also supra* notes 69–72, 76 and accompanying text.

195. *See Easton*, 776 F.2d at 1450.

196. *See* Illinois v. Gates, 462 U.S. 213, 238, 246 (1983).

197. *See Easton*, 776 F.2d at 1450.

198. *See supra* Part II.E.2.

evidence during trial.[199] The author proposes that a similar provision should be incorporated into a federal standard for probable cause during the pre-trial stages of an investigation involving child witnesses and victims. Courts have consistently upheld exceptions to the hearsay rule for children, known as "tender years" exceptions, in the context of trial,[200] making it extremely likely that courts would likewise hold such an exception valid as part of a test for the more flexible standard of probable cause.[201]

Under current law, there is no federal "tender years" exception.[202] As a result, federal courts may only admit the out-of-court statements of a child at trial if they meet the requirements of a "residual" exception.[203] Federal law, aside from a few perfunctory comments in judicial opinions,[204] has even less to say about whether the hearsay statements of a child may be used to form the basis for a finding of probable cause.[205]

A formally adopted federal "tender years" exception, allowing the use of a child's hearsay statements as a basis for a finding of probable cause, would eliminate the existing obscurity in this area and provide more certainty than an ambiguously defined "residual" exception.[206] This exception would also promote the same policy rationales as a similar exception for evidence admitted at trial: (1) ensuring that an investigation does not cease due to the child's unwillingness or inability to participate as a result of trauma or other extenuating circumstances;[207] and (2) guaranteeing that reliable evidence is not discarded because of overly harsh procedural requirements.[208]

Needless to say, a federal court evaluating the sufficiency of a finding of probable cause may not use a "tender years" exception as a carte blanche for upholding a warrant based solely on unreliable hearsay

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199. *See, e.g.*, MICH. CT. RULE § 3.972(C)(2) (2007); MONT. CODE ANN. § 46-16-221 (2007).

200. *See In re* Archer, 744 N.W.2d 1, 8–9 (Mich. Ct. App. 2007) (admitting child's hearsay testimony at trial under "tender years" exception).

201. *See supra* note 187 and accompanying text.

202. *See* Marks, *supra* note 15, at 234.

203. *See id.* at 234–35; *see also* FED. R. EVID. 807. Federal Rule of Evidence 807 allows hearsay evidence to be admitted under the "residual" exception if:

> (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.

Id.

204. *See, e.g.*, United States v. Shaw, 464 F.3d 615, 624 (6th Cir. 2006).

205. *See id.*

206. *See supra* note 203 and accompanying text.

207. *See* Marks, *supra* note 15, at 213.

208. *See id.*

testimony.[209] The trustworthiness of a child's statements should still be satisfactorily evaluated by looking at factors such as "spontaneity, consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of a similar age, and lack of motive to fabricate."[210]

A federal "tender years" hearsay exception in this context would eliminate the prospect of "the exclusion of many trustworthy, probative statements. Far from achieving justice, a rule [that prohibits child hearsay] would hinder the state's ability to protect its citizens from sexual abuse and other criminal conduct."[211] Implementing such an exception would ensure that reliable evidence is not written off as useless during the pre-trial stages of an investigation.

C. Concise Recommendation

The previous section outlined the elements of proposed legislation that would clarify and unify existing law into an across-the-board federal standard regarding the sufficiency of child testimony, including the testimony of children with developmental disabilities, to establish probable cause for a search or arrest warrant.[212] This statute would have three major elements: (1) a flexible factor test, used to determine the reliability and sufficiency of the child's testimony; (2) a corroboration exception; and (3) a hearsay exception.[213]

The first element, a factor test, consists of six factors courts can use to evaluate whether a child's testimony is sufficient to establish probable cause.[214] The author intends the test to be flexible, such that no one factor is dispositive or fatal to a finding of probable cause, as the U.S. Supreme Court has routinely stated that probable cause is a fluid, non-technical standard.[215] These six factors are: (1) the child's age;[216] (2) the child's ability to accurately identify his or her abuser;[217] (3) the presence or absence of corroborating evidence;[218] (4) the length of time between

209. *See id.* at 208–09 (discussing pressure on politicians and courts to "get tough on crime," specifically child sexual abuse, as well as the "frightening prospect" of false accusations and prosecutions for such crimes). Marks argues that, despite the emotionally charged nature of child sexual abuse cases, legislation must balance the desire to achieve justice for victims against the need to protect the rights of criminal defendants. *Id.*

210. *In re* Archer, 744 N.W.2d 1, 9 (Mich. Ct. App. 2007).

211. Marks, *supra* note 15, at 226.

212. *See supra* Part III.B.

213. *See supra* Parts III.B.1–3.

214. *See supra* Part III.B.1.

215. *See* Illinois v. Gates, 462 U.S. 213, 230–31 (1983).

216. *See supra* Part III.B.1.a.

217. *See supra* Part III.B.1.b.

218. *See supra* Part III.B.1.c.

the alleged abuse and the testimony;[219] (5) the spontaneity of the child's statements;[220] and (6) the experiential nature of the statements.[221]

The second element, a corroboration exception modeled after similar state provisions,[222] emphasizes that a child's testimony need not be corroborated to support a finding of probable cause, so long as other factors render the testimony sufficiently reliable.[223]

The third and final element, a "tender years" hearsay exception, likewise inspired by similar state statutes,[224] permits a court to uphold a finding of probable cause based on the out-of-court hearsay statements of a child.[225] Like the corroboration exception, the hearsay exception may apply only if the hearsay statements forming the basis for probable cause are sufficiently reliable.[226]

IV. CONCLUSION

When it comes to the testimony of children, including those with developmental disabilities, federal law thus far has predominately concerned itself with the admissibility of such testimony during full-scale criminal trials.[227] While it is undoubtedly important to craft protections for children who testify in open court, federal law in its current state ignores the reality that much of the child testimony upon which the legal system relies takes place outside of court during the pre-trial stages of criminal investigations.[228] Specifically, in cases involving crimes against children, in which the victim is often the only witness, police officers, magistrates, and judges regularly use child testimony to establish probable cause for search and arrest warrants.[229]

Currently, only a mishmash of federal caselaw addresses the use of such pre-trial testimony, and applicable standards vary among circuits.[230] Further, neither the federal court system nor Congress has adopted a clear standard for evaluating the reliability of the testimony of children

219. *See supra* Part III.B.1.d.
220. *See supra* Part III.B.1.e.
221. *See supra* Part III.B.1.f.
222. *See supra* note 121 and accompanying text.
223. *See supra* Part III.B.2.
224. *See supra* note 122 and accompanying text.
225. *See supra* Part III.B.3.
226. *See* Marks, *supra* note 15, at 241 ("[T]he tender years statute must admit only statements with 'particularized guarantees of trustworthiness' or 'sufficient indicia of reliability.'").
227. *See, e.g.*, 18 U.S.C. § 3509 (2006 & Supp. 2009); *see also supra* Part II.C.2 (explaining the scope of Section 3509).
228. *See supra* note 41 and accompanying text.
229. *See supra* notes 140–41 and accompanying text.
230. *See supra* Parts II.D.1–3.

with developmental disabilities.[231] This lack of clarity may present increasing difficulty in the coming years, especially given the rising number of children diagnosed with developmental disabilities, such as autism spectrum disorders[232] and ADHD.[233]

Accordingly, to ensure justice for particularly vulnerable victims, Congress should enact federal legislation in this area. Such a statute would create a workable standard that achieves the goals of clarity, predictability, and consistency across the entire federal system. At the same time, any standard must maintain the level of flexibility necessary to meet the unique needs of child victims and witnesses, including those with developmental disabilities.

As noted by the United Nations Office on Drugs and Crime:

> In criminal justice systems, victims of crime are often forgotten. A fair, effective and humane criminal justice system is one that respects the fundamental rights of suspects and offenders, as well as those of victims, and that is based on the principle that victims should be adequately recognized and treated with respect for their dignity. Those categories of victim, including children, who are particularly vulnerable, either through their personal characteristics or through the circumstances of the crime, should benefit from measures tailored to their situation.[234]

The goal of properly serving the needs of these victims during the pre-trial stages of an investigation is certainly lofty, but it is not beyond Congress's reach. If such protections are not granted, the justice system may unwittingly insulate a class of victims from the protection of federal law. Justice is not served by discounting the testimony of the most vulnerable victims merely due to youth or disability.[235]

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231. *See supra* note 41 and accompanying text.

232. *See* Benedict Carey, *Diagnoses of Autism on the Rise, Report Says*, N.Y. TIMES, Mar. 29, 2012, http://nyti.ms/HlloIe ("The likelihood of a child's being given a diagnosis of autism, Asperger syndrome or a related disorder increased by more than 20 percent from 2006 to 2008[.]").

233. *See* Michelle Castillo, *ADHD Diagnosis Rates Up 24 Percent over Decade*, CBS NEWS, Jan. 22, 2013, http://cbsn.ws/10pyN7f ("The number of children diagnosed with attention deficit hyperactivity disorder (ADHD) skyrocketed 24 percent between 2001 and 2010[.]").

234. CYRIL LAUCCI, UNITED NATIONS OFFICE ON DRUGS & CRIME, HANDBOOK FOR PROFESSIONALS AND POLICYMAKERS ON JUSTICE IN MATTERS INVOLVING CHILD VICTIMS AND WITNESSES OF CRIME 1 (2009), *available at* http://bit.ly/YZYqQO.

235. *See id.*