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CONVICTIONS THROUGH HEARSAY IN CHILD SEXUAL ABUSE CASES: A LOGICAL PROGRESSION BACK TO SQUARE ONE

FRANK M. TUERKHEIMER*

I. INTRODUCTION

In 1603, Sir Walter Raleigh was tried for high treason. The indictment alleged that Raleigh and Lord Cobham conspired to overthrow the King and replace him with Arabella Stuart, using the assistance of the Austrian Archduke and the King of Spain. Arabella Stuart, in ascending to the Crown, would establish peace between England and Spain, tolerate Popish and Roman superstition, and agree to be bound by the Archduke, the King and the Duke of Savoy in contracting a marriage.\textsuperscript{1}

The principle evidence against Raleigh was a confession given by Lord Cobham while under interrogation in the tower shortly after the period of the alleged conspiracy.\textsuperscript{2} Raleigh urged that the evidence was inadmissible because it was unreliable hearsay. In response to Raleigh's argument that Cobham implicated Raleigh out of a desire to help himself, the attorney for the prosecution responded that while "[t]he accusation of a man on hearsay, is nothing; would he accuse himself on passion, and ruinate his case and posterity, out of malice to accuse you?"\textsuperscript{3} The prosecutor also alluded to an earlier statement of Cobham to his brother in which Cobham said "'[y]ou' are fools, you are on the bye, Raleigh and I'[sic] are on the main; we mean to take away the 'king and his cubs'."\textsuperscript{4} Thus, the prosecution

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1. For a detailed account of Sir Walter Raleigh's treason trial, see 2 COBBETT'S A COMPLETE COLLECTION OF STATE TRIALS 1-59 (1809) [hereinafter 2 COBBETT'S].

2. \textit{Id.} at 10, 11, 17, 19. There is no question that today this confession would be inadmissible as hearsay, even in a joint trial with Cobham. Bruton v. United States, 391 U.S. 123 (1968).

3. 2 COBBETT'S, \textit{supra} note 1, at 14. Presumably, the argument that Cobham would "ruinate his ... posterity" referred to the legal consequence that Cobham's heirs would not inherit his estate if he were found guilty of treason, a potent argument. At another point, the attorney for the Crown stated: "when a man, by his accusation of another, shall, by the same accusation, also condemn himself, and make himself liable to the same fault and punishment: this is more forcible than many Witnesses." \textit{Id.} at 7.

4. \textit{Id.} at 14. Expressed in terms of today's rules of evidence, the prosecutor's argument is that Cobham's statement to his brother was a declaration against his penal interest. Since not offered to exonerate the accused, it is admissible without the need for corroboration if the declarant is unavailable. \textsc{Fed. R. Evid.} 804(b)(3). The evidence on this point suggested Cobham's availabil-
urged that the hearsay confession was usable both because it was reliable and because it was corroborated, albeit by other hearsay.

Raleigh’s defense, in addition to a denial of the charge, rested on the claim that two witnesses were required to prove treason,⁵ and principally, that “bear with me if I desire one.”⁶ He noted that for the simplest of civil cases the witness had to be deposed, “[g]ood my lords, let my Accuser come face to face, and be deposed.”⁷ Raleigh noted that “where the Accuser is not to be had conveniently, I agree with you; but here my Accuser may; he is alive, and in the house.”⁸ What made Raleigh’s case even stronger is that he had a letter from Cobham in which Cobham retracted his implication of Raleigh and stated explicitly, “[s]o [sic] God have mercy upon my soul, as I know no ‘Treason by you.’”⁹ One of the Commissioners seemed to agree with Raleigh that Cobham should be forced to face Raleigh, but the Lord Chief Justice observed that “[t]his thing cannot be granted, for then a number of Treasons should flourish.”¹⁰ Raleigh’s argument on his own behalf was simple. Without Cobham’s confession there was no evidence against him.¹¹ Cobham was as “revengeful as any man on earth” and Cobham’s confession alone was simply insufficient evidence to convict.¹² Interestingly, in arguing the insufficiency of the evidence and in observing that Cobham could easily be brought to court but would not because he “dares not accuse me,”¹³ Raleigh cited precedent,
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noting that "[i]f you grant me not this favour [sic], I am strangely used; Campion was not denied to have his accusers face to face." 14

I have gone into this level of detail on this old case because, despite its age, its arguments have a modern ring to them. Raleigh had two complaints about the Crown's failure to call Cobham. He could not cross-examine Cobham and Cobham was not compelled to look at Raleigh and accuse him. The Crown argued that there was an inherent reliability in Cobham's confession because Cobham would not implicate himself if it were not true, and the cryptic hearsay statement to Cobham's brother corroborated the confession. Finally, it was argued that if the rule were otherwise, treason would go unpunished.

Sir Walter Raleigh was convicted and subjected to the extremely severe penalties then applicable to treason. 15 The case, however, is generally considered to be the beginning of the end of such use of hearsay evidence. While hearsay continued to be admitted during the reigns of the Stuarts in the 17th century, objections to it increased as confidence in its reliability was undermined. 16 It was derided as "a tale of a tale" or "a story out of another man's mouth." 17 By the end of the century, according to Wigmore, the rule against hearsay crystallized, 18 and of course, the general notion of its inadmissibility is the rule today. 19

There appears little doubt that the principal reason for the exclusion of hearsay is that hearsay evidence deprives the person against whom the evidence is admitted of the right to cross-examine the witness that matters. 20 While it is true that Sir Walter Raleigh could cross-examine the interrogator of Lord Cobham, such cross-examination would be limited to the accuracy with which the interrogator noted what Lord Cobham had said, and could not delve into the underlying facts. 21 It is important to note, however, that cross-examination is not the end in itself. Wigmore has noted

14. Id. In the treason trial of Edmund Campion and others, a witness testified as to Campion's statements which presumably supported a papal plot to overthrow Queen Elizabeth. 1 HOWELL'S A COMPLETE COLLECTION OF STATE TRIALS, 1050, 1063 (1816).
15. 2 COBETT'S, supra note 1, at 31. Although Raleigh was executed, the execution actually took place many years after his trial.
16. 5 J. WIGMORE, WIGMORE ON EVIDENCE § 1364 at 18 (Chadbourn rev. ed. 1974).
17. Id. at 18-19 n.32.
18. Id. at 18.
19. FED. R. EVID. 802.
20. C. MCCORMICK, EVIDENCE § 245 at 728 (West, 3d ed. 1984). It is clearly not the only reason. See Coy, 108 S. Ct. at 2798. (The right to cross-examine was totally intact, but only where the accuser did not have to physically face the accused).
21. Raleigh specifically argued that he would ask Cobham if Raleigh knew of a letter from the Austrian ambassador brought to Cobham. 2 COBETT'S, supra note 1, at 2, 23. It is not clear whether this would have been particularly helpful to Raleigh if Cobham were as vengeful as Ra-
that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth."22 It follows from this that if the real end is not simply cross-examination per se, but the discovery of truth, then if hearsay is reliable, it may still be admissible.

Over the years numerous exceptions to the rule against hearsay developed on precisely this ground. Some developed as late as 1942.23 Each had its own justification for reliability, and in a narrow focus, the logic for each is undeniable.24 By the time the rules of evidence were codified in 1975, the number of such exceptions was almost two dozen. In the Federal Rules of Evidence (hereinafter listed by specific rule), Rule 803 contains twenty-three specific exceptions to the rule against hearsay. These exceptions are applicable regardless of the availability of the person making the statement.25 There seems little doubt that the basis for these exceptions is the belief that in each case, there is sufficient reliability about the hearsay to warrant its admission. As clear a guide as any to the logic of the twenty-three designated exceptions is the catch-all exception found in Rule 803(24). Under this catch-all provision, an out of court statement not covered by any of the prior exceptions, "but having equivalent circumstantial guarantees of trustworthiness" is admissible, if certain other requirements are met.26

Another exception, which now becomes the major focus of this article, is Rule 803(4). Under Rule 803(4), the rule against hearsay does not bar

22. 5 J. WIGMORE, supra note 16, § 1367 at 32. Wigmore's observation was cited with approval in California v. Green, 399 U.S. 149, 158 (1970).
23. An example of the cumbersome and tedious manner in which exceptions to the hearsay rule become the law is provided by the present sense impression exception. This exception was originally proposed by Professor Thayer in 1881. See Thayer, Bedingfield's Case—Declarations as a Part of the Res Gestae, 15 AM. L. REV. 1 (1881). The exception was not formally adopted until 1942 in Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942), although several cases had held such statements admissible under different exceptions to the rule. C. McCORMICK, supra note 20, § 298 at 861 n.9. See also FED. R. EVID. 803(1).
24. For example, the justification for the admission of an excited utterance made contemporaneously with the event which is the subject of the utterance under FED. R. EVID. 803(2) is that the excited nature of the utterance and its spontaneity preclude fabrication or error in reporting. Therefore, the utterance is reliable and admissible as an exception to the rule against hearsay.
25. There are, in addition, several exceptions where the declarant must be unavailable for the exception to apply: mainly former testimony, declarations against interest and dying declarations. See FED. R. EVID. 804.
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“[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.”27 The logic of the exception is not subtle. Patients believe that the effectiveness of treatment depends largely upon the accuracy of the information provided the physician and that a misdiagnosis could prove not only costly but painful.28

II. RULE 803(4) AND OTHER EXCEPTIONS IN CHILD SEXUAL ABUSE CASES29

A. Introduction

Child sexual abuse cases are not easy. On one hand, there is the legitimate concern that sexual and physical abuse of children, especially where the children are in the care of the abuser, are extraordinarily serious offenses. Not only do they involve great damage to a child but such acts clearly abuse a most sacred trust. The harmfulness of such abuse on the child may be manifest in the present as well as years, if not decades, in the future.30 Without question, such cases must be prosecuted. Persons convicted of such offenses should be dealt with appropriately which ordinarily means severely.31

On the other hand, precisely because of the nature of the crime, a false accusation and conviction constitute a parallel tragedy. Not only is the defendant convicted, but often, one of the by-products of conviction is the loss of access to the child, with the inevitable disintegration of the family. The support system that other defendants would rely on in comparable situations is also taken away, thus creating a compounded injustice.

27. FED. R. EVID. 803(4).
29. Child sexual abuse cases are rarely brought in federal court since federal criminal jurisdiction would cover such cases only in instances where the alleged abuse occurred in federal enclaves. See, e.g., United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980); United States v. Nick, 604 F.2d 1199 (9th Cir. 1979). Thus, the state counterparts to FED. R. EVID. 803(4) would be applicable. It should be assumed, unless noted to the contrary, that the pertinent state law is identical to the federal provision set forth in the text ending at note 27.
30. See O’BRIEN, CHILD ABUSE: A CRYING SHAME 17-18 (1980). The increasing number of reported incidents of child abuse, about twelve percent of which are sexual abuse, was noted by the dissent in Coy, 108 S. Ct. at 2808 (Blackmun, J., dissenting).
There is a need to insure that the rules which govern criminal trials produce an accurate result. This is accentuated due to the gravity of the crime and the gravity of a mistake in determining whether there is a criminal, and that criminal’s identity. A review of recent cases suggests that courts have not been successful in this critical endeavor. In particular, courts have not been successful in cases where evidence is admitted under Rule 803(4).

B. Hearsay in Recent Child Sexual Abuse Cases

In State v. Nelson, the Wisconsin Supreme Court, by a four to three margin, upheld the first degree sexual assault conviction of Brian Nelson. This conviction was grounded on sexual contacts between Nelson and his three-year old daughter. Nelson and his wife had been divorced when their child (T.N.) was about two. The mother was granted custodial rights to T.N. and the father was granted reasonable visitation rights.

The prosecution’s proof at trial showed that about a year after the parents divorced, T.N. became apprehensive about visiting her father and would beg not to visit him. Nelson’s former wife testified that T.N. had described various incidents which unmistakably involved the father in sexual abuse of the child. T.N.’s mother then arranged for T.N. to visit a clinical psychologist who subsequently interviewed T.N. At trial, the clinical psychologist testified to a series of almost sixty evaluations and treatment sessions with T.N. His testimony, which included what T.N. had told him, once again unmistakably implicated Nelson. However, in one series of conversations with the psychologist, T.N. said that it was “Mitch” who did various things to her and not her father. Mitch was a man who had moved in with T.N.’s mother shortly after the divorce. The psychologist then testified that T.N. had substituted Mitch and her father a number of times. Furthermore, T.N. said that her father had told her to say it was Mitch if anyone asked. The psychologist also testified that when he asked T.N. if she would only tell the truth, she said “I don’t have to tell the truth.”

Principally on the basis of this evidence, the jury found Nelson guilty. In response to a post-conviction motion for a new trial, a hearing was held on T.N.’s availability. At that hearing, the psychologist who had testified

32. 138 Wis. 2d 418, 406 N.W.2d 385 (1987).
33. Id. at 425, 406 N.W.2d at 388.
34. A second psychologist witness for the prosecution testified as to one session with T.N. His testimony included what she told him about sexual activities with her father. Id. at 426, 406 N.W.2d at 388. The defense called two psychologists, neither of whom was particularly helpful to the defense. Id. at 427, 406 N.W.2d at 388-89.
as to the many sessions with T.N. further testified that questioning her about the alleged sexual abuse would traumatize her and that the very presence of her father would have a very negative effect on her. Videotaping her testimony was not ruled out as a possibility. It was noted, however, that there would have to be a large number of videotaping sessions. After the denial of Nelson's new trial motion, Nelson appealed.

In the Wisconsin Supreme Court, the principal issue was the admissibility of the psychologist's testimony under the Wisconsin counterpart to Rule 803(4). In upholding the conviction, the court noted that the rationale underlying the exception was the guarantee of trustworthiness coming from the declarant's motive in obtaining improved health. The court found, based on the solemnity with which the psychologist dealt with T.N., that T.N. understood the psychologist to be an authority figure, not a playmate, and that she was aware that she was being observed toward a goal of treatment.35

The court then turned to the subordinate but critical question of whether the identity of the abuser or merely the fact of abuse was admissible. It noted that, although as a general rule, the identity of the assailant is not admissible because the assailant's identity is ordinarily not necessary for treatment, this is not so with respect to child sexual abuse. Because of the emotional and psychological injuries incident to child sexual abuse, in addition to whatever physical injuries there may be, the identity of the abuser affects the nature of the treatment. Therefore, the court held that the evidence was admissible under the hearsay rule exception.36

The dissent, however, challenged the finding that T.N. knew she was talking to the psychologist for diagnostic purposes, noting that there was no exception for talking to "authority figures." The dissent also pointed out that the alternative of video taping was a viable one that could have been used in place of the hearsay.37

35. Id. at 431-32, 406 N.W.2d at 390-91.
36. Id. at 433-34, 406 N.W.2d at 391-92. See Sluka v. Alaska, 717 P.2d 394, 398-402 (Alaska 1986). Sluka involved physical injuries to a three-year old child. Hearsay admitted against Sluka included the testimony of a physician who examined a three-year old victim whose face was injured. The physician testified that when he spoke to the girl, she told him Sluka had hit her with a shoe. The Alaska Supreme Court found that since the identity of the assailant was not necessary for treatment or diagnosis, it was not within the exception and therefore was inadmissible hearsay. The judgment of conviction was reversed.
37. Nelson, 138 Wis. 2d at 447-49, 406 N.W.2d at 397-98 (Heffernan, C.J., dissenting).

Nelson subsequently attacked the judgment of conviction in a petition for federal habeas corpus. The attack was based on a claimed failure of Wisconsin to comply with Ohio v. Roberts, 448 U.S. 56 (1980). In Roberts, the prosecution used the preliminary hearing testimony of an unavailable witness against Roberts at his trial. The Supreme Court upheld the use of such hearsay, which fit no hearsay rule exception, provided the declarant was unavailable and the hearsay
Nelson symbolizes the dilemma of these cases. If one accepts the hearsay evidence, it is clear that Nelson was guilty and deserved punishment. On the other hand, where there is evidence, as there was in this case, that someone other than the defendant may have abused the child, the inability of the defendant’s lawyer to pursue that line of questioning with the witness seems to be a major failure. Such failure is not obviated even if it is clear that T.N. knew she was talking to a physician for the purpose of treatment. Nelson’s lawyer might have explored the number of times T.N. was alone with Mitch, whether she had any conversations with Mitch about the “truth” and whether the things the psychologist said happened with the father had actually happened with Mitch. In addition, T.N.’s uncertainty about the obligation to tell the truth is fertile ground for any defense lawyer. This is true even where there is no evidence that anyone else might be involved. The use of hearsay, however, irrevocably marks such ground as off-limits to the defense.

bore sufficient “indicia of reliability” to ensure the accuracy of the fact finding process. The Court noted that such indicia exist where the hearsay falls within a firmly rooted exception to the rule. 

In granting Nelson’s petition, the district court found neither prong of Roberts satisfied. Nelson v. Ferrey, 688 F. Supp. 1304 (E.D. Wis. 1988). After noting that the unavailability prong of Roberts appeared to have been eroded by the Supreme Court in United States v. Inadi, 475 U.S. 387 (1986), the district court nevertheless applied that requirement and found it was not met. In so doing, the court noted that “the parties have not cited, and this court has not found, any post-Inadi decision in which a court has ruled that, under the Constitution, admitting hearsay statements under Federal Rule of Evidence 803(4), or a state equivalent, without making a finding that the declarant is unavailable, does not offend the Confrontation Clause.” Ferrey, 688 F. Supp. at 1320. It is clear that the district court was reluctant to take the erosion of the unavailability requirement at face value.

The district court then dealt with the second prong of the Roberts test — indicia of reliability. It noted that an inquiry into inherent reliability need be undertaken only if, as in Roberts, the hearsay did not fit within a firmly rooted hearsay exception. Id. at 1323. The court then noted that while Fed. R. Evid. 803(4) “may be a ‘firmly rooted’ exception from the standpoint of long-time acceptance,” a four-year old declarant was hardly the typical declarant under the exception. Id. With that observation as the justification for further inquiry, the court found that the indicia of reliability required under Roberts were not present. Id. at 1323-24. In so doing, the court obviously wandered from Roberts to permit inquiry into indicia of reliability even where the exception was established, but where its application was to a novel situation.

There is some justification for this variation from Roberts under Wisconsin law. In State v. Bauer, 109 Wis. 2d 204, 325 N.W.2d 857 (1982), the Wisconsin Supreme Court, in a case also involving preliminary hearing testimony, stated “evidence falling within a firmly rooted exception is not admissible per se.” Id. at 213, 325 N.W.2d at 862. It was this language that triggered the inquiry into the reliability of Fed. R. Evid. 803(4) in Nelson. Id. at 429, 406 N.W.2d at 389-90. Roberts, however, does not compel such an inquiry. Thus, in theory at least, Wisconsin offers more protection against the use of hearsay than the United States Constitution requires, since hearsay falling within an exception is not afforded the presumption of reliability which Roberts gives it. Habeas relief, therefore, appears to have been granted on non-federal ground. It does not appear from the decision that this argument was advanced by the State.
The reasoning applied in *Nelson* was also used by the Arizona Supreme Court in *State v. Robinson*. In *Robinson*, the evidence against Robinson included the testimony of a psychologist who had treated one of the two children that Robinson was charged with sexually abusing. In holding such evidence admissible under Arizona's counterpart to Rule 803(4), the court recognized the general rule that statements to a physician about either the assailant's identity or some other person's fault are not within the exception. The court noted that "[i]t is general rule, however, is inapplicable in many child sexual abuse cases because the abuser's identity is critical to effective diagnosis and treatment." Indeed, the psychologist had testified to that effect at trial. In *Robinson*, however, there was non-hearsay evidence implicating the defendant. One of the two girls he was charged with sexually molesting testified in a videotape procedure to both his sexual assault of her and also the girl whose statements were the subject of the psychologist's testimony. Robinson's counsel was present during this testimony.

*Oldsen v. State*, a Colorado case, is also similar to *Nelson*. Oldsen was charged with sexual assault of a child, aggravated incest and child abuse in

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39. *Id.* at 200, 735 P.2d at 810.
40. *Id.*
41. *Id.* at 195, 735 P.2d at 805. Technically, the use of the videotape is "hearsay" since it is an out-of-court statement. FED. R. EVID. 801(c). Since, however, the defendant has an opportunity to cross-examine the pertinent witness, the problems generally associated with hearsay are not present. See generally Roberts, 448 U.S. at 56; *State v. Gilbert*, 109 Wis. 2d 501, 326 N.W.2d 744 (1982). See also Note, The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations, 98 HARV. L. REV. 806, 813-16 (1985).

*State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985), is another case where there were both the non-hearsay testimony of the victims and evidence admitted under the North Carolina counterpart to FED. R. EVID. 803(4). The problem in *Smith* is that the person to whom the statements were made — ostensibly for diagnosis and treatment — was the grandmother of the two cousins who testified as to the sexual assault by the boyfriend of the mother of one of them. The court observed that the commentaries to the North Carolina statute indicated that the statements need not have been made to a physician but could be made to a hospital attendant, ambulance driver or even a family member. In dealing with the more troublesome question as to the identity of the person causing them injury, the court noted a "trend" in that direction and then observed that in any event, the evidence was corroborative of the in-court testimony of the girls. *Id.* at __, 337 S.E.2d at 840.

In United States v. *Nick*, 604 F.2d 1199 (9th Cir. 1979), the boy's mother was permitted to testify that shortly after she picked up her three-year old son in the defendant's bedroom, she noticed "white stuff" inside his clothing and she asked him whether Nick had done anything to him. The child responded, in essence, that Nick had committed anal intercourse with him. This evidence was received at trial under the excited utterance exception, FED. R. EVID. 803(2). Nick's confession, however, was also received into evidence. The Ninth Circuit upheld the admission of the evidence both on statutory and constitutional grounds.

42. 732 P.2d 1132 (Colo. 1986).
connection with a series of alleged sexual contacts with his five-year old daughter. The evidence against Oldsen consisted entirely of the testimony of a school psychologist, a physician, an investigator with the district attorney's office and a social worker. These persons spoke with the daughter in their professional capacities and testified as to the alleged offenses as told to them by the daughter. At the trial, the child was found to be an incompetent witness because of her inability to understand the obligations of a witness. It was for this reason that the Colorado counterpart to Rule 803(4) was also found inapplicable because the same considerations that led to the finding of incompetence also led to the conclusion that she did not understand that what she was saying was said for diagnostic or treatment purposes.

The trial court, however, admitted the hearsay under the residual catch-all provision. In large part, this evidence was admitted on the basis of the physician's testimony that children of the alleged victim's age do not invent allegations of the sort in issue. The trial court then concluded that young children ordinarily do not recognize past events that did not occur or respond to stimuli, such as an anatomically correct doll, without a basis for doing so. Thus, the court reasoned that the prosecution had shown the hearsay to be supported by circumstantial guarantees of trustworthiness, and therefore, was admissible under the catch-all clause.43

The Colorado Supreme Court, with one dissent, affirmed the conviction. It noted that other courts relying principally on the assertion that children are not likely to fabricate stories of sexual abuse, have found that such testimony fits the catch-all hearsay section which the lower court used to warrant the admission of the hearsay.44 The dissent based its opinion on the meager record which questioned the reliability of the child's statement to the three medical professionals.45 It sought a reversal and a new trial so that the defense would have an opportunity to refute the prosecution's evidence on the trustworthiness of the hearsay.

43. Unlike the defendant in Nelson, Oldsen testified and denied the alleged sexual contacts with his daughter. The defendant's wife (and child's mother) also testified that she did not think her husband had sexually assaulted her daughter. Id. at 1134.

44. Id. at 1137 (citing Lancaster v. People, 615 P.2d 720, 722 (Colo. 1980)); see also Nick, 604 F.2d 1199 (9th Cir. 1979); D.A.H. v. G.A.H., 371 N.W.2d 1 (Minn. Ct. App. 1985).

45. No one seemed to suggest that the statement made by the child to the investigator for the district attorney qualified under any exception. The Colorado Court of Appeals, because it based its decision on the Colorado counterpart to Fed. R. Evid. 803(4), found that statement inadmissible, but harmless error in light of the other admissible hearsay. People v. Oldsen, 697 P.2d 787, 789 (Colo. Ct. App. 1985).
In *State v. Vosika*, the defendant was charged with sodomizing and sexually abusing her three-year old daughter. The child’s foster mother, a social worker, and a pediatrician all testified about conversations with the child in which she implicated her mother in the sexual abuse. Although an Oregon appellate court reversed the conviction because the trial court relied on a video tape of the pediatrician’s interview with the child and failed to determine the incompetence of the child as a witness on the basis of personal observations, it went on to discuss the admissibility of the hearsay evidence.

The appellate court found that the Oregon counterpart to Rule 803(4) warranted the admission of what the girl told the three witnesses including the identity of the abuser. While the factual predicate that the child was too young to understand the purpose of the conversation was similar to the rationale used in *Oldsen*, a different result was reached. The court reasoned that from the perspective of the listeners — the foster mother, the social worker, and the pediatrician — the information was essential to correctly treat the child and was properly relied upon by them. Thus, the court reasoned that the information was reliable and, therefore, admissible. The concurring opinion observed that essentially the court was building the catch-all clause into Rule 803(4). It concluded that this type of reconstruction of the rule was not permissible. Ultimately, it is clear by the majority’s reasoning, that if the trial court were to properly decide that the child was incompetent, Vosika could be convicted entirely on hearsay.

In sum, there are cases such as *Robinson* in which hearsay evidence is accompanied by other evidence and affords the defendant an opportunity to confront his or her accuser. The trend, however, as evidenced by *Nelson*, *Oldsen* and *Vosika*, is to permit convictions entirely on hearsay without the accuser ever testifying in any form against the defendant.

47. Since the majority reversed the judgment of conviction because of the judge’s failure to personally see the child before deciding on her competence, the disagreement on the application of FED. R. EVID. 803(4) was technically a concurrence, not a dissent.
48. The court, in apparent recognition of the complete hearsay nature of the proof against Vosika which its opinion envisaged, noted that to rule otherwise would mean that very young children would be at the mercy of their abusers. If abused in private, their abuser would never have to worry about prosecution because the only witness to the crime would be too young to testify. *Vosika*, 83 Or. App. at __, 731 P.2d at 456; see also Goldade v. State, 674 P.2d 721 (Wyo. 1984). This decision, relied on in *Vosika*, in which the state interest in finding the identity of a possible child abuser was heavily relied on as a justification for holding admissible conversations with medical personnel under Wyoming’s counterpart to FED. R. EVID. 803(4).
III. ANALYSIS AND RECOMMENDATION

It would be needlessly overdramatic to equate any of the defendants in these cases to Sir Walter Raleigh. There is, nevertheless, a similarity in their quandry and a familiarity in the arguments that attend their cases.

In Raleigh, when Raleigh objected to the interrogator’s testimony about what Cobham had said, the use of hearsay was justified on grounds of its reliability: “would he accuse himself on passion, and ruin his case and posterity, out of malice to accuse you?”\(^{49}\) When Nelson urged that the identity of the abuser was not within Rule 803(4), the court replied, “it is recognized that disclosure of the identity of the assailant is reasonably necessary to provide treatment for a victim of child abuse.”\(^{50}\) When Raleigh urged that Cobham be brought to testify, the crown responded, “this thing cannot be granted, for then a number of Treasons should flourish.”\(^{51}\) In Vosika, where the defendant insisted that the child testify, the court noted that agreement with the defense’s position would mean that very young children would be at the mercy of their abusers, and that if abused in private, their abuser would never have to worry about prosecution because the only witness to the crime would be too young to testify.\(^{52}\)

Further, as has been demonstrated in Nelson, there are lines of cross-examination helpful to a defendant that simply cannot be pursued with a psychologist or any other intermediary whose role in the diagnostic and treatment process serves as the vehicle for bringing the alleged victim’s hearsay into the trial. In all probability, familiarity with the trial record in each of these cases where hearsay alone has led to a guilty verdict, would suggest similar avenues of possibly fruitful cross-examination precluded by application of Rule 803(4).

On the other hand, it is hard to escape the logic of the idea that where a child knows that he or she is talking to a doctor as part of an effort to get treatment, the identity of the abuser is pertinent to the process and therefore within the exception. Similarly, if the excited utterance exception is used,\(^{53}\) the logic of its applicability may also be hard to contest. In short, because there is a logical basis to each of the exceptions, and since the facts may warrant invocation of the exception in any case, there appears to be an insoluble problem. The correct application of any one of a number of recognized exceptions to the rule against hearsay may result in convictions

\(^{49}\) 2 COBBETT’S, supra note 1, at 14.
\(^{51}\) 2 COBBETT’S, supra note 1, at 16.
\(^{52}\) See supra note 44 and accompanying text.
\(^{53}\) See United States v. Nick, 604 F.2d 1199 (9th Cir. 1979).
based entirely on hearsay. In such a situation, the defendant has never had the opportunity to confront non-hearsay evidence.

We have, therefore, traveled a complete circle. We began by excluding hearsay because it prevented the accused from confronting his accuser. We developed exceptions because, as a general matter, the evidence which was the subject of the exception seemed reliable. We then apply those exceptions with unassailable logic and culminate with convictions where the right to confront is reduced to a general attack on presumably dispassionate psychological testimony. Ultimately, the accuser does not testify and is immune from cross-examination.

There is a method out of this quandry which has not been addressed and seems to have been overlooked generally. All of the cases discussed, and many others like them, fail to recognize the distinction between the admissibility of evidence and the sufficiency of evidence. Each of the analyses described have concerned admissibility, and once it has been determined that the evidence is admissible, there is no further discussion. However, such a

54. Throughout this Article there has been an assumption that the psychologist's testimony is, essentially, reliable. This may not be the case. See D. Faust, K. Hart and T. Guilmette, Pediatric Malingering: The Capacity of Children to Fake Believable Deficits on Neuropsychological Testing, 56 Journal of Consulting and Clinical Psychology 578 (1988); see also Psychologists' Expert Testimony Called Unscientific, N.Y. Times, Oct. 11, 1983, at 19, col. 1.

55. States are free to fashion exceptions to the rule against hearsay beyond those found in the federal rules. Dutton v. Evans, 400 U.S. 74 (1970). Pursuant to this freedom, one approach has been the enactment of statutory exceptions to the hearsay rule directed specifically at child abuse cases. See Note, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 Colum. L. Rev. 1745, 1763-66 (1983); Note, supra note 41, at 811-13. Under this exception, a hearsay rule exception exists for children under the age of ten who describe any act of sexual contact performed on them by another, if the court finds that circumstances provide indicia of reliability and the child either testifies, or is unavailable, in which case the statement may be admitted, but only if there is corroborative evidence of the act. See Ind. Code Ann. § 35-37-4-6 (Burns 1985 & Supp. 1988).

Such statutes have been found constitutional even though the corroboration requirement pertains only to the act of sexual abuse, not the identity of the abuser. Miller v. State, 498 N.E.2d 1008 (Ind. Ct. App. 1986); State v. Slider, 38 Wash. App. 689, 688 P.2d 538 (1984). The child hearsay exception is broader than Fed. R. Evid. 803(4) since such statements apply to any out-of-court statement, not just those made for purposes of diagnosis. The exception can also be seen as narrower than Fed. R. Evid. 803(4) since unavailability is a requirement of the rule. Unavailability is defined, however, to include those instances where a psychiatrist certifies that the child's participation in the trial would be traumatic for the child, a concept of unavailability not directly found in Fed. R. Evid. 804(a).

56. A suggestion of the distinction appears in the concurring opinion in People v. Wilkins, 134 Mich. App. 39, 349 N.W.2d 815 (1984). In Wilkins, the majority found that the testimony of the psychologist as to whom the patient said was the assailant was admissible under the rationale that identity was necessary for treatment. Id. at __, 349 N.W.2d at 818. The concurring judge reserved judgment as to whether such evidence alone could be the basis for a guilty verdict, but concurred in that case because the victim testified and identified the defendant. Id. (Shepherd, J., concurring).
limited view of the question is by no means compelled. A court is certainly free to conclude that evidence is admissible to prove a particular point, but at the same time it is not sufficient to warrant submission of the evidence to a jury.\textsuperscript{57}

In criminal conspiracy cases or in any criminal case involving joint venturers, the prosecution often relies on hearsay evidence. Thus, if A and B are charged with selling a controlled substance, any statement made by A in furtherance of the venture is admissible against B. If, however, there is only hearsay evidence against B, traditionally B cannot be convicted. There must be some non-hearsay proof as to B’s involvement to create the agency which renders admissible against him statements made by A.\textsuperscript{58}

The approach that the courts use to permit admission of hearsay against a joint venturer or co-conspirator provides guidance as to how these troublesome questions of hearsay in child sexual abuse cases can be resolved. Under the rules of evidence applicable to joint ventures, before the hearsay can be considered by the jury against a particular defendant, the court must be satisfied, based on non-hearsay evidence, that a particular defendant is a member of the venture. The degree of proof required for such a determination is the civil standard: by a fair preponderance of the evidence.\textsuperscript{59} If such proof exists, the hearsay is submitted to the jury. The jury is instructed to

\textsuperscript{57} For example, assume that in an automobile negligence case, the plaintiff calls a witness who testifies that at the time of the accident the witness was crossing the street with an unidentified person who was looking at the intersection at the time of the collision, and who, right afterwards, said that the red car drove through a red light. Such evidence would be admissible as an excited utterance under FED. R. EVID. 803(2). The unidentified nature of the speaker would go to the weight of the evidence. It is highly unlikely that such evidence, though clearly admissible, would get to the jury on the negligence of the driver of the red car if that were the only evidence of negligence. Admissibility and sufficiency issues are completely severable.

\textsuperscript{58} See United States v. Bucaro, 801 F.2d 1230, 1232-33 (10th Cir. 1986); United States v. Vinson, 606 F.2d 149, 152-53 (6th Cir. 1979). \textit{But see} Bourjaily v. United States, 483 U.S. 171 (1987). The Supreme Court in \textit{Bourjaily} stated that FED. R. EVID. 104 permits hearsay to bootstrap other hearsay into evidence. In \textit{Bourjaily}, the Court held that hearsay could be used to determine whether the necessary agency relation existed to justify the use of hearsay in the first place, much the way the crown urged that Cobham’s hearsay statement to his brother buttressed the admissibility of the hearsay confession. \textit{See id.} at __. This broad holding was in no way essential to the decision since Bourjaily’s presence in a car into which the drugs were placed coupled with the $20,000 in cash also found in the car easily established Bourjaily’s nexus to the drug conspiracy through non-hearsay evidence. \textit{See Note, Bourjaily v. United States,} 1988 Wis. L. REV. 577, 595-96. \textit{See generally} Graham, \textit{The Confrontation Clause, The Hearsay Rule and Child Sexual Abuse Prosecutions: The State of the Relationship,} 72 MINN. L. REV. 523 (1988). However, \textit{Bourjaily} has been interpreted to reflect a major change on the ability of hearsay to justify the admission of hearsay. \textit{See also} United States v. Zambrana, 841 F.2d 1320, 1344 (7th Cir. 1988).

\textsuperscript{59} United States v. Santiago, 582 F.2d 1128, 1134 (7th Cir. 1978); United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969). \textit{But see supra} note 57 and accompanying text.
consider all the evidence and decide whether the prosecution has sustained its burden of proving guilt beyond a reasonable doubt. On the other hand, if the non-hearsay proof does not rise to the fair preponderance level, the hearsay never gets to the jury.

Such an approach in child sexual abuse cases will often require that the child testify. This in turn will trigger procedures designed to accommodate the interest of the child, while at the same time leaving intact the defendant's right to confront. Videotaping of such testimony is one obvious approach to such accommodation, although there does not appear to be universal agreement that videotaping is ultimately consistent with a defendant's rights.

It is not, however, a foregone conclusion that the child will have to testify. The proposal suggested here requires only that there be non-hearsay proof by a fair preponderance of the evidence, a requirement that does not necessarily require a particular kind of non-hearsay. If there is evidence that a child emerged from the defendant's exclusive custody in a battered or bruised condition, such condition, if not otherwise explained, would lead to a fairly strong inference that the battering or bruising was at the defendant's hands. Alone, this might be a sufficient basis for the admission of the corroborating hearsay.

As is the case with conspiracy, there is no particular time when a court must make the determination that the non-hearsay proof justifies the use of hearsay as long as the determination is made before the case is submitted to the jury. Since the psychologist may well be the last witness that the prosecution calls, as experts usually are, all of the foundation evidence for the hearsay should already be before the court. On the other hand, if a parent of the child or a social worker testifies early in the trial and as part of that testimony states what the child told the witness, the evidence can be received subject to connection.


61. The ABA "Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged," approved by the ABA House of Delegates on July 10, 1985, do not contemplate the use of videotapes in criminal trials. The closest they come is to suggest the use of such tapes in the pretrial or non-criminal settings. See Guideline 3(j).

62. See Goldade v. State, 674 P.2d 721 (Wyo. 1984), where a child was found bruised by a female adult taking care of her after having been alone with the defendant for some time. Id. at 723. There was also make-up on the child's face suggesting that the defendant tried to conceal the injuries. Id. at 728.

63. Geaney, 417 F.2d at 1120.
There is no question that implementation of the suggestion advanced in this Article will make it more difficult to obtain convictions in some child sexual abuse cases. In a system, however, where the defendant is presumed innocent and where the burden of proof is on the prosecution to prove guilt beyond a reasonable doubt, difficulty in obtaining convictions is not a final answer to anything. The argument that more child sexual abuse cases will go unprosecuted is by itself no more weighty an argument than "a number of Treasons should flourish." We should not let the perniciousness of the crime affect the fundamental fairness of the proceedings in which the determination of the criminal's identity is made. If we do, it would not be the first time that an argument with an old and familiar ring prevailed.

IV. CONCLUSION

As this brief venture into child sexual abuse cases has shown, there is a clear conflict between the interests of a child in avoiding testifying at a trial and the defendant's interest in questioning the witness. While a logical application of the hearsay rule exceptions can easily result in admissible evidence pointing unmistakably to the defendant's guilt, exclusive reliance on such evidence puts the defendant in the position where he has no meaningful witness to cross-examine. As a result, the defendant is essentially placed in the dilemma that the rule against hearsay is designed to avoid.

If the distinction between admissibility and sufficiency is kept in mind, then the logic of the numerous hearsay rule exceptions can be accepted, and at the same time the defendant's right to confront would be left intact. By requiring at least some non-hearsay proof of the defendant's guilt, it is suggested that a workable compromise between two otherwise irreconcilable interests can be reached.