

THE FIRST COMPLAINT: AN APPROACH TO THE ADMISSION OF CHILD-HEARSAY STATEMENTS UNDER THE ALASKA RULES OF EVIDENCE

JOHN J. GOCHNOUR*

ABSTRACT

The age of child sexual abuse victims and the private nature of sex crimes make it notoriously difficult for prosecutors to find sufficient admissible corroborating evidence for an effective prosecution. The Alaska courts have responded by stretching various codified and common-law hearsay rule exceptions to accommodate child-hearsay statements. In this Note, the Author discusses the inadequacies of this approach and proposes amending the Alaska Rules of Evidence to include a consistent hearsay exception for child-hearsay in sexual abuse cases, based on the first complaint rule and compliant with the Supreme Court's articulation of the Confrontation Clause in Crawford v. Washington and Davis v. Washington.

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* The author is a member of the Class of 2010 at Duke University School of Law and received a B.A. from Brigham Young University in 2007. He is grateful to Professors Lisa Griffin and Joan Magat for reviewing and commenting on early drafts of this Note. He is also grateful to his wife Melanie, and his sons, Jack and Jonah, for their love, support, and patience during the writing and editing process.

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INTRODUCTION

Despite concerted efforts over the last twenty years to reduce its frequency, child sexual abuse continues to represent a grave threat to Alaska's children. In 2009, more than one hundred cases of child sexual abuse were substantiated in Alaska.¹ That statistic represents only a fraction of all actual incidents of child abuse, diminished by the fact that fear, and in many cases love, prevent more than ninety percent of incidents from being reported to the police.² Although child abuse is an intensely private crime, its direct and indirect costs are openly borne by the victim, his or her family, and society as a whole. Victims often require substantial mental health assistance and are much more likely to suffer from at least one psychological disorder.³ In the long term, sexual abuse makes its victims more likely to abuse drugs or alcohol, spend time in prison, and experience teen pregnancy.⁴

1. Statistics on Child Abuse: Family Service Child Reports of Harm by Region, Federal Fiscal Year 2006, <http://www.ridalaskaofchildabuse.org> (last visited Apr. 10, 2010).

2. See Irving Prager, *Sexual Psychotherapy and Child Molesters: The Experiment Fails*, 6 J. JUV. L. 49, 72 (1982) (stating that "more than ninety percent of all child molestations apparently go unreported").

3. Childhelp, National Child Abuse Statistics, <http://www.childhelp.org/resources/learning-center/statistics> (last visited Apr. 10, 2010); see also National Center for PTSD, Child Sexual Abuse, <http://www.ptsd.va.gov/public/pages/child-sexual-abuse.asp> (last visited Apr. 10, 2010).

4. *Id.*

Detecting sexual abuse and prosecuting its perpetrators is notoriously difficult. For a variety of reasons, sexual abuse is both underdisclosed and underreported.⁵ The difficulty of charging and prosecuting an abuser is enhanced by the lack of witnesses beyond the child, the lack of corroborating physical evidence, and the reluctance or inability of the victim to testify against the perpetrator.⁶

The difficulties and costs of abuse must not cause us to forget the rights of alleged abusers. Child sexual abuse is a heinous crime, but alleged offenders must be provided the same Due Process rights as any other defendant. In particular, the Sixth Amendment of the United States Constitution guarantees defendants the opportunity to confront any witness against them through rigorous cross-examination.

In an effort to resolve the many difficulties of prosecuting child abusers, prosecutors and courts have attempted to admit as evidence out-of-court allegations of abuse made by victims to third parties. These statements would normally be inadmissible hearsay under the Alaska Rules of Evidence, but courts have admitted them under various exceptions to the rules.⁷ Out of necessity and the widespread belief that children are unlikely to lie about sexual abuse, courts have stretched these exceptions to allow admission even when statements otherwise fail to meet any exception's general requirements. For example, courts have admitted statements made long after an abusive event through the "excited utterance" exception.⁸ This approach, uneven at best, is inadequate to draw the necessary balance between admitting child-hearsay statements and protecting defendants' Sixth Amendment rights after the United States Supreme Court's recent decisions in *Crawford v. Washington*⁹ and *Davis v. Washington*.¹⁰

This Note explores the application of Alaska's Rules of Evidence to child-victims' out-of-court statements and recommends a change that

5. See Prager, *supra* note 2, at 72.

6. David Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 1008 (1969).

7. Numerous exceptions have been applied in child sexual abuse cases including: ALASKA R. EVID. 801(a) (Prior Inconsistent Statements); ALASKA R. EVID. 801(b) (Prior Consistent Statements); ALASKA R. EVID. 801(d)(3) (Recorded Statement by Child Victims of Crime); ALASKA R. EVID. 803(2) (Excited Utterances); ALASKA R. EVID. 803(23) (Residual Exception).

8. *Smith v. State*, 252 A.2d 277, 278-79 (Md. Ct. App. 1969) (admitting the hearsay statement of a four-year-old rape victim although the statement was made four to five hours after the assault, and the court found the child had been calm at the hospital for several hours before making the statement).

9. 541 U.S. 36 (2004) (defining a new approach to the confrontation clause based upon whether statements are testimonial in nature).

10. 547 U.S. 813 (2006) (clarifying the term "testimonial" by announcing an objective "primary purpose" test to evaluate police interrogations).

would enable courts to admit child-hearsay statements more freely when they comply with the Confrontation Clause. Part I explains the unique nature of child abuse prosecutions and why the hearsay testimony they often rely upon is generally both reliable and necessary. Part II discusses the reinvigorated Confrontation Clause and how admitted statements must comply with defendants' constitutional rights. Part III describes the current approach of Alaska courts for admitting child-hearsay in sexual abuse cases. Part IV suggests a statutory amendment to the Alaska Rules of Evidence for evaluating child-hearsay statements in a consistent fashion, based upon the first complaint rule. This proposed exception would strike the important balance of admitting statements even when a declarant is unavailable, while still complying with the new requirements set forth in the *Crawford* and *Davis* decisions. Given the special circumstances of child abuse, this more certain hearsay exception for statements of child sexual abuse victims would provide needed direction, consistency, and fairness in prosecutions, and protect vulnerable child witnesses.

I. THE UNIQUE NATURE OF CHILD SEXUAL ABUSE PROSECUTIONS

Questions about the admission of out-of-court statements are not unique to cases involving children, but "there are perhaps no other cases in which these questions arise so regularly and are imbued with such urgent significance."¹¹ Additionally, detecting and prosecuting sex offenders is notoriously difficult, "in large part because there often are no witnesses except the victim."¹²

A. Difficulties Faced in Child Sexual Abuse Prosecutions

The difficulty in prosecuting child sexual abuse cases arises partially because sexual abuse is such an intensely private crime. Often no one except the accused and the victim are present when the abuse takes place, and in many cases the abuser is a parent, relative, or trusted acquaintance of the child.¹³ This private nature ensures that abuse is

11. *Nitz v. State*, 720 P.2d 55, 60 (Alaska Ct. App. 1986).

12. *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

13. GOVERNOR'S REPORT TO THE IDAHO LEGISLATURE: PROSECUTION OF CHILD SEXUAL ABUSE, JULY 1, 2006–JUNE 30, 2007 at 22 (Jan. 2008), available at http://www2.state.id.us/ag/sexual_prosecution_reports/2007IdahoProsecutionOfChildSexualAbuseReport.pdf [hereinafter GOVERNOR'S REPORT] (illustrating a study that found that eighty-six percent of abusers were family members, friends, or acquaintances of their victims).

both underdisclosed and underreported.¹⁴ Child victims often experience low self-esteem, guilt, isolation, depression, embarrassment, and feelings of inadequacy.¹⁵ These feelings lead to a reticence to tell anyone about the abuse, and a tendency for children to feel responsible for and blame themselves for its occurrence.¹⁶ These and other traits of victimization make children unwilling, and in some cases unable, to answer the detailed questions relating to the abuse that police and prosecutors necessarily require.¹⁷ In cases where a child is old enough to understand the consequences of his or her decision to talk, the child may be forced to choose between the abuse and losing a parent or step-parent because of the abuse.¹⁸

Even when a child chooses to tell someone about the abuse, it is often difficult for police and prosecutors to find admissible evidence to corroborate the victim's claims. Many sex crimes do not involve physical penetration or contact that leaves physical marks such as bruises; instead, abuse takes the form of petting, fondling, or exhibitionism.¹⁹ These less violent methods of abuse can be perpetrated without leaving obvious physical evidence, and even when children are examined by medical professionals, no certain conclusions can be drawn. This often leaves prosecutors with precious little evidence outside of the children's statements to support accusations of child abuse.²⁰

When sufficient evidence is found and an alleged abuser is charged, the prosecution can be further hindered because children are often unable to tell their stories at trial. Victims are often too young to be competent witnesses or unable to cope with the trauma of being in a courtroom and facing their accuser, so they are declared unavailable.²¹ Even when they are able to testify, child-victims are often "unsophisticated," "inarticulate," and "emotionally torn by the experience."²² As witnesses, children are "impressionable, readily confused, and incapable of furnishing any detailed verbal account of [an] offense."²³ Beyond these weaknesses, children sometimes retract

14. See Prager, *supra* note 2, at 72.

15. Christopher Bagley, *Development of an Adolescent Stress Scale For Use of School Counselors*, 13 SCH. PSYCHOL. INT'L 31, 49 (1992).

16. Barbara Brooks Johnson, *Sexual Abuse Prevention: A Rural Interdisciplinary Effort*, 66 CHILD WELFARE 165, 165-67 (1987).

17. Lucy Berliner & Mary Kay Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125, 137 (1984).

18. *Id.*

19. GOVERNOR'S REPORT, *supra* note 13.

20. *Nitz v. State*, 720 P.2d 55, 60 (Alaska Ct. App. 1986).

21. *Id.*

22. *Id.*

23. *Id.*

true accusations of sexual abuse out of love, guilt, fear of reprisal, or fear that the offender will be sent to jail.²⁴

For jurors, child testimony about sexual abuse is often more traumatizing than valuable and is sometimes met with skepticism and disbelief.²⁵ As the Alaska Court of Appeals stated in *Nitz*:

Jurors are left with virtually no frame of reference for evaluating the credibility of the victim's story, which is bound to seem, at one and the same time, too serious to be accepted uncritically and too shocking to be rejected lightly. Reliance on personal experience and common sense will be of little value to most jurors: because the victim is a child and sexual abuse of children is a subject alien to the experience of most jurors a realistic context for evaluating truthfulness will be difficult to find.²⁶

The private nature of sexual abuse, lack of corroborating evidence for children's claims, and difficulties with child testimony indicate the need for hearsay statements in child sexual abuse prosecutions to be approached in a unique manner. To effectively prosecute child sexual abuse, prosecutors need more tools at their disposal.

B. Using Victims' Hearsay Statements in Child Sexual Abuse Prosecutions

The use of hearsay statements made by child victims can alleviate many of the shortcomings described above. Section 801 of the Alaska Rules of Evidence defines hearsay as "statement[s], other than [those] made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."²⁷ Hearsay statements are generally inadmissible under the Rules. The danger of this type of testimony is that its value rests upon the credibility of an out-of-court speaker whose memory, perception, narration, and sincerity cannot be tested by cross-examination.²⁸ The law is explicit that hearsay is admitted only under codified exceptions contained in the Rules, or

24. Glen Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 J. MARSHALL L. REV. 1, 6 (1984).

25. See *Brown v. United States*, 152 F.2d 138, 139 (D.C. Cir. 1945); *Fitzgerald v. United States*, 443 A.2d 1295, 1299 (D.C. 1982).

26. *Nitz*, 720 P.2d at 60-61.

27. ALASKA R. EVID. 801(c).

28. 2 MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 245-246, at 583-84 (Edward Cleary et al. eds., 1972) [hereinafter 2 MCCORMICK].

through other exceptions “prescribed by the Alaska Supreme Court, or by enactment of the Alaska Legislature.”²⁹

Exceptions to the hearsay rule are generally allowed for two reasons: reliability and necessity. Some out-of-court statements are made with circumstantial guarantees of reliability that substitute for in-court guarantees like an oath and cross-examination.³⁰ For example, a statement may be admitted as an excited utterance because it is made when the declarant is under the influence of a startling event and is therefore less likely to lie. Second, necessity sometimes justifies the use of hearsay evidence.³¹ For example, statements are admitted when a declarant is deceased or when the statements have unique evidentiary value that cannot be obtained from other sources.³² Section 803 of the Alaska Rules of Evidence contains a list of twenty-three codified exceptions to the general rule against hearsay.³³ Additionally, some common-law exceptions to the rule against hearsay survived the adoption of the Alaska Rules of Evidence and continue to be applied by Alaska courts.³⁴

Research shows that statements by victims of child sexual abuse are appropriately admitted under these exceptions.³⁵ First, children’s statements are generally reliable.³⁶ One study found that roughly ninety-five percent of children’s accusations are accurate.³⁷ Others show more generally that although children cannot provide descriptions of events in the same detail as adults, the information they do provide is just as

29. ALASKA R. EVID. 802.

30. 5 JOHN WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1420, at 251 (James H. Chadbourn ed. 1974) [hereinafter 5 WIGMORE] (noting that some hearsay is so reliable that cross-examination is a “work of supererogation”).

31. See FED R. EVID. Art. VIII advisory committee’s note (“[W]hen the choice is between evidence which is less than the best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without.”).

32. 5 WIGMORE, *supra* note 30, at 253.

33. ALASKA R. EVID. 803(1)-(23).

34. *Contreras v. State*, 718 P.2d 129, 136 (Alaska 1986) (citing *Greenway v. State*, 626 P.2d 1060 (Alaska 1980)) (noting that some common law evidence rules survived the adoption of the Alaska Rules of Evidence).

35. Gary Melton, *Procedural Reforms to Protect Child Witnesses in Sex Offense Proceedings*, CHILD SEXUAL ABUSE AND THE LAW: A REPORT OF THE NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, A.B.A. 184 (Josephine Bulkley ed., 1982).

36. Lucy Berliner & Mary Kay Barbieri, *The Testimony of the Child Victim of Sexual Assault*, J. SOC. ISSUES 125, 127 (1984) (“[T]here is little or no evidence indicating that children’s reports are unreliable, and none at all to support the fear that children often make false accusations of sexual assault or misunderstand innocent behavior by adults.”).

37. Faye A. Silas, *Would a Kid Lie: Probably Not, Studies Find*, A.B.A. J., Feb. 1985, at 17 (noting a study that found that roughly ninety-five percent of children’s accusations of sexual abuse were accurate).

accurate.³⁸ Studies also show that children can remember as much or more than adults when they are familiar with the situation.³⁹ In particular, children can develop a knowledge base for repeated experiences that become familiar to them.⁴⁰ In situations of repeated sexual abuse, these findings imply that children's memories of the abuse would likely improve as abuse is repeated and becomes more routine and familiar to them.⁴¹

Second, research shows that children are unlikely to lie about being sexually abused. Generally, children do not have the necessary vocabulary or knowledge about sexual matters to lie about them.⁴² Many do not even realize that what has happened to them is wrong,⁴³ and most are unlikely to promulgate a continuous lie to parents and authority figures for a substantial amount of time. Furthermore, studies show that children can separate fantasy from reality,⁴⁴ and they are unlikely to fabricate accusations of sexual acts they know little about.⁴⁵

Finally, children's out-of-court statements may be more accurate than in-court testimony. Children's memories can fade rapidly, indicating that statements made closer to the time of the assault may be more reliable than in-court testimony.⁴⁶ Studies show that cognitive and developmental limitations may restrain children's ability to relate events

38. JON'A F. MEYER, INACCURACIES IN CHILDREN'S TESTIMONY: MEMORY, SUGGESTIBILITY, OR OBEDIENCE TO AUTHORITY? 15 (1997) ("The few items children provide on free recall tend to be highly accurate.").

39. Michelle Chi, *Knowledge Structures and Memory Development*, CHILDREN'S THINKING: WHAT DEVELOPS? 73, 82 (Robert Siegler ed., 1978) (finding that young chess players are able to recall chess positions briefly presented to them better than adults unfamiliar with the game).

40. Stephen Lepore, *Child Witness: Cognitive and Social Factors Related to Memory and Testimony*, 3 ISSUES IN CHILD ABUSE ACCUSATIONS 65, 83 (1990).

41. MEYER, *supra* note 38, at 13.

42. Janet Flammang, *Interviewing Child Victims of Sex Offenders*, THE SEXUAL VICTIMOTOLOGY OF YOUTH 175, 177 (Leroy G. Schultz ed., 1980).

43. Thomas W. McCahill et al., *THE AFTERMATH OF RAPE* 44 (1979) ("In many cases, the nature of the event (or events) is merely confusing. Whereas the event is disturbing to the victim, it is perhaps no more disturbing than so many other aspects of a child's life.").

44. *See, e.g.*, Patricia Morison and Howard Gardner, *Dragons and Dinosaurs: The Child's Capacity to Differentiate Fantasy from Reality*, 49 CHILD DEV. 642, 645 (1978) (reporting that elementary school students could differentiate between real and fantastic images).

45. Marcia K. Johnson & Mary Ann Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory*, 33 J. SOC. ISSUES 33, 45 (1984); *see also* Kathleen Fuller, *Is the Child Victim of Sexual Abuse Telling the Truth?*, 8 CHILD ABUSE & NEGLECT 471, 475 (1984) (asserting that children will not make up stories because it is not "in their interests" to do so and many children lack the requisite sexual knowledge to convince an adult they have been victimized).

46. A. DANIEL YARMEY, *THE PSYCHOLOGY OF EYEWITNESS TESTIMONY* 204-05 (1979).

under pressure.⁴⁷ Requiring a child-victim to testify in a sexual abuse case often creates stress that could adversely affect the child's perception and memory.⁴⁸ The stress of testifying is intensified by the fact that most child-victims know their abuser as a relative or friend and must face him or her in the courtroom.⁴⁹

The use of hearsay testimony is more appropriate in child sexual abuse cases than in many other criminal cases. Children's out-of-court statements are generally reliable because children lack the knowledge and vocabulary necessary to fabricate stories of sexual abuse and lack the motive to lie about the incident in a free-recall situation; furthermore, they are not subject to the stress and possible manipulation of testifying against a loved one in court when making the out-of-court statements. These statements can be a powerful tool to help alleviate many of the problems prosecutors have in corroborating allegations of child sexual abuse.

II. THE CONFRONTATION CLAUSE AND ITS APPLICATION TO CHILD-HEARSAY STATEMENTS UNDER ALASKA LAW

Abuse cases too often end up as a swearing contest between a child victim and an abuser maintaining his innocence. When much of a case hinges on the testimony and credibility of a child, it is unfair to allow too much testimony "through a parade of articulate, experienced, adult witnesses who impart to the child's statements the mature eloquence of adulthood and a sense of their own credibility, while adding nothing of substance but the force of repetition."⁵⁰ This is particularly true when victims are found unavailable to testify and the defendant is unable to confront his accuser.

Courts must be careful in sexual abuse cases to protect defendants' constitutional rights.⁵¹ The Sixth Amendment mandates, "In criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."⁵² The clause is applied to the states through the Fourteenth Amendment⁵³ and is applicable when the state offers

47. *Id.*

48. *Cf. id.* at 208-09 (citing a study that showed children were adversely affected by the pressure of making identifications from lineups, in contrast to identifications made from slides).

49. GOVERNOR'S REPORT, *supra* note 13, at 22.

50. *Nitz v. State*, 720 P.2d 55, 61 (Alaska Ct. App. 1986).

51. *Id.*

52. U.S. CONST. amend. VI.

53. *Pointer v. Texas*, 380 U.S. 400 (1965) (holding that the Confrontation Clause was incorporated by the Due Process Clause of the Fourteenth Amendment and therefore binding on the states).

otherwise admissible hearsay against a criminal defendant. A literal reading of the Confrontation Clause would bar the admission of all hearsay evidence, but the Supreme Court has not interpreted the clause this way.⁵⁴ However, the clause places significant limits on the use of hearsay evidence by generally requiring the declarant to testify and be cross-examined.⁵⁵ The requirements of the Sixth Amendment reflect the longstanding belief that face-to-face confrontation at trial enhances the truth-finding process by allowing the jury the best opportunity to judge the credibility of the witness under oath.⁵⁶

A. The Confrontation Clause's Evolution from the Adequate Indicia of Reliability Approach to the Testimonial Statement Approach

Recent decisions have dramatically altered the application of the Confrontation Clause to hearsay statements. For nearly a quarter of a century, courts viewed statements under the criteria set forth in *Roberts v. Ohio*.⁵⁷ *Roberts* held that, to be admissible under the Confrontation Clause, hearsay statements had to be "necessary" and "reliable."⁵⁸ "Necessity" required that the prosecution "produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."⁵⁹ "Reliability" required that the statement be admissible only under a firmly-rooted exception to the hearsay rule or where evidence existed showing particularized guarantees of trustworthiness.⁶⁰ Unless the evidence fit within a "firmly rooted hearsay exception," or

54. *Mattox v. United States*, 156 U.S. 237, 243 (1895) (holding that the general prohibition against hearsay evidence must "occasionally give way to considerations of public policy and the necessities of the case"); see also *California v. Green*, 399 U.S. 149 (1970).

55. *Pointer*, 380 U.S. at 406-07; *Mattox*, 156 U.S. at 242-43.

56. 5 WIGMORE, *supra* note 30, § 1420 ("The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.").

57. 448 U.S. 56 (1980). *Roberts* and its progeny defined Confrontation Clause rights from 1980 until the Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

58. *Roberts*, 448 U.S. at 65-66.

59. *Id.* at 65.

60. *Id.* at 65-66.

the defendant had a prior chance to cross-examine the witness,⁶¹ the testimony had to be excluded.⁶²

In *Crawford v. Washington*,⁶³ the Court altered the paradigm for Confrontation Clause analysis and ostensibly overruled *Roberts*.⁶⁴ Justice Scalia, speaking for the Court, held that the “firmly rooted hearsay exception[s]” or “particularized guarantees of trustworthiness” under *Roberts* were not enough to protect defendants’ Confrontation Clause rights.⁶⁵ Instead, the Court held that the Confrontation Clause would bar the admission of all “testimonial statements” unless the declarant was available as a witness or the defendant had prior opportunity to cross-examine him.⁶⁶ The Court defined “testimony” as “a solemn declaration or affirmation made for the purpose of establishing or proving some fact,”⁶⁷ and noted by example that “an accuser making a statement to government officers bears testimony in a sense that a person who makes a casual, offhand remark to an acquaintance cannot.”⁶⁸ Some statements qualify as testimonial under any definition of testimonial, such as ex parte testimony at a preliminary hearing.⁶⁹ However, the Court refused to more thoroughly define “testimonial.”⁷⁰

In the Court’s consolidated decision in *Davis v. Washington* and *Hammon v. Indiana*,⁷¹ Justice Scalia returned to the task of defining “testimonial” and set out an “objective” test:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose is to

61. *Id.* at 66.

62. *Id.*

63. 541 U.S. 36 (2004).

64. *Id.* at 74 (Rehnquist, J., concurring) (“In choosing the path it does, the Court of course overrules *Ohio v. Roberts*, 448 U.S. 56 (1980), a case decided nearly a quarter of a century ago.”); see also *Valdivia v. Schwarzenegger*, 548 F. Supp. 2d 852, 862 (E.D. Cal. 2008) (noting that *Crawford* completely overturned *Roberts* but that *Idaho v. Wright*, 497 U.S. 805 (1990), was only partially overturned).

65. *Crawford*, 541 U.S. at 60.

66. *Id.* at 53–54.

67. *Id.* at 51 (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

68. *Id.*

69. *Id.* at 52.

70. *Id.* at 68 (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”).

71. 547 U.S. 813 (2006).

establish or prove past events potentially relevant to later criminal prosecution.⁷²

In *Davis*, the Court distinguished two sets of statements according to this “primary purpose” test. It found statements made by the victim during a 911 call to be non-testimonial, even though they accused the defendant and described an assault.⁷³ The Court reasoned that the statements were made during an ongoing emergency, and that the operator’s questions were designed to enable police assistance and not to investigate the crime.⁷⁴ Another set of statements, made by a victim in response to police questioning shortly after an assault, were found to be testimonial because the purpose of the questioning was to investigate a crime in preparation for filing charges.⁷⁵

The *Davis* decision left important questions unanswered. The Court declined to establish a bright line rule regarding what statements are considered “testimonial” or “interrogatory” or explicitly state whose purpose (i.e., the questioner or the responder) is most relevant in determining whether a statement is testimonial.⁷⁶ Importantly, *Crawford* and *Davis* involved statements made to police officers, who are typically not the recipients of the first complaint in child abuse cases. It is not yet clear whether statements made to private parties can be considered testimonial.⁷⁷

B. Application of the Confrontation Clause to Child Abuse Cases

The Supreme Court has given very few reference points for examining the renewed Confrontation Clause’s effect on child hearsay statements. In *Crawford*, the Court referred to *White v. Illinois*.⁷⁸ In that

72. *Id.* at 822.

73. *Id.* at 827.

74. *Id.*

75. *Id.* at 828.

76. GEORGE FISHER, EVIDENCE 615 (2d ed. 2008).

77. See *Davis v. Washington*, 547 U.S. 813, 822 n.2 (2006) (conceding that the analysis did not reach the question of “whether and when statements made to someone other than law enforcement personnel are ‘testimonial’”); see also Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: “A Little Child Shall Lead Them,”* 82 IND. L. J. 917, 920–43 (2007). Professor Mosteller makes reference to *White v. Illinois*, 502 U.S. 346 (1992); *Idaho v. Wright*, 497 U.S. 805 (1990); and *The King v. Brasier*, 168 Eng. Rep. (1779) as reference points in applying the *Davis/Crawford* paradigm to hearsay in child abuse cases.

78. *Crawford v. Washington*, 541 U.S. 36, 58 n.8 (2004) (“One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White v. Illinois*, 502 U.S. 346 (1992), which involved, *inter alia*, statements of a child victim to an investigating police officer admitted as spontaneous declarations.”).

case, the trial court admitted hearsay statements made by a child sexual abuse victim to a babysitter, mother, police officer, nurse, and doctor under various hearsay exceptions.⁷⁹ The Court affirmed admission of the statements under the “excited utterance” and “statement to medical professional” exceptions to the hearsay rule, finding that those exceptions were firmly rooted and that therefore the testimony was independently reliable.⁸⁰ Justice Scalia’s reference in *Crawford* indicates that the victim’s statements to the police officer likely conflicted with the Confrontation Clause.⁸¹ Interestingly, Scalia made no reference to the testimony of the babysitter, mother, nurse, and doctor.⁸² This explicit reference to the police officer’s statements, while not identifying the statements made to the parent, babysitter, nurse and doctor as testimonial, offers a guidepost in interpreting the clause in child sexual abuse cases.⁸³

Allowing the testimony of private parties in child sexual abuse cases makes sense under the objective test set forth in *Davis*. When a parent, babysitter or doctor asks a child what is bothering him or what caused certain injuries, the primary purpose of the questioning is not to “establish or prove past events potentially relevant to later criminal prosecution.”⁸⁴ Instead, the point of the questioning is almost always to solve the problem; in other words, to enable “assistance to meet an ongoing emergency.”⁸⁵ Because of the tremendous risks associated with child sexual abuse and its nefarious and private nature, even if a child is not in immediate danger when questioned, the situation might be considered an emergency for Confrontation Clause purposes.

In applying *Crawford* and *Davis*, appellate courts have used the *White* guidepost and the *Davis* criteria to determine if hearsay statements are testimonial. Their analysis has included examining the identity of a questioner and her relationship to the State, the purpose of the questioning, the knowledge or belief of the child as to the future use of the child’s statements, and the situation’s formality and relationship to law enforcement.⁸⁶ A victim’s statements to parents, family members,

79. 502 U.S. at 350–51.

80. *Id.* at 356.

81. *Id.*

82. *Id.*

83. Mosteller, *supra* note 77, at 942–44.

84. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

85. *Id.*

86. *State v. Shafer*, 128 P.3d 87 (Wash. 2006) (holding statements made to the victim’s mother and a family friend non-testimonial under these criteria), *cert. denied sub nom. Shafer v. Washington*, 549 U.S. 1019 (2006); *see also State v. Hosty*, 944 So.2d 255, 261 (Fla. 2006) (holding statements made by a twenty-three-year-old mentally handicapped sexual abuse victim to a teacher were not testimonial).

and friends have generally been treated as non-testimonial.⁸⁷ Statements to medical professionals who first examine a child after an incident are also generally treated as non-testimonial.⁸⁸ Alternatively, statements to police officers are routinely classified as testimonial regardless of the age of the child or the formality of the circumstances involved.⁸⁹

In *State v. Pantano*,⁹⁰ the Nevada Supreme Court drew an explicit contrast between statements made by children to their parents and statements made to police:

A parent questioning his or her child regarding possible sexual abuse is inquiring into the health, safety, and well-being of the child. To characterize such parental questioning as the gathering of evidence for the purposes of litigation would unnecessarily and undesirably militate against a parent's ability to support and nurture a child at a time when the child most needs that support. We therefore conclude that [the child's] statements to her father were nontestimonial in nature.⁹¹

but that statements made to a police officer were testimonial); In the Interest of N.D.C., 229 S.W.3d 602, 606 (Mo. 2007) (holding that statements to a child-victim's mother were admissible under *Crawford*).

87. *State v. Coder*, 968 A.2d 1175, 1186 (N.J. 2009) (holding a child-victim's statements to her mother admissible as non-testimonial statements under the *Crawford* analysis); see also *State v. Brigman*, 615 S.E.2d 21, 23-24 (N.C. Ct. App. 2005) (holding statements to a foster parent were non-testimonial); *People v. Vigil*, 127 P.3d 916, 920-21 (Colo. 2006) (holding statements to the victim's father and the father's friend were non-testimonial).

88. *United States v. Peneaux*, 432 F.3d 882, 896 (8th Cir. 2005) ("Where statements are made to a physician seeking to give medical aid in the form of diagnosis or treatment, they are presumptively nontestimonial."); see also *People v. Cage*, 155 P.3d 205, 218-20 (Cal. 2007) (holding statements made to a doctor in an emergency room were non-testimonial); *Foley v. State*, 914 So.2d 677, 685 (Miss. 2005) (holding statements made as part of neutral medical evaluations did not meet *Crawford's* "testimonial" criterion).

89. See, e.g., *Cage*, 155 P.3d at 210, 217-18 (holding statements made to police officers during an informal emergency room meeting were non-testimonial); *State v. Grace*, 111 P.2d 28, 31, 38 (Haw. Ct. App. 2005) (holding statements by a child victim to a police officer were non-testimonial).

90. 138 P.3d 477 (Nev. 2006). In *Pantano*, the child testified and was available for cross-examination; the court recognized that the Confrontation Clause was not violated regardless of whether the statement was testimonial, but addressed the issue because it wanted to clarify treatment of this class of statements. *Id.* at 482.

91. *Id.* at 483.

C. Alaska's Application of *Crawford* and *Davis*

The Alaska Court of Appeals has not directly addressed how the Confrontation Clause should be applied in sexual abuse cases; however, its decisions offer some guidance in addressing hearsay testimony after *Crawford* and *Davis*. First, the court has followed the distinction the Supreme Court drew in *Crawford* between statements made to government officials investigating a crime and statements made to friends or acquaintances.⁹² Since victims' out-of-court statements are most often made to family members, medical personnel, or social workers, and not to police officers, this distinction carries special import.

Second, the court has used an "entirety of the circumstances" analysis to apply the *Davis* "primary purpose" test. In *Clark v. State*,⁹³ the court held that hearsay statements identifying the assailant in a physical abuse case did not violate the Confrontation Clause.⁹⁴ The victim, Amouak, was allegedly beaten by her boyfriend, Clark.⁹⁵ When she arrived at the hospital for treatment, Amouak told emergency room personnel that Clark had assaulted her.⁹⁶ During trial, the State relied on medical records describing Amouak's statements identifying Clark.⁹⁷

The court found that based on the entirety of the circumstances—"the underlying events of the evening in question, plus the subsequent actions and statements of Amouak, the nurse, and the doctor"—it was objectively clear that the victim and medical personnel acted with the primary purpose of obtaining or providing medical care.⁹⁸ This analysis corresponds with that of other courts, which have found statements made by children to parents, medical personnel, and social workers admissible under the primary purpose test.⁹⁹

Finally, even first complaints made to a police officer might be admissible when the statements were made to stop an ongoing emergency. In *Anderson v. State*,¹⁰⁰ the court of appeals evaluated statements made by an assault victim to the police.¹⁰¹ When the officers arrived after the assault had ended, they were led to the victim, who was lying on the floor in the fetal position and had suffered life-

92. *Potterfield v. State*, 145 P.3d 613, 614 (Alaska Ct. App. 2006).

93. 199 P.3d 1203 (Alaska Ct. App. 2009).

94. *Id.* at 1213.

95. *Id.* at 1205.

96. *Id.*

97. *Id.*

98. *Id.* at 1213.

99. *See supra* notes 88–89.

100. 163 P.3d 1000 (Alaska Ct. App. 2007).

101. *Id.* at 1001.

threatening injuries.¹⁰² When the officer asked the victim to describe “what happened,” the victim identified the assailant as Anderson, the man police had apprehended in the apartment’s other room.¹⁰³ The court found the officer’s question was focused on determining the nature and extent of the injuries and the assistance that would be needed.¹⁰⁴ Furthermore, the officer initially knew only that someone had been hurt and not that a crime had been committed.¹⁰⁵ Under these circumstances, the court held that the officer’s question and the victim’s statement had the primary purpose of ending the ongoing emergency and were therefore non-testimonial.¹⁰⁶

Under this analysis, in certain circumstances a child’s statement to a police officer about ongoing abuse may be admitted without offending a defendant’s Sixth Amendment rights. Because of the secretive nature of sexual abuse and general absence of physical harm, only rarely will this be the case. However, in cases where a child is raped or sexually assaulted, this analysis shows that statements admissible under a hearsay exception may not violate the Confrontation Clause, even if made to police officers.

III. ADMITTING CHILD HEARSAY STATEMENTS UNDER THE ALASKA RULES OF EVIDENCE

The reliability and necessity of hearsay evidence in sexual abuse trials has caused it to be admitted under a variety of codified and common-law exceptions in Alaska. A discussion of the currently used exceptions illustrates, however, the weaknesses of this ad-hoc approach and the necessity of a more systematic regime for admitting child-hearsay statements. Such a regime could protect the rights of both children and defendants. This discussion is not meant to encompass all methods used to introduce hearsay testimony in sexual abuse cases, but rather to illustrate that the court’s and legislature’s current approach to child hearsay is inadequate, and to suggest a new hearsay exception that would recognize the unique reliability of child hearsay statements.

102. *Id.* at 1004.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1005.

A. Excited Utterance Hearsay Exception

One important way in which hearsay statements are admitted when a child abuse victim is unavailable as a witness is the “excited utterance” exception codified in the Alaska Rules of Evidence as Rule 803(2).¹⁰⁷ The rule is supported by the basic theory that certain circumstances “may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of fabrication.”¹⁰⁸ Because such statements are inherently reliable, the availability of the declarant is immaterial. A declaration may be admitted as an excited utterance only when it is “sufficiently contemporaneous with the event” that it can be regarded as having been stimulated by the event and not by the declarant’s deliberation.¹⁰⁹ Declarations made after the shocking circumstances have faded are not admissible as excited utterances.¹¹⁰

Alaska’s application of the excited utterance exception in child abuse cases has generally followed these principles. The Alaska Supreme Court announced the test for determining if a statement is an excited utterance in *Beech Aircraft Corp. v. Harvey*:¹¹¹ “Was the declaration spontaneous, excited, or impulsive, or was it the product of reflection and deliberation?”¹¹² Application of the test has focused on whether there was opportunity for “reflection”¹¹³ or “reflective thought”¹¹⁴ before a statement was made. Courts have used the amount of time between an exciting event and a statement to determine whether there was opportunity for reflection. In *Torres v. State*,¹¹⁵ the Alaska Supreme Court admitted evidence of a child victim’s complaint to her mother as an excited utterance.¹¹⁶ Approximately five to ten minutes had elapsed between the assault and the young girl’s statement to her mother.¹¹⁷ The

107. ALASKA R. EVID. 803(2) (“A statement relating to a startling event or condition made *while the declarant was under the stress of excitement* caused by the event or condition.” (emphasis added)).

108. FED. R. EVID. 803(2) advisory committee’s note.

109. 2 WHARTON’S CRIMINAL EVIDENCE § 288, at 226 (Charles E. Torcia ed., 14th ed. 1986).

110. *Vandiver v. State*, 726 P.2d 195, 198 (Alaska Ct. App. 1986) (“We recently recognized that, in order to qualify as an excited utterance, a statement must be made while under the stress of the event, and must not be the product of reflective thought.”).

111. 558 P.2d 879 (Alaska 1976).

112. *Id.* at 884.

113. *Lipscomb v. State*, 700 P.2d 1298, 1307 (Alaska Ct. App. 1985).

114. *State v. Agoney*, 608 P.2d 762, 764 (Alaska 1980).

115. 519 P.2d 788 (Alaska 1974).

116. *Id.* at 793.

117. *Id.* at 792.

court looked to the short period of elapsed time and evidence that the girl was “excited and emotionally upset” in reasoning that there had been little opportunity for deliberation or fabrication.¹¹⁸ In contrast, the Alaska Court of Appeals in *Sluka v. State*¹¹⁹ concluded that a child’s out-of-court statements made nearly four hours after a physical assault did not qualify as excited utterances.¹²⁰ The court reasoned that the length of time between the attacks and the statements, and the dearth of evidence that the child had been “emotionally engulfed by the situation,” necessitated a denial of the exception.¹²¹

The focus on spontaneity and the time between an assault and a statement fails to account for the unique circumstances surrounding child sexual abuse. According to the excited utterance rule, a child’s hearsay report must take place soon after an assault. This is inadequate in sexual abuse cases for several reasons.¹²² First, many children do not regard sexual abuse as shocking or even unusual.¹²³ Often, children act normally because they do not know what child molestation is or understand why an abuser committed the act. Some children even view sexual incidents as expressions of warmth and affection.¹²⁴ Dr. Alfred Kinsey described children’s view of sexuality this way:

[C]hildren have only a dim sense of adult sexuality. What may seem like a horrible violation of social taboos from an adult perspective need not be so to a child. A sexual experience with an adult may be something unusual, vaguely unpleasant, even traumatic at the moment, but not a horror story. Most children’s sexual experiences involve encounters with fondlers and exhibitionists, . . . and it is difficult to understand why a child, except for its cultural conditioning, should be disturbed

118. *Id.* at 793.

119. 717 P.2d 394 (Alaska Ct. App. 1986).

120. *Id.* at 398.

121. *Id.* The court also referenced the fact that the child’s statements had come as a response to questioning, a very common situation in child abuse cases. *Id.* While the court did not hold the amount of time that had elapsed, emotional state, or fact that the statement was a response to a question as dispositive, the totality of the circumstances indicated that the statements were not reliable enough to be excited utterances. *Id.*

122. See Judy Yun, Note, *A Comprehensive Approach to Hearsay Statements in Child Sex Abuse Cases*, 1983 COLUM. L. REV. 1745, 1755 (1983) (discussing inadequacies of excited utterance exceptions for child-hearsay statements).

123. McCahill, *supra* note 43, at 44.

124. Kee MacFarlane, *Sexual Abuse of Children*, THE VICTIMIZATION OF WOMEN 88–89 (Jane Chapman Roberts ed., 1978).

at having its genitals touched, or disturbed at seeing the genitals of other persons.¹²⁵

Second, children may make complaints long after a sexual act; hours, days, months,¹²⁶ or even years¹²⁷ may elapse before a child reports abuse. A delay can be caused by numerous factors, including feelings of confusion or guilt, fears of not being believed, efforts to forget, or threats made by the defendant to the victim.¹²⁸ In many cases, a child will remain silent until circumstances compel him to recount the experience.¹²⁹

Because of these stark realities, courts in many jurisdictions have stretched the excited utterance exception beyond its traditional limits in order to admit hearsay testimony of child sexual abuse victims.¹³⁰ These courts made decisions to avoid the harsh results of a strict hearsay exception that could destroy the prosecution's entire case. Such a broad application of the exception destroys its integrity and leaves precedent that is inconsistent and difficult to follow.

B. The Residual Exception

Alaska's courts have sometimes used the residual or "catch-all" hearsay exception¹³¹ in sexual abuse cases to admit child hearsay

125. ALFRED KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 121 (1953).

126. *See Greenway v. State*, 626 P.2d 1060 (Alaska 1980) (finding that a child victim did not report a rape for over one month after its commission).

127. *See Emery v. State*, No. A-7799, No. 4608, 2002 Alas. App. LEXIS 198 (Alaska Ct. App. Aug. 14, 2002). The victim, who had been abused for several years by her stepfather, did not go to authorities for more than two years after the last act of abuse. *Id.* at *5. The court allowed an expert witness to explain why a child often does not report child abuse immediately, especially against a family member. *Id.*

128. *Greenway*, 626 P.2d at 1061.

129. *See, e.g., State v. Messamore*, 639 P.2d 413, 416 (Haw. Ct. App. 1982).

130. *See, e.g., Smith v. State*, 252 A.2d 277, 278-79 (Md. Ct. Spec. App. 1969) (allowing the hearsay statement of a four-year-old rape victim although the statement was made four to five hours after the assault and the child had been calm at the hospital for several hours before the statement), *State v. Noble*, 342 So.2d 170, 172-73 (La. 1977) (admitting as excited utterances statements of a four-year-old victim made two days after the rape), *Haley v. State*, 247 S.W.2d 400, 401 (Tex. Crim. App. 1952) (admitting as excited utterances statements of a child victim more than eight hours after a rape).

131. ALASKA R. EVID. 803(23); ALASKA R. EVID. 804(b)(5). These exceptions allow hearsay statements not covered by any other hearsay exception provided that the statement has "circumstantial guarantees of trustworthiness" and provided 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)

statements that cannot qualify under any other hearsay exception. In particular, this exception has been used when a declarant is unavailable but his statement cannot fit into the excited utterance exception. In *Broderick v. Kings Way Assembly of God Church*,¹³² the Alaska Supreme Court defined the residual exception's requirements and emphasized its proper use.¹³³ A young child told her mother that a church nursery worker had committed sexual abuse.¹³⁴ At trial, the only identification of the alleged abuser came from testimony by the girl's mother.¹³⁵ The court's analysis focused on whether the circumstances surrounding the child's statement provided indicia of reliability equivalent to those of other hearsay exceptions.¹³⁶ It held that the child's testimony was inherently reliable based on her young age, childish terminology, consistency, and lack of motive to lie.¹³⁷ These factors correspond to those used by courts in other jurisdictions to allow child abuse statements to be admitted under the residual hearsay exception.¹³⁸

Some commentators have advocated using the *Broderick* court's application of the residual hearsay exception on a more generalized basis, in essence creating a hearsay exception for child abuse statements based on the criteria of the residual exception.¹³⁹ The *Broderick* court, however, explicitly stated that while "the residual exception may sometimes be appropriate in the child abuse context," it "does not create a new class exception to the hearsay rule."¹⁴⁰

Although basing the introduction of children's reports of sexual abuse on the residual hearsay exception might offer courts more flexibility, such an approach is inadequate for two reasons. First, as the court noted in *Broderick*, it would expand the rule beyond its limited intent.¹⁴¹ The exception was not intended to allow an entire class of hearsay statements to be admitted pursuant to its requirements.¹⁴²

the general purposes of these rules and interest of justices will best be served by admission of the statement into evidence." ALASKA R. EVID. 803(23).

132. 808 P.2d 1211 (Alaska 1991).

133. *Id.* at 1218. The court noted the widespread use of the residual exception in other states and circuits. *Id.* at 1218 n.17.

134. *Id.* at 1214.

135. *Id.* at 1217.

136. *Id.* at 1219-20.

137. *Id.*

138. *See, e.g.,* *Bertrang v. State*, 184 N.W.2d 867 (Wis. 1971).

139. NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, AMERICAN BAR ASSOCIATION, RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES 35 (1982).

140. *Broderick*, 808 P.2d at 1218.

141. *Id.*

142. *Id.*

Instead, the rule was intended to be used rarely and only in special circumstances.¹⁴³

Second, some statements allowed under the residual exception would likely fail to meet the exacting standards of the Court's reinvigorated Confrontation Clause. Statements by child victims to police and other agents of the state might meet the criteria of the residual exception, but would be classified as testimonial and prohibited by the Sixth Amendment.

C. Medical Records Exception

Hospital records, including statements made by patients about how their injuries occurred, are admissible under Section 803(4) of the Alaska Rules of Evidence. Although these statements are generally made in response to questions, the statements are viewed as highly reliable because patients believe that the quality of their medical care is contingent upon the accuracy of the information they give to their doctors.¹⁴⁴ The exception admits statements made to all medical personnel—not only doctors—so long as the statement is related to diagnosis and treatment.¹⁴⁵ The medical records exception is particularly useful in child sexual abuse cases because it does not require that the victim be available to testify.

Alaska courts' application of the medical records exception generally mirrors application of the federal exception. Evidence is admissible as long as it relates to the cause of the victim's condition.¹⁴⁶ A statement that assigns fault or identifies the assailant, however, is inadmissible.¹⁴⁷ In *Johnson v. State*, the Alaska Supreme Court explained the distinction: "Since statements fixing fault and indicating the identity of an assailant are not relevant to medical diagnosis or treatment, they lack assurances of reliability and should be excluded."¹⁴⁸

In the recent case of *Clark v. State*,¹⁴⁹ the Alaska Court of Appeals applied the exception in evaluating the admissibility of an assault victim's statements to her doctor regarding her injuries.¹⁵⁰ The court

143. *Id.*

144. 2 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE, PRACTITIONER TREATISE SERIES 246-47 (1992).

145. *Id.* at 248.

146. *Johnson v. State*, 579 P.2d 20, 22 (Alaska 1978) (holding statements that identified the victim's attacker are inadmissible under the medical records exception).

147. *Id.*

148. *Id.*

149. 199 P.3d 1203 (Alaska Ct. App. 2009).

150. *Id.* at 1205.

held as admissible evidence that the injuries were inflicted by another person, the manner they were inflicted, and the amount of force used by the perpetrator.¹⁵¹ The identity of the perpetrator, however, was inadmissible under *Johnson*.¹⁵²

The medical records exception will continue to be a valuable tool in prosecuting sex offenders; however, its use is still limited because the identity of the perpetrator is generally inadmissible under the exception. In some cases where a victim is unavailable to testify, his or her statement to medical personnel may be the only evidence that the child named the abuser. As with the excited utterance and residual hearsay exceptions, in this situation, courts are faced with a difficult decision between expanding an exception beyond its traditional form or allowing valuable evidence identifying an alleged abuser to slip away.

D. Recorded Statement by Child Victims of Crime

Section 801(d)(3) of the Alaska Rules of Evidence contains a special exception for recorded statements made by child sexual abuse victims. The exception allows recorded statements made prior to a trial to be shown to the jury, provided the defendant is available as a witness to be cross-examined.¹⁵³ Exceptions like 801(d)(3) were enacted in many states during the 1980s in an attempt to solve issues surrounding children's ability to testify in the courtroom.¹⁵⁴ Prerecorded statements can also preserve child testimony from memory loss or recantation.

Alaska's statutory exception complied with the Confrontation Clause as it was then enforced under *Roberts*, by requiring that the victim be available for cross-examination. However, the exception still inadequately balances the rights of the accused with the special nature of child abuse testimony. Like the current application of the first complaint doctrine, the recorded statement exception requires that a victim be available for cross-examination. This means that a child's statements are most likely to be prohibited in cases where they are most necessary.¹⁵⁵

151. *Id.*

152. *Id.*

153. ALASKA R. EVID. 801(d)(3).

154. *See, e.g.,* TEX. CODE CRIM. P. ANN. art. 38.071 (2007) (Texas videotaping statute admitting the result of a child interview by a neutral investigator).

155. Where a victim is available to testify, corroborating hearsay might be allowed under the first report exception, or if the victim's story is impugned, under the prior consistent statement theory. It is where victims are unavailable due to absence, age, or trauma that a videotaped statement might be most helpful.

Furthermore, the statutory prerecorded statement exception is most likely to be used when the victim is available on videotape in a controlled and prepared setting, but unavailable in the courtroom because of the trauma of live testimony.¹⁵⁶ Under the current law, the standard of availability for cross-examination is low, and courts are lenient in allowing prosecutors to introduce videotaped testimony.¹⁵⁷ Nonetheless, it is unclear whether this lenient standard should allow the admission of such psychologically powerful testimony.¹⁵⁸ Under the “primary purpose” test announced in *Davis*,¹⁵⁹ videotaped testimony would be testimonial because the purpose of the interview is to prepare the statement for trial. It seems likely that the Confrontation Clause requires that, when presenting the videotaped testimonial statements of a young child under 801(d)(3), the child must be available for cross-examination about the statements and the circumstances of their making; otherwise, they should be deemed inadmissible.

E. The First Complaint Doctrine

The first complaint exception to the hearsay rule evolved from the original “hue and cry” doctrine of the English common law.¹⁶⁰ This doctrine presupposed that a victim of violent crime would immediately cry out and alert her neighbors that she had been assaulted.¹⁶¹ This theoretically allowed neighbors and friends to search for the aggressor and dispelled any notion that the victim was complicit in the crime.¹⁶²

156. See *Vaska v. State*, 135 P.3d 1011, 1021 n.50 (Alaska 2006). The court noted that at the defendant’s original trial the victim was “so terrified of appearing as a witness that she hid under a table in the court building’s law library and could not be convinced to come out, or even to communicate, despite repeated entreaties by the prosecuting attorney.” *Id.*

157. See *United States v. Owens*, 484 U.S. 554, 559 (1988). The Confrontation Clause guarantees an opportunity for effective cross-examination, not successful cross-examination. *Id.* A witness has “appeared for cross-examination” for Confrontation Clause purposes if he has taken the stand and willingly answered questions, even if he has no recollection of the facts underlying the prior statement and minimal recollection of making the prior statement. *Id.* at 559–60.

158. For a discussion of the complexity of the right to effective cross-examination, see Lisa Kern Griffin, *Circling around the Confrontation Clause: Redefined Reach but not a Robust Right*, 105 MICH. L. REV. FIRST IMPRESSIONS 16, 19–20 (2006), available at <http://students.law.umich.edu/mlr/firstimpressions/vol105/griffin.pdf>.

159. 547 U.S. 813, 822 (2006); see also *supra* notes 144 to 148 and accompanying text.

160. 4 JOHN WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1134 (James H. Chadbourn ed., 1972) [hereinafter 4 WIGMORE] (explaining the original purpose of the “hue and cry” in English common law).

161. *New Jersey v. Hill*, 578 A.2d 370, 374 (N.J. 1990).

162. *Id.*

The doctrine gradually fell out of favor for most violent crimes, as it proved generally ineffective in leading to the aggressor's apprehension, and even one complicit in the crime could raise the cry.¹⁶³ However, its importance in rape and sexual assault prosecutions increased as the primary purpose of the "hue and cry" evolved from a method of facilitating an aggressor's capture to a method of dispelling any suspicion that a victim had fabricated assault charges.¹⁶⁴ Under this doctrine, evidence of a victim's complaint was fully admissible as substantive evidence and was an important part of the State's case-in-chief, rebutting the presumption that if no complaint was made, then no violence had been committed.¹⁶⁵

During the early 1800s, as evidence rules were developed and the prohibition against hearsay gained importance, complaints still admitted under the "hue and cry" tradition became suspect and courts enforced a somewhat more stringent fresh complaint rule.¹⁶⁶ The rule admitted evidence that a victim had made a "fresh complaint"—a complaint made shortly after the incident¹⁶⁷—but excluded most of the details of the complaint, including identification of the assailant, and prevented the testimony from being used to show that an assault actually occurred.¹⁶⁸ The evidence of the complaint was admitted for the sole purpose of forestalling the "natural assumption"¹⁶⁹ that if a woman had not complained to someone, then she had not been harmed.¹⁷⁰ Courts have applied this principle to require that the victim of a crime must testify, since the testimony's sole purpose is to repel the inconsistency between the victim's current testimony and former silence.¹⁷¹

The Alaska Supreme Court initially recognized the first complaint exception to the hearsay rule in a footnote in *Torres v. State*.¹⁷² In

163. *Id.*

164. *Id.*

165. 4 WIGMORE, *supra* note 160, § 1134.

166. *Hill*, 578 A.2d at 375.

167. 4 WIGMORE, *supra* note 160, § 1135.

168. *Hill*, 578 A.2d at 375.

169. 4 WIGMORE, *supra* note 160, § 1135.

170. *Id.* The evidence was admitted during the prosecution's case in chief, and in the process it preemptively negated evidence not yet introduced by the opponent. Wigmore explained this apparent paradox: "[T]his process is regular enough in reality, because the impression upon the tribunal would otherwise be there as if the opponent had really offered evidence of the woman's silence." *Id.*

171. *Id.* § 1136.

172. 519 P.2d 788, 793 n.9 (Alaska 1974). In that case, an eight-year-old victim had complained of a sexual assault to her mother five to ten minutes after the occurrence. While the court admitted the statement as an excited utterance, it

Greenway v. State, the court more clearly defined and applied the exception.¹⁷³ Harold Greenway was convicted of raping his thirteen-year-old stepdaughter in July 1978.¹⁷⁴ According to the victim, Greenway threatened to kill her if she told anyone about the rape.¹⁷⁵ Three days after the assault, she allegedly mentioned the incident to her mother, but the mother misinterpreted the conversation and took no action.¹⁷⁶ When school started in September, the victim reported the rape to her high school counselor.¹⁷⁷ The trial court allowed the testimony of both the mother and the counselor.¹⁷⁸

The Alaska Supreme Court affirmed the trial court's decision to admit testimony from the mother and the counselor, applying the exception it first acknowledged in *Torres*.¹⁷⁹ The court noted:

In a prosecution for a sex crime, such as rape or assault with intent to rape, it may be shown by testimony of the prosecutrix or by that of some other witness, that the prosecutrix made complaint of the crime shortly after its commission. Such evidence tends obviously to indicate the truth of the charge and is corroborative thereof; conversely, evidence of the failure to make a prompt complaint casts doubt upon the truth of the claim that a crime had been committed.¹⁸⁰

The court failed to further explain its reasoning, leaving application of the principle to lower courts' understanding of the Wigmore and Wharton evidence texts. The court did indicate in a footnote that the exception would allow only the admission of the fact of a complaint, but not the details of that complaint.¹⁸¹ It also admitted the statement despite the one-month delay between the assault and the victim's conversation with her guidance counselor, finding that the delay was explained by the victim's age and Greenway's threats.¹⁸² In doing so, the court held that delay in reporting does not necessitate excluding a complaint, but

noted that the statement might also be admissible under the fresh complaint doctrine. *Id.* at 790-97.

173. 626 P.2d 1060 (Alaska 1980).

174. *Id.* at 1060.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 1060-61 (quoting 2 WHARTON'S CRIMINAL EVIDENCE § 313 (Charles E. Torcia ed., 13th ed. 1972)).

181. *Greenway*, 626 P.2d at 1061 n.4.

182. *Id.* at 1061.

rather is a factor that may be considered in weighing the complainant's testimony.¹⁸³

The rule set out in *Greenway* continues the gradual evolution of the fresh complaint doctrine. Although the fact that an assault had taken place is admissible during the prosecution's case-in-chief to corroborate the victim's testimony and repel any assumption that might be inferred from a victim's silence, under *Greenway*, the details of the assault and the identification of the perpetrator are not admissible.¹⁸⁴ The decision relaxed the traditional freshness requirement, and indicated that a statement's timing was not dispositive, but rather only one factor in determining a victim's credibility.¹⁸⁵

The *Greenway* court's first complaint rule was altered by the court of appeals's decision in *Nitz v. State*.¹⁸⁶ There, the court of appeals considered the case of a stepfather accused of abusing his stepdaughter from the time she was seven until she reached eleven.¹⁸⁷ Under *Greenway*, the trial court in *Nitz* admitted testimony by the child's mother that the victim had said that "daddy" had been bothering her; testimony by an officer who interviewed the child the day after her accusations; and testimony by another officer who had received a more detailed version of the events from the victim more than four months after the initial accusations.¹⁸⁸ The court of appeals held that the *Greenway* rationale applied only to the first complaint of sexual assault and could therefore be invoked to admit the statements made to the victim's mother, but not those made to the police officers.¹⁸⁹ The court also noted a "marked trend" in other jurisdictions towards relaxation of the first complaint rule's prohibition against the admission of details.¹⁹⁰ Therefore, the court held that details of the complaint, including the identity of the assailant, were admissible "within the reasonable limits of the trial court's discretion . . ."¹⁹¹

183. *Id.*; see also *Commonwealth v. King*, 834 N.E.2d 1175, 1197 (Mass. 2005) (citing *Greenway*, 626 P.2d at 1061).

184. *Greenway*, 626 P.2d at 1060-61. This interpretation comes from the WHARTON text quoted in the *Greenway* and *Torres* opinions. See *supra* note 109.

185. *Id.*

186. 720 P.2d 55 (Alaska Ct. App. 1986).

187. *Id.* at 58.

188. *Id.* at 59.

189. *Id.* at 62.

190. *Id.* at 63. "In recent years, there has been a marked trend toward relaxation of the traditional restrictions governing admission of evidence of the victim's first complaint." See also Michael H. Graham, *The Cry of Rape: The Prompt Complaint Doctrine and the Federal Rules of Evidence*, 19 WILLAMETTE L. REV. 489, 502-06 (1983).

191. *Nitz*, 720 P.2d at 63.

The first complaint rule has served an important purpose in child sexual abuse cases. Unfortunately, its utility is hampered by both its limitation to testifying declarants and its somewhat inconsistent application by Alaska courts. First, courts have applied the first complaint exception only when a victim testifies.¹⁹² In child abuse cases, this potentially disqualifies reliable statements made by victims who are too young or otherwise unable to appear in court.¹⁹³

Second, application of the *Greenway* rule has in some respects been inconsistent. In *Greenway*, the court allowed two witnesses to testify under the first complaint doctrine.¹⁹⁴ *Nitz*, in contrast, noted that the rule permitted only one witness to testify.¹⁹⁵ Relaxing the details requirement “for the purpose of enabling the jury to obtain a fair understanding of the circumstances under which the complaint was made”¹⁹⁶ has also resulted in confusion. Some cases have allowed an abuser’s identity to be revealed along with other details of a complaint; others have not.¹⁹⁷ The shortage of concrete applications on these issues further indicates

192. *Ryan v. State*, 899 P.2d 1371, 1378 (Alaska Ct. App. 1995) (The court noted that “because the rationale of the ‘first complaint’ exception is to corroborate the victim’s testimony, the State can rely on this exception only when the victim testifies.” The court held that because the victim had not testified at grand jury and could not testify at trial, her statements could not be admitted under the “first complaint” hearsay exception.); *see also* 4 WIGMORE, *supra* note 160, § 1136.

193. *See, e.g., Broderick v. King’s Way Assembly of God Church*, 808 P.2d 1211 (Alaska 1991). In *Broderick*, the Alaska Supreme Court held an unavailable three-year-old victim’s statements reliable for purposes of the residual hearsay exception. *Id.* at 1220. Factors indicating reliability included the age of the victim, childish terminology, and lack of a motive to lie. *Id.* at 1218–20.

194. *Greenway*, 626 P.2d at 1061 (Alaska 1980).

195. *Nitz*, 720 P.2d at 62 (noting that “the *Greenway* rationale applies, by definition, only to the first complaint of sexual assault . . .”); *see also* *Thompson v. State*, 769 P.2d 997 (Alaska Ct. App. 1989) (the trial court admitted the victim’s hearsay statements to numerous individuals under *Greenway*, but the court of appeals noted that only the initial report should have been admitted under the rule), *Vandiver v. State*, 726 P.2d 195 (Alaska Ct. App. 1986) (the trial court admitted the statement of both a social worker and a police officer under the *Greenway* rule; the court of appeals reversed, holding that only the social worker’s statement could qualify as a first complaint).

196. *Nitz*, 720 P.2d at 63.

197. *Compare* *Russell v. State*, 934 P.2d 1335 (Alaska Ct. App. 1997) (testimony about the details of the complaint were either admissible or harmless error) *with* *Thompson*, 769 P.2d at 1001 (“*Greenway* does not allow a detailed description of the complaining witness’ allegations, the case permits only evidence of the fact of the complaint and the circumstances under which it was made.”), *and* *Horton v. State*, 758 P.2d 628 (three friends were allowed to testify to the initial complaint but were not permitted to provide details of the complaint). *Greenway* does not allow a detailed description of the complaining witness’ allegations, but permits only evidence of the fact of the complaint and the circumstances under which it was made. *Greenway*, 626 P.2d at 1060–61.

why lower courts have had difficulty applying the exception as it currently stands.¹⁹⁸

The problems associated with each of these current methods for introducing hearsay statements in the case-in-chief demonstrates the necessity of a new exception that meets the unique needs of child sexual abuse prosecutions.

IV. PROPOSED AMENDMENT TO THE ALASKA RULES OF EVIDENCE

The first complaint exception to the hearsay rule offers Alaska rule- and policymakers a logical method for balancing the necessity of hearsay with the rights of defendants.¹⁹⁹ A codified exception would eliminate the current first complaint rule's uneven application in child sexual abuse cases, prevent judicial wrangling of the excited utterance and residual hearsay exceptions, and supplement the current exception for medical records and recorded statements. The rule can be crafted in the format of existing Rule 801(d), and read as follows:

Rule 801(d)(4) – Statements That Are Not Hearsay:

The following definitions apply under this article:

- (d) Statements which are not hearsay. A statement is not hearsay if
 - (4) The statement is a first complaint of sexual abuse offered by a child under the age of 12 and
 - (a) The declarant testifies at trial and is subject to cross examination concerning the statement or
 - (b) The declarant is unavailable as a witness under ARE 804(b)(1-4) and
 - (1) the statement is made to a family member, friend, acquaintance, school employee, or medical caretaker not in the course of a criminal investigation, or

198. Compare *D.G. v. State*, 754 P.2d 1128 (Alaska Ct. App. 1988) (holding that revealing the identity of the accuser invalidated a first complaint), with *Nusunginya v. State*, 730 P.2d 172 (Alaska Ct. App. 1986) (admitting the identity of the accused in a first complaint).

199. See Joel Michael Cohen, *Nitz v. State: Skewing the Evidentiary Rules to Prosecute Child Molesters*, 4 ALASKA L. REV. 333 (1987). Cohen recognizes the problems *Nitz* and its progeny created in the application of the first complaint rule, and he proposes an exception to the rule against hearsay "that would allow the out-of-court statement of prompt complaint by a child victim of sexual abuse under the age of ten to be admitted at trial, so long as the testimony is strictly limited to the existence of the complaint, and the time and place where it was made." *Id.* at 357.

(2) the statement is made to a government official where the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.

Under this proposed exception, an alleged abuse victim's first complaint of sexual abuse would be admissible as substantive evidence on direct examination. The amendment continues the evolution of the *Greenway* first complaint rule by fully removing the freshness requirement and allowing any initial complaint. Admitting all initial complaints counteracts the outdated assumption that abuse victims will immediately cry out, while still allowing the jury to weigh the delay in determining credibility.²⁰⁰

Furthermore, the rule comports with the reality of sexual abuse prosecutions by admitting the details of the complaint, including the identity of the accused. This eliminates any inconsistencies in applying the details standard and corresponds with the changes that have already occurred in many jurisdictions.²⁰¹ Permitting the details of the complaint also gives the fact-finder a more thorough understanding of the relevant context and circumstances.²⁰²

Subsection (b) of the proposed exception alters the longstanding first complaint requirement that the victim must testify. Subsection (b)(1) would allow an unavailable child witness's statements to be admitted, provided the statement was made to family members, acquaintances, or school or medical personnel when no crime is being investigated. These are the statements most likely given in response to non-leading questions and are most likely to rely on the speaker's free recall. Subsection (b)(2) makes admissible statements made to police officers or social workers in the course of an investigation, if such statements helped government officials respond to an ongoing emergency. The addition of these subsections is important in child hearsay cases because children are often unavailable to testify due to young age, memory loss, or stress. It ensures that statements retracted out of love or fear when the defendant is someone who is close to the child are still admitted when the evidence is reliable.

The change does not affect the historical purpose of the rule, which is to corroborate the victim's claim of sexual abuse. Studies show that

200. *Emery v. State*, No. A-7799, No. 4608, 2002 Alas. App. LEXIS 198 (Alaska Ct. App. Aug. 14, 2002). In *Emery*, expert testimony: (1) explained that it is common for a child not to first report in-family sexual abuse to the non-abusing parent, (2) noted the reasons a child may delay reporting sexual abuse, and (3) explained why it is common for a child to disclose sexual abuse during a separate family crisis. *Id.* at *5.

201. *Nitz v. State*, 720 P.2d 55, 63 (Alaska Ct. App. 1986).

202. *Id.*

most children's accusations of sexual abuse are accurate;²⁰³ a victim's inability to testify does not necessarily diminish the validity of his or her claim. Hearsay evidence that would be admitted under this rule provides corroboration and support for a victim's statements even in cases where the victim does not testify.

The altered rule would help alleviate the tendency of some courts to stretch the excited utterance exception or to over-aggressively use the residual hearsay exception to admit initial complaints of child sexual abuse. Under the proposed rule, first complaint evidence can be admitted substantively, removing the need to use other exceptions when the victim is unavailable to testify. The rule would not eliminate admission based on other exceptions. Subsequent complaints could still be admitted as excited utterances, prior consistent statements, medical records, or under the residual exception, but they would be required to legitimately meet the criteria of those exceptions.

While the proposed exception loosens the restrictions on hearsay in sexual abuse trials, it does so in a manner that is fair to criminal defendants. The proposed rule allows testimony of the details of the complaint, but also limits admission to a victim's first complaint. This will provide context that may clarify a child's accusations. More importantly, the exception provides a definite rule for admissibility, preventing prosecutors from producing witnesses who repeat similar statements by the victim that add little substance "but the force of repetition."²⁰⁴ For example, in *Greenway*, the child victim "sounded the alarm" when she complained of abuse to her mother.²⁰⁵ The statement to her mother was the first complaint and would have been admissible under the proposed rule. However, the victim's later statements to her guidance counselor would not have been admitted. Such a scenario does not unduly prejudice the defendant because the adult to whom the child initially complains will have little reason to ask leading questions or to interpret the child's statements as accusations of abuse unless they clearly are. Testimony from such a conversation will, therefore, generally be based on the child's free recall and increase the likelihood that the accusations are reliable.

The proposed rule also complies with the Confrontation Clause. Most first complaints by children, even those containing explicit details and the identity of the accuser, are likely to be nontestimonial in nature under the criteria set forth in *Davis* and *Crawford*. The initial complaint is the one most necessary to avert the emergency and keep the child from

203. GOVERNOR'S REPORT, *supra* note 13.

204. *Nitz*, 720 P.2d at 61.

205. *Greenway v. State*, 626 P.2d 1060, 1060 (Alaska 1980).

danger. A question by a parent, doctor, or other private individual will almost always precede questioning by a police officer or other agent of the state.²⁰⁶ From the child's point of view, the statements are often spontaneous responses to a question from a parent, more similar to a "casual remark to an acquaintance" than an accusation.²⁰⁷ The intent or purpose of the person who receives the statement, especially if the individual is a family member or friend, also likely indicates that the statements are nontestimonial.²⁰⁸ Such persons are almost always motivated by a desire to improve the child's well-being or to end the abuse, rather than to investigate a crime. The questioning is also unlikely to be formalized with a specific intent to elicit accusations. Furthermore, specifying that nontestimonial statements are admissible allows judges the discretion to evaluate individual statements under the factors defined in *Davis*.

CONCLUSION

Current approaches to admitting children's statements in sexual abuse cases are inconsistent, and sometimes run into problems with the reinvigorated right to confrontation developed by the Supreme Court in *Crawford* and *Davis*. A new, codified exception to the hearsay rules based on the current first complaint exception will not resolve all of the difficulties of prosecuting child sexual abuse in Alaska. However, it can increase the fairness of these prosecutions, and help facilitate compliance with the Confrontation Clause. *Crawford* and *Davis* focused application of the Confrontation Clause on the prohibition of testimonial statements. The Court has not yet applied this new paradigm in a child abuse case. However, the approach has been consistently applied by lower courts to allow children's statements to parents, friends, and medical personnel. Since most first complaints are made to these private individuals and not to police officers, much evidence admissible under the first complaint exception will be regarded as nontestimonial and therefore admissible. The exception proposed here recognizes both the

206. *People v. Vigil*, 127 P.3d 916, 920–21 (Colo. 2006) (admitting statements made to a child's father and father's friend because they were made to private individuals and were "not solemn or formal statements"); see also *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004) (noting the framers' concern for the "involvement of government officers in the production of testimony with an eye toward trial . . .").

207. *In re Rolandis G.*, 817 N.E. 2d 183, 191 (Ill. App. Ct. 2004) (quoting *Crawford*, 541 U.S. at 51) (finding that the victim's statements to his mother were not testimonial because they were similar to a "casual remark to an acquaintance").

208. *Mosteller*, *supra* note 77, at 947.

reliability and necessity of child hearsay testimony and the importance of protecting defendants' rights to confront their accusers. It represents an additional tool to help deal with the difficulties of prosecuting child sexual abuse in Alaska.