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# “SWEET CHILDISH DAYS”: USING DEVELOPMENTAL PSYCHOLOGY RESEARCH IN EVALUATING THE ADMISSIBILITY OF OUT-OF- COURT STATEMENTS BY YOUNG CHILDREN

*Lynn McLain*

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## “SWEET CHILDISH DAYS”: USING DEVELOPMENTAL PSYCHOLOGY RESEARCH IN EVALUATING THE ADMISSIBILITY OF OUT-OF- COURT STATEMENTS BY YOUNG CHILDREN

Lynn McLain\*

We'll talk of sunshine and song,  
And summer days, when we were young;  
Sweet childish days, that were as long  
As twenty days are now.<sup>1</sup>

### I. INTRODUCTION

For too many children, what should be “sweet childish days”<sup>2</sup> of innocence and safety are terrorized by adults’ physical, mental, or sexual abuse,<sup>3</sup> with the physical abuse of young children often so extreme as to cause their deaths.<sup>4</sup> Despite some sensational cases, such as the McMartin Preschool case where reports of sexual abuse were unfounded,<sup>5</sup> commentators observe that false reports

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1. William Wordsworth, *To a Butterfly*, in 4 THE HOME BOOK OF VERSE, AMERICAN AND ENGLISH 1471, 1471 (Burton Egbert Stevenson ed., 1915), available at <http://books.google.com/books?id=ZxxKAAAAMAAJ>.

2. *Id.*

3. See *Kennedy v. Louisiana*, 554 U.S. 407, 455 n.2 (2008) (Alito, J., dissenting) (recounting statistics, including that “[i]n 1995, local child protection services agencies identified 126,000 children who were victims of either substantiated or indicated sexual abuse. Nearly 30% of those child victims were between the ages of four and seven”); CHILDREN’S BUREAU, U.S. DEPT. OF HEALTH & HUMAN SERV. ADMIN. ON CHILDREN, YOUTH & FAMILIES. CHILD MALTREATMENT ix (2009), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf> (“Victims [of child abuse and neglect] in the age group of birth to 1 year had the highest rate of victimization at 20.6 per 1,000 children of the same age group in the national population. Victimization was split between the sexes with boys accounting for 48.2 percent and girls accounting for 51.1 percent. Less than 1 percent of victims had an unknown sex. Eighty-seven percent of victims were comprised of three races or ethnicities—African-American (22.3%), Hispanic (20.75), and White (44.0%).” Of those children who were abused: “[m]ore than 75 percent (78.3%) suffered neglect; [m]ore than 15 percent (17.8%) suffered physical abuse; [l]ess than 10 percent (9.5%) suffered sexual abuse; and [l]ess than 10 percent (7.6%) suffered from psychological maltreatment.”); Myrna Raeder, *Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don’t Die and Ways to Facilitate Child Testimony*, 16 WIDENER L. REV. 239, 241 nn.15-19 (2010) (pointing out that many cases of abuse are not reported to child protection services). See *infra* note 13.

4. In the United States, “[m]ore than five children die every day as a result of child abuse. . . . approximately 80% of children that die from abuse are under the age of 4.” *National Child Abuse Statistics*, CHILDHELP, <http://www.childhelp.org/pages/statistics> (last visited Oct. 6, 2011).

5. Raeder, *supra* note 3, at 242 nn.20-24.

comprise a small minority.<sup>6</sup>

The negative ramifications of child abuse are far-reaching.<sup>7</sup> Abused children are more likely to abuse alcohol, become addicted to drugs, become pregnant as teens, commit violent crime, and be arrested than are children who have not been abused.<sup>8</sup> Most tragically, evidence of the defendant’s having been abused as a child is often offered as mitigating evidence in capital sentencing proceedings, after the defendant has been convicted of a heinous crime.<sup>9</sup>

When an abused child is young and is the only witness to the abuse, proving the misconduct becomes extremely problematic if the child either cannot testify at trial or cannot testify effectively.<sup>10</sup> The burden of proof as to physical abuse will be difficult to meet when a child’s injuries, such as broken bones, could also have been caused by an accidental fall. Sexual abuse that leaves no physical evidence<sup>11</sup> will be that much more difficult to prove. Even if there is compelling physical evidence that sexual abuse has occurred—such as when a toddler has gonorrhea or another sexually transmitted disease<sup>12</sup>—the child victim is usually the only one who has first-hand knowledge of the identity of the abuser, so that the case will

6. See JULES EPSTEIN, *THE PROSECUTION AND DEFENSE OF SEX CRIMES* § 31:04, at 6, 8 n.1 (4th ed. 2008) (“most reports [of child abuse] are true”); James M. Wood et al., *Child Sexual Abuse Investigations: Lessons Learned from the McMartin and Other Daycare Cases*, in *CHILDREN AS VICTIMS, WITNESSES, AND DEFENDERS: PSYCHOLOGICAL SCIENCES AND THE LAW* 82 (Bette L. Bottoms et al. eds., Guilford Press 2009) [hereinafter Bottoms] (“[T]he large majority of sexual abuse allegations made by children to police and [child protective services] today are probably true and reliable.”).

7. *Kennedy*, 554 U.S. at 468-69 (Alito, J., dissenting) (recounting serious, lasting, disturbing effects on child rape victims, as well as adverse ramifications to society, including victim’s greater likelihood of committing sex crimes and prostitution).

8. See BARBARA TATEM KELLEY ET AL., U.S. DEP’T OF JUSTICE, *IN THE WAKE OF CHILDHOOD MALTREATMENTS 1* (Aug. 1997), available at <https://www.ncjrs.gov/pdffiles1/165257.pdf> (The long term effects on maltreated children include “delinquency, pregnancy, alcohol and drug abuse, school failure, and emotional and mental health problems.”).

9. See, e.g., Glenn Small, *Thanos: Violent, Venomous – and ‘Damaged’ ‘Sick’ Convicted Killer is Product of Abuse, Lawyer Says*, *BALT. SUN*, (Oct. 31, 1993), available at [http://articles.baltimoresun.com/1993-10-31/news/1993304035\\_1\\_thanos-baltimore-county-sick](http://articles.baltimoresun.com/1993-10-31/news/1993304035_1_thanos-baltimore-county-sick) (relating father’s severe physical and emotional abuse of convicted murderer).

10. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (plurality opinion) (“Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim.”); Charles W. Ehrhardt & Ryon M. McCabe, *Child Sexual Abuse Prosecutions: Admitting Out-of-Court Statements of Child Victims and Witnesses in Louisiana*, 23 *S.U. L. REV.* 1, 1 (1995) (referring to the lack of other witnesses and the difficulty in obtaining corroborating evidence in “child abuse cases”).

11. Not all sexual abuse will result in physical evidence. See, e.g., *United States v. Bahe*, 40 F. Supp. 2d 1302, 1303 (D.N.M. 1998) (physician testified that digital penetration would “not necessarily leave any physical traces”); *State v. Hunt*, 741 P.2d 566, 571 (Wash. Ct. App. 1987) (“[I]n most cases of child sexual abuse, there is no physical evidence or eyewitness.”).

12. See, e.g., *State v. Maldonado*, 536 A.2d 600, 601 (Conn. App. Ct. 1988) (three-and-one-half year old girl had gonorrhea); *R.S. v. Knighton*, 592 A.2d 1157, 1158 (N.J. 1991) (one of five boys who were alleged sexual abuse victims of day care center operator had venereal warts); *In re Interest of L.S.*, 748 S.W.2d 571, 573 (Tex. App. 1988) (eighteen-month-old girl had vaginal discharge and gonorrhea; there was also other medical evidence that she and her three half-sisters had been sexually abused). See also *infra* note 109.

necessarily fail unless the child's testimony or out-of-court statement is admitted.<sup>13</sup>

Young children are frequently precluded from testifying at trial on the grounds of incompetency because they cannot answer questions about abstract concepts regarding "truth" and "lies."<sup>14</sup> In this situation, should the child's earlier, out-of-court statements disclosing the abuse and identifying the abuser also be inadmissible? The intuitive answer may be "yes, of course!" The lawyerly answer, however, should be, "it depends."

The stakes are huge. If young children cannot testify, and their out-of-court statements are precluded, they simply become safe prey, unprotected by the judicial system.<sup>15</sup> The pivotal question becomes, are there procedures that can ensure fairness both to children and to their alleged abusers?<sup>16</sup>

13. See *Doe v. United States*, 976 F.2d 1071, 1074-75 (7th Cir. 1992) ("The number of children sexually abused each year in the United States has been estimated at between 60,000 and 100,000, and even these disturbing statistics are under-inclusive because many cases go unreported. Detecting sexual abuse, and convicting its perpetrators, is problematic because of the lack of witnesses, the difficulty of obtaining corroborative physical evidence, and the typical reluctance or inability of the victim to testify against the defendant. In light of these circumstances, the out-of-court statements of the child victim take on exceptional significance; a youngster's hearsay statements in sex abuse cases often constitute the only proof that a crime has occurred.") (citations and footnotes omitted); Livia L. Gilstrap et al., *Child Witnesses: Common Ground and Controversies in the Scientific Community*, 32 WM. MITCHELL L. REV. 59, 62 (2005) (discussing why most cases where children are essential witnesses are sexual abuse cases).

14. See *infra* note 72 and accompanying text.

15. Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017, 1020 (2000) ("As a general rule, if the child witness cannot qualify [to testify], the prosecutor cannot prove up her case."). See also *id.* at 1025 & n.31 (pointing out that prosecutors very often decline to prosecute when the child victim is unlikely to be found competent to testify); *Morgan v. Foretich*, 846 F.2d 941, 943 (4th Cir. 1988) ("Often, the child is the only witness. Yet age may make the child incompetent to testify in court. . . . '[W]hen the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without.'") (quoting FED. R. EVID. art. VIII, advisory committee's note). For additional information, see sources cited *supra* note 13 and *infra* note 109. As to the shameful inadequacy of our judicial system's protection of children, see *Child Abuse: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 109-11 (1990) (statement of Dr. Muriel Sugarman, child psychiatrist) [hereinafter Sugarman] ("In 73.7 percent of the [divorce] cases [in which child sexual abuse was alleged], the divorce court system did not believe the allegations. The conclusions of evaluators without proper qualifications who found no evidence of sexual abuse were accepted over those of qualified evaluators. About 58 percent of the children were inadequately protected from further sexual abuse, from intimidation and harassment by the perpetrator, and from fear of retaliation."); Karla-Dee Clark, *Innocent Victims and Blind Justice: Children's Rights to Be Free From Child Sexual Abuse*, 7 N.Y.L. SCH. J. HUM. RTS. 214 (1990); Rebecca K. Connally, "Out of the Mouth[s] of Babes": Can Young Children Even Bear Testimony?, ARMY LAW., Mar. 2008, at 1. See generally BILLIE WRIGHT DZIECH & CHARLES B. SCHUDSON, ON TRIAL: AMERICA'S COURTS AND THEIR TREATMENT OF SEXUALLY ABUSED CHILDREN (2d ed. 1991).

16. See *People v. Dist. Court*, 776 P.2d 1083, 1085, n.1 (Colo. 1989) (en banc) ("Two alternative hazards are confronted. On the one hand, in accepting the testimony of a child there is the danger that she may not be telling the truth, in which event an innocent man may be convicted of crime and suffer the consequences thereof. On the other [hand], if the child's testimony is not accepted, a man guilty of crime, and possibly with the potential for more . . . will go free. In this connection, it must be borne in mind that when such an offense [assaulting and taking indecent liberties upon a child] is committed, it is done with the greatest possible stealth and secrecy, so that most often the testimony of the victim, coupled with the type of corroboration we have here, is the only evidence available upon which to determine guilt or innocence. The fact that there are difficulties involved should not prevent the processes of justice from functioning.") (emphasis in original) (quoting *State v. Smith*, 401 P.2d 445,

The parameters of the criminal justice system were re-set in 2004 by *Crawford v. Washington*.<sup>17</sup> Under *Crawford* and its progeny the confrontation clause<sup>18</sup> will generally exclude the child’s out-of-court statement from admission at trial, if the statement is found to be “testimonial” and is offered against a criminal accused but the child does not testify at trial.<sup>19</sup> The confrontation clause will not bar the evidence, however, if the child’s statement is nontestimonial<sup>20</sup> or if the defendant has forfeited her confrontation right.<sup>21</sup> The confrontation clause is also inapplicable to many proceedings where child abuse is at issue, such as divorce, child custody, or other family court<sup>22</sup> or juvenile<sup>23</sup> proceedings regarding alleged abuse or neglect of a child.

When the confrontation clause is inapplicable, the due process clauses of the

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447 (Utah 1965)). Cf. *State v. Hosty*, 944 So. 2d 255, 262-263 (Fla. 2006) (finding that protected persons’ and tender years statutes protect interests both of defendants and of mentally disabled or child victims).

17. 541 U.S. 36, 68-69 (2004).

18. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him. . . .”). This right is applied to the states via the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 401 (1965).

19. *Crawford*, 541 U.S. at 68-69. Under *Crawford* and its progeny, the confrontation clause applies only to “testimonial” statements, those as to which the declarant is considered a “witness against” the accused, within the meaning of those words in the Sixth Amendment. E.g., *Davis v. Washington*, 547 U.S. 813, 821-22 (2006) (holding that the confrontation clause applies to hearsay only when it is “testimonial.” Statements made in response to police interrogation to establish “past events potentially relevant to later criminal prosecution” are testimonial, whereas statements made “to enable police assistance to meet an ongoing emergency” are nontestimonial). Regarding the determination of which statements are testimonial and which are not, see, for example, Connally, *supra* note 15, at 21 (arguing that the inquiry must be made from the perspective of “a reasonable child in the declarant’s position”); Christopher Cannon Funk, *The Reasonable Child Declarant After Davis v. Washington*, 61 STAN. L. REV. 923 (2009); Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: “A Little Child Shall Lead Them,”* 82 IND. L.J. 917 (2007). See also *infra* notes 113, 115. Prof. Friedman has argued that extremely young children ought not be considered “witnesses” within the confrontation clause; if a child is too young to be expected to testify, “we should admit their statements for what they are worth, without pretending that the children have the capacity to act like adults.” Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW. & CONTEMP. PROBS. 243, 251-52 & n.34 (2002).

20. See generally *Davis*, 547 U.S. 813. Additionally, see *infra* note 115.

21. *Giles v. California*, 554 U.S. 353, 367-68 (2008). See also Clifford S. Fishman, *The Child Declarant, the Confrontation Clause, and the Forfeiture Doctrine*, 16 WIDENER L. REV. 279 (2010).

22. E.g., *State ex rel. Children, Youth & Families Dept. v. Frank G.*, 108 P.3d 543 (N.M. Ct. App. 2004), *aff’d sub nom. State v. Pamela R.D.G. (In re Pamela A.G.)* 134 P.3d 746 (N.M. 2006) (petition against parents for child abuse and neglect). See Jules Epstein, *Foreword: Why “The Child Witness” Now?*, 10 WIDENER L. REV. i, vii n.32 (2010) (“[I]t has been estimated that ‘[i]n the United States alone, hundreds of thousands of children are deposed, interviewed and examined each year as part of civil and family court proceedings, abuse/neglect investigations, and other types of criminal investigations.’”) (citation omitted); William Wesley Patton, *Viewing Child Witnesses Through a Child and Adolescent Psychiatric Lens: How Attorneys’ Ethical Duties Exacerbate Children’s Psychopathology*, 16 WIDENER L. REV. 369, 370-71 (2010) (“Most law review articles and psychological studies have focused on child witnesses in adult criminal cases. . . . However, in reality, the number of child victim witnesses who testify in adult criminal courts pales in comparison to the number of child abuse victim witnesses who testify in civil child dependency hearings.”) (footnotes omitted).

23. E.g., *State v. C.J.*, 63 P.3d 765 (Wash. 2003) (en banc) (juvenile delinquency).

Fifth and Fourteenth Amendment gain new importance.<sup>24</sup> By virtue of the due process clauses, neither a civil nor a criminal judgment may be based on *unreliable* hearsay.<sup>25</sup> On the other hand, due process will not have been violated if the judgment is based on reliable hearsay, even though the out-of-court declarant does not testify at trial.<sup>26</sup> Opposing counsel can be expected to argue that any statement by a child who is found to be incompetent to testify is inherently unreliable. Yet both case law and research in developmental psychology refute that “black and white” position.

This article argues that a child’s testimonial incapacity at trial ought not automatically bar the admission of those nontestimonial statements that fall within exceptions to the hearsay rule. Admissibility should turn on whether, in light of principles of developmental psychology as applied to the particular child, at the time the child made the statement he was capable of making an accurate statement of that type: if so, the evidence ought not be excluded on the ground of incompetency to testify. Attacks on the child’s credibility should go to the weight of this evidence, not its admissibility.

It may be helpful, in understanding the counterintuitive proposition that a person who is incompetent to testify at trial nonetheless may have earlier made a reliable statement, to consider similarly situated adult witnesses. It is easy to recognize that an adult who cannot testify because she has developed dementia or Alzheimer’s disease at the time of trial may have years earlier made a reliable statement that falls within a hearsay exception.<sup>27</sup> To exclude it because of the person’s present incompetence would be to deprive the judge or jury of valuable, irreplaceable evidence.

That premise also holds true for a young child who spoke of recent, concrete facts when she had first-hand knowledge and a clear memory of them but—due to age-appropriate, physiologically based developmental psychology—cannot demonstrate the ability of long-term recall or an understanding of the abstract concepts of truth and falsity required for being a witness at a trial long after the event in question. This article argues that, in these situations, the trial court should evaluate the qualities and circumstances of each proffered hearsay statement; if it concludes that both the statement is reliable and that it qualifies under a hearsay exception, the statement may be constitutionally admitted unless barred by *Crawford*. Thus, such statements ought to be admitted (1) in any non-criminal proceeding; or (2) in a criminal trial if either (a) the statement is offered by the accused or (b) the statement is “nontestimonial” and is offered by the prosecution.

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24. See Lynn McLain, “*I’m Going to Dinner with Frank*”: Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker—and the Role of the Due Process Clause, 32 CARDOZO L. REV. 373, 377, 416-30 (2010) (making this argument).

25. *Id.* at 425 & n.284. See also *infra* note 117.

26. *E.g.*, State v. Vaught, 682 N.W.2d 284, 286, 292-93 (Neb. 2004) (ruling there was no confrontation clause violation in admission of examining physician’s testimony to nontestifying child’s statement that “her Uncle DJ put his finger in her pee-pee,” and even if the requirement of reliability of *Ohio v. Roberts*, 448 U.S. 56 (1980), still applies to nontestimonial statements, no error occurred); *Frank G.*, 108 P.3d at 543 (holding no due process violation in child abuse and neglect adjudication).

27. See generally *Johnson v. State*, 492 A.2d 1343 (Md. Ct. Spec. App. 1985) (finding trial court’s admission of 89-year-old’s excited utterance at time of event was proper, despite fact that declarant was in a nursing home and incompetent at time of trial).

Admissibility is consonant with the general trend toward permitting the fact-finder to properly gauge credibility by admitting impeachable evidence, rather than excluding it.<sup>28</sup> As in all other situations, if the evidence is admitted, appellate review will be available as to whether the trial court erred in finding the hearsay to be reliable and, if error occurred, whether the verdict was based on the unreliable hearsay.<sup>29</sup>

Part II of this article will discuss the difficulty in proving cases where children are key witnesses. Young children are often ruled incompetent to testify at trial. Even if they are found competent to testify, they often make ineffective witnesses. For both of these reasons, if the children's out-of-court statements are reliable they will have significant probative value that cannot be replaced by the declarants' in-court testimony.<sup>30</sup>

Part III will address the constitutional parameters and will review judicial decisions that have recognized that a determination of reliability of the out-of-court statement requires a separate and different analysis from the question of the defendant's competency to testify at trial. It will also critique cases that appear to stand for the opposite proposition, as either having themselves been misinterpreted or having misread the authority they relied on.

Part IV will posit that the courts' evaluation of the reliability of a young child's statement should take into account not only the circumstances under which the statement was made, as some have done in the past, but also established principles of developmental psychology: what aptitudes of perception, memory, and accurate recall can a child of a certain age be expected to have? The author will argue that, if at the time the statement was uttered, the child was capable of making an accurate statement of the type offered, then the testimonial incompetency ruling should not exclude it. As long as the statement complies with the other rules of evidence it should be admitted. Under Federal Rule of Evidence ("Rule") 806 and its many state corollaries,<sup>31</sup> the out-of-court child declarant's credibility will be subject to impeachment just as if the child had testified.<sup>32</sup> The

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28. *See, e.g.*, *Lawson v. State*, 865 A.2d 617, 631 (Md. Ct. Spec. App. 2005) (holding that trial court properly admitted child's out-of-court statements that were inconsistent with her trial testimony and left the "question of credibility to be resolved by the jury"), *rev'd on other grounds*, 886 A.2d 876 (Md. 2005); *see also infra* notes 61-66, 83, and accompanying text; *see generally* 1 DONALD T. KRAMER, *LEGAL RIGHTS OF CHILDREN* § 13.2 (2d ed. 2005 & Supp. 2010).

29. *E.g.*, *Nunley v. State*, 916 N.E.2d 712, 722-23 (Ind. Ct. App. 2009).

30. *See infra* note 38.

31. *See* 5 LYNN MCLAIN, *MARYLAND EVIDENCE: STATE AND FEDERAL* xvii n.2 (2d ed. 2001) (citing 38 states, in addition to Maryland, as having adopted evidence codes modeled on the Federal Rules of Evidence).

32. Federal Rule of Evidence 806 provides in pertinent part:

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E) has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.

FED. R. EVID. 806. As restyled effective December 1, 2011, Federal Rule of Evidence 806 provides:



author will also argue that, in order to promote an accurate evaluation of a child witness's credibility if the child testifies, courts should use Rule 611(a) to preclude questioning of children by developmentally inappropriate, confusing questions.

## II. THE OFTEN IRREPLACEABLE PROBATIVE VALUE OF CHILDREN'S OUT-OF-COURT STATEMENTS

Children may be key eyewitnesses in many types of proceedings, both civil<sup>33</sup> and criminal. The inherent drama when this is the case has inspired Hollywood in making such films as "The Sixth Sense." In the real world, children may have been the victims of alleged abuse or neglect<sup>34</sup> or may have witnessed crimes to others, such as the murder of their parent<sup>35</sup> or the sexual abuse of their sibling.<sup>36</sup>

Thus, both prosecutors and civil litigants may find themselves dealt a hand where their key witness is a young child, making it difficult to prove their case. Very young children are often found incompetent to testify at trial.<sup>37</sup> Even when a child witness is permitted to testify, he or she is likely inherently to be a far less effective witness than most similarly situated adults.

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When a hearsay statement – or a statement described in Rule 801(d)(2)(C), (D), or (E) – has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

FED. R. EVID. 806 (Proposed Official Draft 2011), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV\\_Rules.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf).

33. *E.g.*, *Rosche v. McCoy*, 156 A.2d 307 (Pa. 1959) (finding reversible error to permit minor personal injury plaintiff's playmate to testify, when she was seven years old, to event she witnessed when she was four).

34. *E.g.*, *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980).

35. *See Perry v. State*, 848 A.2d 631 (Md. 2004); Nick Madigan, *Perry Again Found Guilty of Killing 2 Women in '98*, BALTIMORE SUN (Feb. 9, 2011), available at [http://articles.baltimoresun.com/2011-02-08/news/bs-md-ci-perry-retrial-verdict-20110208\\_1\\_killings-guilty-verdict-janice-bledsoe](http://articles.baltimoresun.com/2011-02-08/news/bs-md-ci-perry-retrial-verdict-20110208_1_killings-guilty-verdict-janice-bledsoe) (daughter of one of the murder victims testified as "key witness" at both trials; she was four years old at the time of the killings; at the first trial she was seven years old, and at the retrial she was seventeen).

36. *E.g.*, *United States v. Hollis*, 54 M.J. 809, 811, 814-16 (N.M. Ct. Crim. App. 2000) (ruling four-year-old sister of six-year-old victim made admissible statements to pediatrician, describing sexual abuse four-year-old had witnessed).

37. *E.g.*, *Ring v. Erickson*, 983 F.2d 818, 819 (8th Cir. 1993) (Minnesota state court finding child incompetent); *People v. Bowers*, 801 P.2d 511 (Colo. 1990) (en banc) (reversing sexual abuse conviction on ground that there was inadequate "corroborative evidence" of truth of victim's out-of-court statements to meet requirement of tender years statute; the victim, defendant's daughter, who was three years old at the time of the alleged abuse, and four-and-one-half years old at the time of trial, had been found incompetent to testify at trial); *People v. Dist. Court*, 776 P.2d 1083, 1085 n.1 (Colo. 1989) (en banc); *People v. Rocha*, 547 N.E.2d 1335, 1337 (Ill. App. Ct. 1989) (parties stipulated that child was incompetent to testify); *Smith v. State*, 252 A.2d 277, 279 (Md. Ct. Spec. App. 1969); *State v. Lanam*, 459 N.W.2d 656, 657 (Minn. 1990); *State v. Massengill*, 62 P.3d 354, 358 (N.M. Ct. App. 2002); *State v. Waddell*, 527 S.E.2d 644, 647-50 (N.C. 2000); *State v. Rogers*, 428 S.E.2d 220, 222 (N.C. App. 1993); *State v. Wallace*, 524 N.E.2d 466, 467 (Ohio 1988); *State v. Fisher*, 108 P.3d 1262, 1266 (Wash. Ct. App. 2005).

In either event—that children cannot testify or cannot testify effectively—their out-of-court statements, if reliable, will possess irreplaceable probative value.<sup>38</sup> Recognition of the added probative value of out-of-court statements is what has led, in general, to the recognition under the rules of evidence to exceptions to the hearsay rule. Thus admissibility of such children’s reliable statements is consonant with the goals of the rules of evidence.

*A. Irreplaceable Probative Value Is a Familiar Concept Underlying the Hearsay Exceptions Recognized in the Rules of Evidence*

The rationale for most, if not all, of the myriad exceptions to the hearsay rule (the general rule against admissibility of an out-of-court statement when offered to prove the truth of some fact that was being asserted by the out-of-court declarant when making the statement)<sup>39</sup> is that qualifying pretrial statements will possess probative value that cannot be recaptured at trial. Those codified under Rule 804 admit the hearsay only if the out-of-court declarant is unavailable to testify at trial, so that the irreplaceable nature of the evidence is obvious.<sup>40</sup>

But the numerous hearsay exceptions codified under Rule 803 are also based on the theory that the hearsay has probative value beyond that which the declarant’s live testimony could provide.<sup>41</sup> For that reason, the hearsay falling

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38. See *White v. Illinois*, 502 U.S. 346, 355-56 (1992) (finding child’s excited utterances or statements made when seeking medical treatment had probative value); *United States v. Nick*, 604 F.2d 1199, 1204 (9th Cir. 1979) (three-year-old child sexual assault victim’s “declaration to his mother at the time of the event was more, rather than less probative than testimony that he might have been able to give months after the event even if the district court would have found him competent.”); *State v. Hosty*, 944 So. 2d 255, 262 (Fla. 2006) (“Like children’s hearsay statements, mentally disabled adults’ hearsay statements shortly after the alleged criminal incident would likely be more reliable than their in-court testimony many months or years later, due to both their diminished cognitive abilities and their highly fragile emotional states.”); *Perez v. State*, 536 So. 2d 206, 209 n.5 (Fla. 1998)) (“The child’s first accounts of an incident of sexual abuse are sometimes more reliable than later testimony given in the often intimidating courtroom setting. . . . [B]oth the Arizona and Florida supreme courts have held that the child’s earlier testimony is the kind of irreplaceable substantive evidence that might be more probative than in-court testimony, thus excusing unavailability.”); *Rocha*, 547 N.E.2d at 1343 (citing *State v. Robinson*, 735 P.2d 801, 814 (Ariz. 1987); *Lawson v. State*, 865 A.2d 617, 631 (Md. Ct. Spec. App. 2005) (“Indeed, it has been observed that a child’s out-of-court statements may ‘be more reliable than the child’s testimony at trial, which may suffer distortion by the trauma of the courtroom setting or become contaminated by contacts and influences prior to trial.’ . . . That is why, we hold, that any conflicts between Nigha’s out-of-court statements and her in-court testimony do not render her out-of-court statements inadmissible, but rather present a question of credibility to be resolved by the jury.”) (citations omitted), *rev’d on other grounds*, 886 A.2d 876 (Md. 2005); *State v. Loughton*, 747 P.2d 426, 429 (Utah 1987) (stating that out-of-court statements by child victims of sexual abuse provide more accurate accounts than their testimony at trial because they are “made nearer to the time of the incident and removed from the pressure of a courtroom situation”).

39. FED. R. EVID. 801(a)-(c), 802.

40. FED. R. EVID. 804.

41. See *White*, 502 U.S. at 355-56 (“[T]he evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations and statements made in the course of receiving medical care is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness. But those same factors that contribute to the statements’ reliability cannot be recaptured even by later in-court testimony.”).

under Rule 803 is admissible even if the declarant testifies at trial.<sup>42</sup>

The “nonhearsay” categories of Rule 801(d)(2), regarding statements of a party opponent, are also recognized in light of the fact that the party would be unlikely to reiterate those statements at trial.<sup>43</sup> The out-of-court statements are irreplaceable. Similarly, when the out-of-court declarant testifies at trial, Rule 801(d)(1) recognizes other categories of out-of-court statements that will be admissible as substantive evidence<sup>44</sup> because of the probative value they are perceived to add. Finally, the addition of essential probative value is an explicit prerequisite for admissibility under the “catch-all” or residual hearsay exception codified in Rule 807.<sup>45</sup>

Child witnesses, like adults, may be unavailable to testify at trial for any reason recognized under Rule 804(a),<sup>46</sup> but young children are much more likely than adults to be unavailable as a result of having been found to be incompetent to testify.<sup>47</sup> This remains true despite efforts in numerous jurisdictions to make it easier for children to be found qualified to testify.<sup>48</sup> When child witnesses are unable to testify at trial, their out-of-court statements will not be excluded by the hearsay rule if they fall within any exception recognized by Rules 803, 804 or 807.

### B. Competency to Testify

Traditionally, courts have been hesitant to allow young children to testify without having first established their competence. There have been several concerns: (1) that young children may not have the ability to understand the relevant facts or to distinguish fact from fantasy;<sup>49</sup> (2) that they may not have a sufficient command of the language to explain their observations without being

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42. FED. R. EVID. 803.

43. FED. R. EVID. 801(d)(2). See *United States v. Inadi*, 475 U.S. 387, 395 (1986) (Co-conspirator statements admissible under Federal Rule of Evidence 801(d)(2)(E) “provide evidence of the conspiracy’s context that cannot be replicated, even if the declarant testifies to the same matters in court.”).

44. FED. R. EVID. 801(d)(1). Some jurisdictions also recognize hearsay exceptions for prompt complaints of rape, but generally only where the declarant testifies at trial. E.g., MD. RULE 5-802.1(d); *Coleman v. Higgins*, 351 P. 2d 901, 903 (Mont. 1960). See generally J.T.W., Annotation, *Admissibility of Evidence of Complaint or Details of Complaint by Alleged Victim of Rape or Other Similar Offense as Affected by Fact that She Is Not a Witness or Is Incompetent to Testify Because of Age or Other Reason*, 157 A.L.R. 1359 (1945).

45. FED. R. EVID. 807.

46. See, e.g., FED. R. EVID. 804(a); MD. RULE 5-804(a); *State v. Silverman*, 906 N.E.2d 427, 430 (Ohio 2009) (child victim had been killed in a fire set by his mother, before his father was tried for sexual abuse).

47. See *supra* note 37 and accompanying text.

48. See *Lyon*, *supra* note 15, at n.135 (collecting California, Colorado, and Michigan statutes and Massachusetts and Tennessee cases).

49. See generally George B. Collins & E. Clifton Bond, Jr., *Youth as a Bar to Testimonial Competence*, 8 ARK. L. REV. 100, 105 (1953) (“Often the child intermingles imagination with memory, with resulting damage to the opposing party.”); John H. Flavell, *Cognitive Development: Children’s Knowledge About the Mind*, 50 ANN. REV. PSYCHOL. 21 (1999).

misleading; or (3) that they will not appreciate sufficiently the seriousness of the proceeding to feel the duty to tell the truth.<sup>50</sup>

Historically, at common law, a child under the age of ten years was presumed to be incompetent to testify and was permitted to testify only if the trial judge examined the child and found the child to have sufficient capacity both (1) to remember and (2) to relate facts at the time of trial, as well as (3) to understand and be bound by the oath.<sup>51</sup> Although the per se age bar has been abandoned,<sup>52</sup> many United States jurisdictions continue to mandate a positive showing of the latter three requirements.<sup>53</sup> The inquiry is as to the particular child's testimonial capacity.

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50. 2 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 509 (James H. Chadbourne rev. 1979) (arguing, however, that the child simply should be allowed to testify, for what his or her story may seem to be worth). See also *id.* § 1751 (cited in *State v. Wallace*, 524 N.E.2d 466, 473 n.11 (Ohio 1988)).

51. Collins & Bond, *supra* note 49, at 100-01; 2 WIGMORE, *supra* note 50, § 508. See also *State v. Poole*, 859 P.2d 944, 946 (Idaho 1993) ("Although the common law at one time automatically disqualified children as competent witnesses, the trend of the law favors general competency.").

52. E.g., *Perry v. State*, 848 A.2d 631, 640 n.7 (Md. 2004) ("[T]here is no evidence or proffer that [the seven-year-old witness] Jewel suffered from learning disabilities, some kind of communication problem, a mental disability or disorder, or poor academic performance. There is also no evidence in the record that the defense was denied an opportunity to question Jewel, before the trial, to determine if there was any evidence of an inability to understand the difference between lying and telling the truth. It appears quite clear that defense counsel's concern about Jewel's ability to understand the difference between truth and fiction was based solely on a false assumption that a child's young age *automatically* calls into question her ability to understand the difference between truth and lies. That kind of assumption in no way presents a 'substantial question' regarding one's competency as a witness.") (citing *Evans v. State*, 499 A.2d 1261, 1271-72 (Md. 1985)) (emphasis in original); *Brandau v. Webster*, 382 A.2d 1103, 1106 (Md. Ct. Spec. App. 1978) (finding error for chancellor to refuse to conduct voir dire examination of five-and-one-half-year-old child, either in court or in chambers, but to rule that as a matter of law she was too young to testify).

A 1985 Maryland statute provides that, specifically in a child abuse case, the alleged child victim may not be precluded from testifying because of "age." MD. CODE ANN., CTS. & JUD. PROC. § 9-103 (West 2006). Under the approach apparently contemplated by the bill's sponsors in the Maryland General Assembly, an approach long ago advocated by Wigmore, see *supra* note 50, the court would have to let the child testify and leave it to the fact finder to give no more credit to the child's testimony than it is worth. See *Sia, Child Abuse Bills Supported, Faulted*, BALTIMORE SUN, Feb. 27, 1985, at 3F, col. 4. See generally Jonathan Spodnick, *Competency of the Child Witness in Sexual Assault Cases: Examining the Constitutionality of Connecticut General Statute § 54-86h*, 10 U. BRIDGEPORT L. REV. 135 (1989).

53. E.g., *State v. Maldonado*, 536 A.2d 600, 604 (Conn. App. Ct. 1988) (trial court properly determined that six-year-old victim was competent to testify; "The trial court's unusually thorough inquiry was more than adequate for its evaluation of the child's maturity and its effect on his ability to receive accurate sensory impressions, to recall and narrate events and the subject matter of his testimony, and to appreciate the moral duty to tell the truth."); *State v. Smith*, 401 P.2d 445, 447 (Utah 1965) ("The testimony of a six-year-old child is not rendered completely incompetent nor entirely discredited solely because of her age. As we have previously observed, no particular age nor any specific standard of mental ability can be set as the qualification for giving testimony, but it is an important factor to be considered, along with others, in determining whether she should be allowed to testify. What is essential is that it appear that the child has sufficient intelligence and maturity that she is able to understand the questions put to her; that she has some knowledge of the subject under inquiry and the facts involved therein; that she is able to remember what happened; and that she has a sense of moral duty to tell the truth. Whether she meets these tests and is therefore a competent witness is within the sound discretion of the trial court to determine. His ruling will not be disturbed in the absence of a clear showing of abuse. We find no such indication here. After the trial court is satisfied with the competency of the witness, the final judgment as to the credibility and weight to be given her testimony

Most cases in which children are key witnesses—child custody, termination of parental rights, criminal prosecutions for child abuse, and juvenile delinquency—are within the jurisdiction of state courts. State evidence law applies to these cases. Under the Assimilative Crimes Statute,<sup>54</sup> the federal courts hold trials for child abuse and similar matters occurring on military bases and other federal lands, including Indian reservations.<sup>55</sup> The Federal Rules of Evidence apply only to these latter trials.<sup>56</sup> Both state and federal trials are subject to the restraints imposed by the United States Constitution.<sup>57</sup>

### 1. Federal Courts

Federal Rule of Evidence 601, which became effective in 1975,<sup>58</sup> provides that “Every person is competent to be a witness except as otherwise provided in these rules.”<sup>59</sup> This rule adopted the model that generally all persons are competent to testify, and weaknesses in a person’s testimony should be brought out by impeachment.<sup>60</sup> The witness’s foibles—such as difficulties in perception,<sup>61</sup>

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is for the jury.”) (footnotes omitted); *State v. C.J.*, 63 P.3d 765, 770 (Wash. 2003) (en banc) (“A young child is competent to testify as a witness at trial if that child has (1) an understanding of the obligation to speak the truth on the witness stand, (2) the mental capacity at the time of the occurrence to receive an accurate impression of the matter about which the witness is to testify, (3) a memory sufficient to retain an independent recollection of the occurrence, (4) the capacity to express in words the witness’ memory of the occurrence, and (5) the capacity to understand simple questions about it. The determination of competency rests primarily with the trial judge who sees the witness, notices his or her manner and demeanor, and considers his or her capacity and intelligence.”) (internal citations omitted). See *Lyon*, *supra* note 15, at 1023 & nn.16-21 (explaining that even those states that technically have removed the oath requirement still, de facto, require oath-worthiness).

54. 18 U.S.C. § 13 (2006).

55. *E.g.*, *United States v. Edward J.*, 224 F.3d 1216 (10th Cir. 2000) (juvenile delinquency); *United States v. Beaulieu*, 194 F.3d 918 (8th Cir. 1999).

56. In civil matters, however, “with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.” FED. R. EVID. 601 As restyled and slated to be effective December 1, 2011, Rule 601 reads: “Every person is competent to be a witness unless these rules provide otherwise. But in civil case, state law governs the witness’s competency regarding a claim or defense for which state law supplies the rule of decision.” FED. R. EVID. 601 (Proposed Official Draft 2011), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV\\_Rules.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf).

57. *Pointer v. Texas*, 380 U.S. 400 (1965).

58. Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1926, 1934 (1975) (codified at 28 U.S.C. app. at 341 (2006)).

59. FED. R. EVID. 601.

60. See *infra* text accompanying note 68.

61. See *Andrews v. Neer*, 253 F.3d 1052, 1062-63 (8th Cir. 2001) (no error in admitting testimony of an involuntarily committed schizophrenic eyewitness); *United States v. Lightly*, 677 F.2d 1027, 1028 (4th Cir. 1982) (trial court’s disqualification of defense witness who suffered from hallucinations, was criminally insane, and incompetent to stand trial was reversible error, when his treating physician indicated that witness “had a sufficient memory, that he understood the oath, and that he could communicate what he saw”).

Even under the law before the adoption of the Federal Rules of Evidence, an insane person could testify if he or she had a “sufficient understanding of the nature of an oath and [was] capable of giving a correct account of what he [had] seen and heard.” *Lockard v. Parker*, 164 F.2d 804, 806 (4th Cir. 1947); 6 MCLAIN, *supra* note 31, §§ 607:3, :8.

imprecision in speech,<sup>62</sup> lapses in memory,<sup>63</sup> bias or prejudice,<sup>64</sup> or poor character as to veracity<sup>65</sup>—go to the weight the fact-finder will decide to give her testimony.<sup>66</sup>

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62. See *United States v. Bell*, 367 F.3d 452, 464 & n.5 (5th Cir. 2004) (deaf-mute victim who communicated by unique system of noises and gestures was not incompetent to testify; trial court did not err in permitting him to testify, even though he did not know a standardized system of sign language); *United States v. Villalta*, 662 F.2d 1205, 1206-07 (5th Cir. 1981) (per curiam) (witness’s lack of fluency in translating Spanish to English goes to weight of testimony, not competency, when recounting transaction conducted in Spanish; holding that he was incompetent was reversible error); 6 MCLAIN, *supra* note 31, §§ 607:3, :8.

63. See *United States v. Peyro*, 786 F.2d 826, 830-31 (8th Cir. 1986) (no abuse of discretion to allow government witness, who admitted she “had ‘some very substantial memory problems’ and was ‘emotionally unbalanced,’” to testify); 6 MCLAIN, *supra* note 31, §§ 607:3, :8. As to impeachment of a witness by her prior inconsistent statements, see FED. R. EVID. 613; 6 MCLAIN, *supra* note 31, §§ 613:1, :3.

64. 6 MCLAIN, *supra* note 31, §§ 607:2, :7.

65. *Id.* §§ 608:1-:2, :4-:5, 609:1-:10.

66. See *United States v. Snyder*, 189 F.3d 640, 645 (7th Cir. 1999) (“As long as a witness has the capacity to testify truthfully, it is best left to the fact-finder to determine whether he in fact did so.”); *Walters v. McCormick*, 122 F.3d 1172, 1175-1176 (9th Cir. 1997) (no violation of either due process or confrontation right in Montana state trial court’s admission of young child’s testimony, when child may not have understood the oath and her “testimony was riddled with inconsistencies,” but defense had had opportunity to develop these flaws on cross examination); *Falwell v. Flynt*, 797 F.2d 1270, 1277 (4th Cir. 1986) (no error in admitting defendant’s deposition; argument that he was incapable of telling truth because of medication goes to weight of the evidence rather than to its admissibility), *rev’d on other grounds*, 485 U.S. 46 (1988); *United States v. Odom*, 736 F.2d 104, 110, 112-13 (4th Cir. 1984) (“Most writers are of the opinion that ‘[t]he trial court’s responsibility under Rule 104(a) to determine preliminary questions concerning the qualifications of witnesses is largely vitiated by Rule 601 which makes all witnesses competent except where state law applied [sic] the rule of decision and declares a witness incompetent . . . .’ Rule 601 . . . represents . . . ‘the culmination of the modern trend which has converted questions of competency into questions of credibility while “steadily moving towards a realization that judicial determination of the question of whether a witness should be heard at all should be abrogated in favor of hearing the testimony for what it is worth.”’ Weinstein suggests that it is ‘probably more accurate to say that [in determining questions under Rule 601], the Court will decide not competency but minimum credibility.’ Under this rule every witness is presumed to be competent. Neither feeble-mindedness [nor] insanity renders a witness incompetent or disqualified. . . . The only grounds for disqualifying a witness under Rule 601 . . . are that the witness ‘does not have knowledge of the matters about which he is to testify, that he does not have the capacity to recall, or that he does not understand the duty to testify truthfully. . . .’ Whether the witness has such competency is a matter for determination by the trial judge after such examination as he deems appropriate and his exercise of discretion in this regard is to be reversed only for clear error.”) (citations omitted); *United States v. County of Arlington, Va.*, 702 F.2d 485, 489-490 (4th Cir. 1983) (letter from German ambassador admitted, in absence of any evidence that he was not competent to testify); *United States v. Jackson*, 576 F.2d 46, 48 (5th Cir. 1978) (“The fact that a witness is a narcotics user goes not to his competency, but to his credibility.”); *United States v. Van Meerbeke*, 548 F.2d 415, 418 (2d Cir. 1976) (addict competent despite fact he took opium while on the witness stand; question of credibility properly left to jury); *United States v. Banks*, 520 F.2d 627, 630 (7th Cir. 1975) (“Competency of a witness to testify, as distinguished from the issue of credibility, is a limited threshold decision by the trial judge as to whether a proffered witness is capable of testifying in any meaningful fashion whatsoever.”); *United States v. Jones*, 482 F.2d 747, 751 (D.C. Cir. 1973) (“[I]t has become the modern trend to limit even the trial court’s power to exclude testimony because of incompetency and to make the pivotal question one of credibility. . . .”) (dictum); *United States ex rel. Lemon v. Pate*, 427 F.2d 1010, 1014 (7th Cir. 1970) (“[T]he fact that [a prosecution witness] was an addict was a matter to be considered in connection with his credibility and the weight which should be given his testimony but not his competency.”); *United*

Under Rule 601, youth alone is insufficient to preclude a child from testifying.<sup>67</sup> As the Advisory Committee's note explains:

No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. A leading commentator observes that few witnesses are disqualified on that ground. Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence.<sup>68</sup>

Rule 601 is complemented by the first-hand knowledge requirement of Rule 602,<sup>69</sup> as well as by the oath or affirmation requirement of Rule 603.

Rule 603 provides: "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."<sup>70</sup> This rule has been applied to prevent young children from testifying when the child has not demonstrated, to the trial judge's satisfaction under Rule 104(a),<sup>71</sup> the ability to distinguish "truth" from a "lie."<sup>72</sup>

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States v. Hicks, 389 F.2d 49, 50 (3d Cir. 1968) (per curiam) (no error to refuse to strike testimony against defendant of a witness who admitted on cross-examination that, inter alia, she used narcotics, heard voices telling her that "they" would take her to Hell, and was scheduled for a mental examination in a state hospital); Fowel v. Cont'l Life Ins. Co., 55 A.2d 205, 207-08 (D.C. 1947) (fact that witness had been drinking heavily on day he testified would affect his credibility not his competency). See generally 1 MCCORMICK ON EVIDENCE §§ 61-62 (Kenneth S. Broun ed., 6th ed. 2006) ("Even if the trier of fact lacks legal training, it is still better on balance to let the evidence come in for what it is worth with cautionary instructions."); 3 CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, FEDERAL EVIDENCE § 6:1-05 (3d ed. 1997); 2 WIGMORE, *supra* note 50, § 501, Michael Graham, *Evidence and Trial Advocacy Workshop: Competency of Lay Witnesses*, 20 CRIM. L. BULL. 141 (1984); Lawrence E. Nill, *Witnesses Under Article VI of the Proposed Federal Rules of Evidence*, 15 WAYNE L. REV. 1236 (1969); Lester B. Orfield, *Competency of Witnesses in Federal Criminal Cases*, 46 MARQ. L. REV. 324 (1962).

67. See, e.g., United States v. Spotted War Bonnet, 882 F.2d 1360, 1362-63 (8th Cir. 1989) (no error in permitting children to take witness stand before court found them to be competent), *vacated*, 497 U.S. 1021 (1990).

68. FED. R. EVID. 601 advisory committee's note (citations omitted).

69. FED. R. EVID. 602. As restyled and slated to be effective December 1, 2011, Rule 602 reads: "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703." FED. R. EVID. 602 (Proposed Official Draft 2011), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV\\_Rules.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf).

70. FED. R. EVID. 603. As restyled and slated to be effective December 1, 2011, Rule 603 reads: "Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty in the witness's conscience." FED. R. EVID. 603 (Proposed Official Draft 2011).

71. The trial court determines competency. E.g., United States v. Odom, 736 F.2d 104, 111 (4th Cir. 1984); United States v. Lyon, 567 F.2d 777, 784 (8th Cir. 1977). See also FED. R. EVID. 104(a) ("Preliminary questions concerning the qualification of a person to be a witness . . . shall be determined by the court. . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges."). Note that Rule 104(a), as restyled and slated to be effective December 1, 2011 provides: "The court must decide any preliminary question about whether a witness is qualified, a

Several commentators have criticized the manner of questioning of children as to these matters as developmentally inappropriate. They have characterized the typical types of questions posed by judges as more appropriate to adults’ ways of thinking and have proposed more child-friendly ways of phrasing the questions.<sup>73</sup> It has also been proposed that the oath requirement be scuttled in favor of a more developmentally appropriate requirement simply that the child agree that she “will” tell the truth.<sup>74</sup>

In apparent sympathy with these suggestions, Congress passed the Victims’ Rights Act as a part of the Crime Control Act of 1990.<sup>75</sup> Under this federal statute, a child witness is explicitly presumed to be competent in criminal cases in federal court.<sup>76</sup> The statute provides that a court may examine a child witness as to competency only for compelling reasons found on the record, after a party has made a written motion and offer of proof of incompetency.<sup>77</sup> The child’s age does not by itself justify such an examination.<sup>78</sup>

privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.” FED. R. EVID. 104 (Proposed Official Draft 2011).

The court in its discretion may determine the form of inquiry to be used and the procedure to be followed in assessing a witness’s competence, including whether to conduct the inquiry outside the presence of the jury. *E.g.*, *Odom*, 736 F.2d at 109-12 (4th Cir. 1984) (no abuse of discretion in denying defense request for in camera determination of competency of approximately 30 prosecution witnesses; request was not made until during government’s case in chief). The same standard of discretion applies in state courts. *See supra* note 53.

72. Lyon, *supra* note 15, 1023-24 & nn.26-29; Raeder, *supra* note 3, 254 & nn.111-12. *See also infra* note 82.

73. *See* SHERRIE BOURG CARTER, CHILDREN IN THE COURTROOM: CHALLENGES FOR LAWYERS AND JUDGES 8 (2009) (referring to the need to use “developmentally appropriate questions” in competency determinations); Lyon, *supra* note 15, 1023-24, 1051-52. *See also infra* notes 193, 196.

74. Lyon, *supra* note 15, 1058-63; Raeder, *supra* note 3, 254 & nn.114, 117-19. *See also* Lucy S. McGough, *Asking the Right Questions: Reviving the Voir Dire for Child Witnesses*, 5 GA. ST. U. L. REV. 557, 584-85 (1989) (proposing that court ask qualification questions “in words the child can comprehend”). *See generally* John Gibeau, *Picture of Competency*, 86 A.B.A. J. 24 (2000) (reporting on Lyon & Saywitz’s work); Thomas D. Lyon & Karen J. Saywitz, *Young Maltreated Children’s Competence to Take the Oath*, 3 APPLIED DEVELOPMENTAL SCI. no. 16-24 (1999) (reporting on results of experiments and recommending asking children which of two pictured characters in a story is lying and which one will “get in trouble”).

75. 18 U.S.C. § 3509 (2006).

76. *Id.* § 3509(c)(2). *See also id.* § 3509(c)(1)-(9). A “child” is defined as a person under the age of eighteen. *Id.* § 3509(a)(2). This approach was advocated by Wigmore. 2 WIGMORE, *supra* note 50, § 509. It has attracted numerous advocates. *See* Michelle L. Morris, *Li’l People, Little Justice: The Effect of the Witness Competency Standard in California on Children in Sexual Abuse Cases*, 22 J. JUV. L. 113, 113 (2002) (proposing the adoption of this policy); *see also infra* note 79.

77. 18 U.S.C. § 3509(c)(3)-(4). *See* *United States v. Kelly*, 436 F.3d 992, 996 (8th Cir. 2006) (court had no duty to sua sponte inquire into competency of child witness); *Tate ex rel Tate v. Bd. of Educ.*, 346 F. Supp. 2d 536, 537 (S.D.N.Y. 2004) (finding “multiply disabled” six-year-old competent to testify, after examination in chambers); *United States v. Walker*, 261 F. Supp. 2d 1154, 1155-56 (D.N.D. 2003) (insufficient offer of proof was made in order to call nine-year-old’s competency into question), *aff’d*, 89 Fed. App’x. 595 (8th Cir. 2004) (unpublished table decision); *United States v. Sumner*, 119 F.3d 658, 663 (8th Cir. 1997) (no abuse of discretion in denying motion for competency hearing).

78. 18 U.S.C. § 3509(c)(4); *Walker*, 261 F. Supp. 2d at 1155-56 (“[C]hildren are presumed to be competent to testify and a competency examination involving a child may be ordered only if ‘compelling reasons’ exist. It is well-established that as long as a witness has the capacity to testify



The statute requires treating children the same as adult witnesses, in that an adult witness is in effect presumed competent to testify.<sup>79</sup> An adult witness merely takes an oath or affirms that he will testify truthfully.<sup>80</sup> No inquiry is made into an adult's mental competence, absent some showing by the opposing party that puts the witness's testimonial competency into substantial doubt.<sup>81</sup>

But the Victims' Right Act does not explicitly address the oath or affirmation

truthfully, it is best left to the fact-finder to determine whether she, in fact, did so."). *See, e.g.*, *United States v. Thai*, 29 F.3d 785, 810 (2d Cir. 1994) (six-and-a-half year-old robbery victim testified).

79. FED. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules."). The rules cross-referenced specifically address only competence of interpreters, judges, and jurors, and the requirements of first-hand knowledge and an oath. FED. R. EVID. 602-606; MD. RULE 5-601 ("Except as otherwise provided by law, every person is competent to be a witness."); MD. RULE 5-601 advisory committee's note ("Under this Rule, a witness is not generally incompetent by virtue of status. A court could find, however, that because of insufficient memory, intelligence, or ability to express oneself, or inability to appreciate the need to tell the truth, a particular witness is not competent to testify as to certain matters. *See* Rules 5-401 through 5-403, and 5-603."). *See also supra* note 56.

80. The witness may "affirm" her intention to testify truthfully, rather than swear to it. *E.g.*, FED. R. EVID. 603; MD. RULE 1-303 ("Except as provided in Rule 16-819(d)(3), whenever an oral oath is required by rule or law, the person making oath shall solemnly swear or affirm under the penalties of perjury that the responses given and statements made will be the whole truth and nothing but the truth."); *Thai*, 29 F.3d at 812 (holding that affirmation was sufficient).

81. *See, e.g.*, *Anderson v. Franklin Cnty.*, 192 F.3d 1125, 1129 (8th Cir. 1999) (no abuse of discretion in excluding testimony by eyewitness who was deaf and mute, and who could not read, write, or communicate with standard form of sign language; trial court stated that "the communication to and from [eyewitness] through the interpreters is not reliable," that "[t]he accuracy of questions to and responses from [eyewitness] are highly suspect," and that eyewitness's severe limitation in communicating would render his testimony unreliable, confusing, and misleading); *United States v. Garcia*, 1990 WL 160187, at \*2 (4th Cir.) (per curiam) (no abuse of discretion to refuse to permit defense witness who did not understand English to testify without an interpreter); *United States v. Odom*, 736 F.2d 104, 111, 114 (4th Cir. 1984) (trial court refused to allow clerk to swear nine witnesses, residents of nursing home, because of their "obvious incapacity"; "five did not even respond to their names or show any ability to comprehend the questions directed to them or to give any testimony whatsoever"; "four gave such contradictory answers in direct and cross-examination that the district judge concluded that [they] were not competent"; the burden is on the opponent of a witness to show that the witness is incompetent); *United States v. Lightly*, 677 F.2d 1027, 1028 (4th Cir. 1982) ("Every witness is presumed competent to testify, Fed. R. Evid. 601, unless it can be shown that the witness does not have personal knowledge of the matters about which he is to testify, that he does not have the capacity to recall, or that he does not understand the duty to testify truthfully."); *Huff v. White Motor Corp.*, 609 F.2d 286, 293-94 n.12 (7th Cir. 1979) ("In the extreme case in which the witness' incompetence is clear, the judge could exercise his balancing authority under Rule 403 to exclude the evidence."); *United States v. Banks*, 520 F.2d 627, 630 (7th Cir. 1975) (a witness is incompetent if he or she is not "capable of testifying in any meaningful fashion whatsoever"); *United States v. Benn*, 476 F.2d 1127, 1130 (D.C. Cir. 1972) ("Competency depends upon the witness' capacity to observe, remember, and narrate as well as an understanding of the duty to tell the truth. It also requires an assessment of the potential prejudicial effects of allowing the jury to hear the testimony. Mental retardation may be so severe, capabilities so impaired, and the testimony so potentially prejudicial that it should be barred completely by the judge."); *Tate*, 346 F. Supp. 2d at 537 (judge held competency hearing regarding "multiply disabled" six-year-old after finding "reasonable cause" to do so); *Perry v. State*, 848 A.2d 631, 636 n.4, 639 (Md. 2004) (party who knows that there is "a substantial question regarding [an opponent's key witness's] competency" should raise the issue before trial); *Burgess v. State*, 598 A.2d 830, 844-45 (Md. Ct. Spec. App. 1991) (no abuse of discretion by trial court in nonjury trial to have conducted competency examination of tenth grader who functioned at third grade level); 3 WEINSTEIN'S FEDERAL EVIDENCE ¶ 601.03(1)(a) & (c) (Joseph M. McLaughlin ed., 2d ed. 2010).

requirement of Rule 603. In practice, Rule 603’s requirement can impose a much greater obstacle for children than it does for adults. Asking a young child to explain the abstract concepts of “truth” and “lies” can be like asking an adult to speak an incomprehensible foreign language.<sup>82</sup> As a result, children who may have valuable and accurate knowledge of key facts can be found unable to meet Rule 603’s criteria and thus precluded from testifying.

Some prominent commentators, including Dean Wigmore, have urged that courts jettison this preliminary vetting of child witnesses, and simply let the child testify, trusting the jury—as with adult witnesses—to properly evaluate what weight to give the child’s testimony.<sup>83</sup> Indeed both Great Britain and Canada have done away with any requirement that a child take an oath, make an affirmation, or show an understanding of a duty to tell the truth.<sup>84</sup>

## 2. State Courts

Yet the longstanding practice in many American state jurisdictions remains that the trial judge interview a young child, usually out of the hearing of the jury, and often in chambers, before permitting the child to testify.<sup>85</sup> Only if the judge, in

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82. *Perez v. State*, 536 So. 2d 206, 210-11 (Fla. 1988); *see also State v. Superior Court ex rel. County of Pima*, 719 P.2d 283, 286 (Ariz. Ct. App. 1986) (“A preschool-aged child generally does not understand abstract concepts such as oath, duty, truth or lie. A child’s testimony may be rambling and disjointed, characterized by lack of continuity, spotty memory and an inability to discuss specific dates and times. Those failings, however, go to the credibility of the witness and the weight to be given the testimony, not to competency.”).

83. Joseph A. Colquitt & Charles W. Gamble, *From Incompetency to Weight and Credibility: The Next Step in an Historic Trend*, 47 ALA. L. REV. 145, 146-52 (1995); *see* 1 KRAMER, *supra* note 28, § 13.2; Morris, *supra* note 76; Reply Brief For Petitioner at \*6, *Idaho v. Wright*, 497 U.S. 805 (1990), (No. 89-260), 1990 WL 10013037 (citing WIGMORE); *see also* J. G. A., *The Competency of Children as Witnesses*, 39 VA. L. REV. 358 (1953) (discussing authorities).

Another prominent commentator has argued that our efforts should be focused on making the children available for cross-examination. Mosteller, *supra* note 19.

84. *See* Kay Bussey, *An International Perspective on Child Witnesses*, in Bottoms, *supra* note 6, at 217-18 (Since 1933, Great Britain has permitted children to give unsworn testimony; Canada follows a similar approach. In England, by virtue of a 1999 statute, all children of all ages are presumed competent to testify, and they need not be questioned as to their “knowledge of lies and untruths or their understanding of the duty to speak the truth”; but the judge may exclude the child’s testimony if, upon hearing it, the judge determines that the child “could not understand the questions and answer them in a comprehensible manner.” Canada followed suit by statute in 2005, and requires of children under age 14 only that they “promis[e] to tell the truth,” they need not swear or affirm, and “no assessment is undertaken of whether they understand the promise to tell the truth.”); Khristopher M. Gregoire, Comment, *A Survey of International Hearsay Exceptions in Child Sex Abuse Cases: Balancing the Equities in Search of a More Pragmatic Rule*, 17 CONN. J. INT’L L. 361 (2002) (discussing English law).

85. *E.g.*, *Matthews v. State*, 666 A.2d 912, 919-20 (Md. Ct. Spec. App. 1995); Myrna S. Raeder, *Navigating Between Scylla and Charybdis: Ohio’s Efforts to Protect Children Without Eviscerating the Rights of Criminal Defendants—Evidentiary Considerations and the Rebirth of Confrontation Clause Analysis in Child Abuse Cases*, 25 U. TOL. L. REV. 43, 52-54 (1994) (citing Ohio cases). *See* *Kentucky v. Stincer*, 482 U.S. 730 (1987) (excluding criminal defendant, but not his counsel, from in-chambers hearing held to determine competency of two child witnesses violated neither due process nor his confrontation right, as exclusion did not interfere with his opportunity for effective cross-examination; also, after each child had testified on direct examination, defense counsel could have asked judge to reconsider earlier ruling that the child was competent); Laurie Shanks, *Evaluating Children’s Competency to Testify: Developing a Rational Method to Assess a Young Child’s Capacity to Offer*

his or her discretion,<sup>86</sup> then determines that the child has sufficiently demonstrated the ability to observe, remember, and communicate the relevant facts<sup>87</sup> and an understanding of the duty to tell the truth,<sup>88</sup> will the judge allow the child to testify.<sup>89</sup>

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*Reliable Testimony in Cases Alleging Child Sex Abuse*, 58 CLEV. ST. L. REV. 575 (2010) (urging a lengthier competency hearing for children, in which among other suggestions, their understanding of time should be explored). Cf. Alice Dvoskin & Leonard S. Jacobson, *Judicial Interview of Children in Custody Litigation*, 27 MD. B.J. 44 (1994) (arguing in child custody litigation a judge's interview of a child in chambers is limited in its effectiveness).

86. E.g., *Robert v. State*, 151 A.2d 737, 739 (Md. 1959); 2 WIGMORE, *supra* note 50, §§ 507-08; see also Lyon, *supra* note 15, at 1043 & nn.87-88 (stating the proposition that Federal Rule of Evidence 104(a) governs; preponderance of evidence standard applies).

87. E.g., *Wheeler v. United States*, 159 U.S. 523, 524-25 (1895) ("That the [five-and-one-half-year-old] boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath."); John E.B. Myers, *Expert Psychological Testimony in Child Sexual Abuse Trials*, in Bottoms, *supra* note 6, at 179 ("For a child to testify, the judge must be persuaded that the child possesses the ability to remember salient events, is able to communicate, understands the difference between truth and lies, and apprehends the duty to tell the truth. Children as young as four possess the necessary moral and cognitive capacities to meet these requirements.") (citations omitted); 2 WIGMORE, *supra* note 50, §§ 505-06; see also Greg Tasker, *Judge Orders Test of Autistic Girl's Ability to Testify*, BALT. SUN (Jan. 11, 1994), [http://articles.baltimoresun.com/1994-01-11/news/1994011048\\_1\\_facilitated-communication-frederick-county-communication-method](http://articles.baltimoresun.com/1994-01-11/news/1994011048_1_facilitated-communication-frederick-county-communication-method) (Judge Cave of Montgomery County, Maryland, sitting in Frederick County Circuit Court, ordered that ten-year-old autistic child be tested to see whether she could use "facilitated communication," in which "an aide holds the girl's hand or arm while she types on a computer keyboard") (internal quotation marks omitted).

88. E.g., *Wheeler*, 159 U.S. at 525; *Jones v. State*, 275 A.2d 508, 513 (Md. Ct. Spec. App. 1971); *Hill v. Skinner*, 79 N.E.2d 787, 789 (Ohio Ct. App. 1947) (finding it was proper to allow four-year-old, who had said if he did not tell the truth God would not love him, to testify); 1 MCCORMICK, *supra* note 66, § 62; 2 WIGMORE, *supra* note 50, §§ 505-06.

89. For examples of applications of the test, see *Walters v. McCormick*, 108 F.3d 1165, 1168-69 (9th Cir. 1997) (finding no violation of due process or confrontation right in trial court's admission of four-year-old's testimony, when child may not have understood the oath and her testimony was riddled with inconsistencies, but defense had opportunity to develop these flaws on cross); *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1990) (en banc) (three-year-old was properly found to be competent to testify); *State v. Townsend*, 635 So.2d 949 (Fla. 1994) (remanding for determination of whether two-year-old's out-of-court statement to her mother was reliable); *Jones v. State*, 980 A.2d 469, 472-76, 478-80 (Md. 2009) (no clear error in trial court's determination that six-year-old child was competent to testify, even though he gave some incorrect responses during voir dire); *Perlin Packing Co. v. Price*, 231 A.2d 702, 711 (Md. 1967) (finding eight-year-old incompetent; trial court properly struck her testimony, because it was apparent witness "either did not understand the questions as asked or did not know what she was saying when she attempted to answer them"); *Freeny v. Freeny*, 31 A. 304, 304-05 (Md. 1895) (affirming the decision that the twelve, ten, and seven-year olds were competent); *Mathews*, 666 A.2d at 919-20 (holding no abuse of discretion in finding four-year-old child competent to testify); *Jones v. State*, 510 A.2d 1091 (Md. Ct. Spec. App. 1986) (reversing the trial court's decision to allow the witness to testify because the child, who was four years old at time of alleged abuse, was shown to be incompetent); *Williams v. State*, 274 A.2d 403, 404-05 (Md. Ct. Spec. App. 1971) (finding eight-year-old competent); *State v. Dwyer*, 440 N.W.2d 344 (Wis. 1989) (error to preclude three-and-a-half-year-

A few states, however, have adopted Wigmore’s proposal to some degree. As explained by the Colorado Supreme Court, a Colorado statute provides:

In a criminal prosecution for a sexual offense, a child under ten years of age is considered competent to testify as a witness as long as the child is “able to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined.” § 13-90-106(1) (b) (II), 6A C.R.S. (1987 & Supp. 1990). This statutory requirement, of course, assumes that the child was physiologically capable of apprehending or perceiving the facts or events about which the child is to be examined.<sup>90</sup>

Several other states have similar statutes.<sup>91</sup> Ohio case law follows this approach, as well.<sup>92</sup>

But many young children in numerous states continue to be incompetent to testify under traditional standards. The concern that the key witness will be held to be incompetent inevitably prevents prosecutors and other child advocates from being able to pursue innumerable cases,<sup>93</sup> especially when they cannot offer the child’s out-of-court statements into evidence.

Even if the child testifies, the child’s testimony alone may be insufficient to persuade the fact-finder. A young child’s trial testimony may lack the probative value of his initial statements, and the inadmissibility of the child’s earlier statements may mean the loss of the case. Though this may be true of adult witnesses, as well, there are special challenges for children.

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old child witness’s testimony, if child could understand the significance of telling the truth, even if she had difficulty understanding questions or remembering, or was confused and inattentive); *In Interest of CB*, 749 P.2d 267 (Wyo. 1988) (no plain error under Wyo. R. Evid. 601 in allowing three-year-old child to testify after court held a competency hearing). See *State v. Campbell*, 579 P.2d 1231, 1233-34 (Mont. 1978) (trial court should have determined whether four-year-old witness was able to testify at trial, which he would be if he could be shown to “perceive correct impressions of the facts he observed, to remember those impressions, to communicate what he saw, and to understand his duty to tell the truth”; instead, trial court had committed reversible error by admitting child’s out-of-court statements that did not fall within a hearsay exception). See generally EPSTEIN, *supra* note 6, § 31.06; Gary B. Melton, *Children’s Competency to Testify*, 5 L. & HUM. BEHAV. 73 (1981); John E.B. Myers, *The Testimonial Competence of Children*, 25 U. LOUISVILLE J. FAM. L. 287 (1986-87); Jeff C. Woods, *Children Can Be Witnesses, Too: A Discussion of the Preparation and Utilization of Child-Witnesses in Courts-Martial*, ARMY LAW. 2 (Mar. 1983); Carol J. Miller, Annotation, *Instructions to Jury as to Credibility of Child’s Testimony in Criminal Case*, 32 A.L.R. 4th 1196 (1984 & Supp. 2011); Nora A. Uehlein, Annotation, *Witnesses: Child Competency Statutes*, 60 A.L.R.4th 369, §§ 31-32 (1988 & Supp. 2011) (listing cases where three- and four-year-olds were found competent to testify); Annotation, *Competency of Young Child as Witness in Civil Case*, 81 A.L.R.2d 386 (1962).

90. *People v. Bowers*, 801 P.2d 511, 519 (Colo. 1990) (en banc); see also *People v. District Court ex rel. Summit Cnty.*, 791 P.2d 682 (Colo. 1990) (en banc).

91. See ALA. CODE 15-25-3(c) (1995) (“[A] child victim of a physical offense, sexual offense, or sexual exploitation, shall be considered a competent witness. . . .”); CONN. GEN. STAT. ANN. 54-86h (2009) (“any child who is a victim of assault, sexual assault or abuse shall be competent to testify without prior qualification”); MO. ANN. STAT. 491.060(2) (1996) (excepting from usual qualification requirements “a child under the age of ten who is alleged to be a victim under chapter 565, 566 in 568”); UTAH CODE ANN. 76-5-410 (2008 Repl. Vol.) (“A child victim of sexual abuse under the age of ten is a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding. The trier of fact shall determine the weight and credibility of the testimony”).

92. See *State v. Silverman*, 906 N.E.2d 427, 434, 438 (Ohio 2009)

93. Raeder, *supra* note 3, at 239 & n.3. See also Lyon, *supra* note 15.

### C. Ineffectiveness of Young Children's Testimony

Children are often particularly ineffective witnesses.<sup>94</sup> Frequently this is because of the child's fear of the opposing party or of the trial court setting or both,<sup>95</sup> so that the child gives only halting or incomplete responses to questions.<sup>96</sup> Additionally, as when adult victims of domestic abuse are asked to testify against their abusers,<sup>97</sup> the child victim may be either reluctant to testify<sup>98</sup> or even recant

94. Ehrhardt & McCabe, *supra* note 10, at 1 ("Due to their age, immaturity, and intimidation of the courtroom, children are frequently poor witnesses when called to testify at trial.")

The United States Supreme Court has recognized this deficiency, noting:

At trial A.T., then 6 ½ years old, was the Government's first witness. For the most part, her direct testimony consisted of one- and two-word answers to a series of leading questions. Cross-examination took place over two trial days. The defense asked A.T. 348 questions. On the first day A.T. answered all the questions posed to her on general, background subjects. The next day there was no testimony, and the prosecutor met with A.T. When cross-examination of A.T. resumed, she was questioned about those conversations but was reluctant to discuss them. Defense counsel then began questioning her about the allegations of abuse, and it appears she was reluctant at many points to answer. As the trial judge noted, however, some of the defense questions were imprecise or unclear. The judge expressed his concerns with the examination of A.T., observing there were lapses of as much as 40-55 seconds between some questions and the answers and that on the second day of examination, the witness seemed to be losing concentration. The trial judge stated, "We have a very difficult situation here."

Tome v. United States, 513 U.S. 150, 153-54 (1995). See, e.g., United States v. Dorian, 803 F.2d 1439, 1443, 1445 (8th Cir. 1986) ("[T]he five-year-old was called to the stand, but because of her age and obvious fright, she was unable to testify meaningfully"; she was "frightened and uncommunicative, especially when asked questions relating to sexual abuse."); United States v. Iron Shell, 633 F.2d 77, 87 (8th Cir. 1980) ("At trial Lucy [the nine-year-old victim] was unable to repeat the statements she had made to Officer Marshall and Dr. Hopkins although she was able to provide some facts to support her earlier statements."); Bowers, 801 P.2d at 514 ("The prosecuting attorney asked K.B., who was then four and one-half years old, very basic questions, such as her name, age, and whether she could identify her parents in the courtroom. The child answered these questions but only with great reluctance and by nodding."); People v. Rocha, 547 N.E.2d 1335, 1338 (Ill. App. Ct. 1989) ("It has been estimated that some 400,000 children are sexually abused every year in the United States. These cases present special problems of proof that make their prosecution especially difficult. The most obvious difficulty is the fact that usually the only witness to the crime is a young child who may not be able to testify adequately about what occurred. The courtroom setting can be intimidating to the child attempting to recount the incident of abuse, and cross-examination is likely to confuse the child witness. A child may retract a claim of sexual abuse because of the guilt or fear caused by the event. Moreover, when the perpetrator is a friend or family member, the child may even fear the consequences for the offender. The child may simply refuse to retell his or her story in open court, and sometimes parents will decline to prosecute the case rather than subject the child to what amounts to yet another trying ordeal.") (internal citations omitted). See generally 1-2 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES §§ 1.2-.7, 1.29, 6.1-.22 (3d ed. 1997) (describing and explaining difficulties faced by child witnesses).

95. E.g., Lawson v. State, 865 A.2d 617, 631 (Md. Ct. Spec. App. 2005) ("[A] young child can be easily intimidated into not testifying about [such] offenses. . . ." State v. Benwire, 98 S.W.3d 618, 624 (Mo. Ct. App. 2003)."); State v. C.J., 63 P.3d 765, 769 (Wash. 2003) (en banc) ("[C]hildren are often ineffective witnesses at trial because they are intimidated by the accused, who is often a parent or relative, by the trial process, or both."); Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009, 1015 (2007); Veronica Serrato, Note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U. L. REV. 155, 157-61 (1988) (discussing intimidation of children).

96. See *supra* note 94.

97. See generally Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747 (2005).

her earlier reports of abuse.<sup>99</sup>

These problems are compounded because, as other legal commentators and social scientists have pointed out, the manner of examination at trial is developmentally inappropriate and confusing to children.<sup>100</sup> On cross-examination, a child may often be asked questions beyond the reasoning process appropriately expected for a person of his age. Such a confused child will give more inconsistent responses than would a similarly situated adult. Developmentally delayed (mentally retarded) adults have the same problems as do young children.<sup>101</sup>

Children’s credibility may be attacked on the ground that they did not promptly report the alleged abuse, giving rise to the inference that it never happened. Jurors may not understand that, like adult victims of domestic violence, child abuse victims may be slow to disclose the abuse due to loyalty to dependency on, or love or fear of their abuser.<sup>102</sup> Delays in reporting also may result from the child having been made to promise to keep it as “our secret”<sup>103</sup> or from the child having been threatened—such as: “If you tell, something very bad will happen to your mommy.”<sup>104</sup> Less like adult victims, children’s failure to recognize that an act such as sexually-motivated fondling by an adult is “wrong” may result in delayed

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98. See *supra* note 94.

99. See, e.g., *United States v. Bahe*, 40 F. Supp. 2d 1302, 1303 (D.N.M. 1998) (child recanted; evidence was held insufficient to support a conviction); *Lawson*, 865 A.2d at 631 (“For that reason and others, ‘as a general phenomenon, child abuse victims frequently recant their initial reports of abuse.’” *Yount v. State*, 99 Md. App. 207, 210, 636 A.2d 50 (1994).”), *rev’d on other grounds*, 886 A.2d 876 (Md. 2005); Raeder, *supra* note 3, at 250 & nn.85-89.

100. See Frank E. Vandervort, *A Search for the Truth or Trial by Ordeal: When Prosecutors Cross-Examine Adolescents How Should Courts Respond?*, 16 WIDENER L. REV. 335, 359-67 (2010) (applying Wigmore’s observation that a cross-examiner “may make the truth appear like falsehood” to propose that judges should curb unfair examination of juvenile defendants, in part because “legal professionals overestimate the linguistic abilities of children and youths”). See also *supra* note 73 and accompanying text.

101. *State v. Hosty*, 944 So. 2d 255, 262-63 (Fla. 2006).

102. *Kennedy v. Louisiana*, 554 U.S. 407, 443-45 (2008); Thomas D. Lyon, *Abuse Disclosure: What Adults Can Tell*, in *Bottoms*, *supra* note 6, at 20 (discussing research confirming that “most sexual abuse is not disclosed during childhood, and that . . . disclosure is difficult even for older respondents, and particularly so in cases of intrafamilial abuse”); Lyon, *supra* note 15, at 1070 & nn.176-78; Raeder, *supra* note 3, at 249 & nn.81-83; CHILD SEXUAL ABUSE: DISCLOSURE, DELAY, AND DENIAL (Margaret Ellen Pipe et al. eds., 2007) (discussing scientific research regarding children’s disclosure of their having been sexually abused and resulting legal, clinical, and policy implications). See also *United States v. Dorian*, 803 F.2d 1439, 1444 (8th Cir. 1986) (“According to the psychologist, it frequently takes a long time for children to share what is really going on and they may then do so in stages, telling a little more each time.”); JAYCEE DUGARD, *A STOLEN LIFE* (2011) (author, who was kidnapped at age eleven for eighteen years and repeatedly raped, did not leave her abusers when she had the opportunity, because they had told her she could not survive without them).

103. See Paul Wagland & Kay Bussey, *Factors that Facilitate and Undermine Children’s Beliefs about Truth Telling*, 29 LAW & HUM. BEHAV. 639 (2005) (investigating effect on children’s truthfulness about an adult, when the adult has sworn them to secrecy).

104. See *United States v. Harrison*, 296 F.3d 994, 996 (10th Cir. 2002) (victim said that for years she did not tell anyone about defendant’s sexual assaults on her, because he “had told her not to and had threatened to kill her if she did”); *United States v. Hollis*, 54 M.J. 809, 813 (N-M. Ct. Crim. App. 2000) (defendant, victim’s biological father, told her he would go to jail if she told anyone).

reporting of the event.<sup>105</sup>

Particularly when there is a long delay between the child's initial report of abuse and the trial, memory problems may also arise.<sup>106</sup> Like an adult, a child's memory may have faded with the passage of time.<sup>107</sup> Unlike adults, however, young children may not have recognized the abuse as aberrational so as to ascribe special importance to it at the time it occurred; thus, not having recognized it as traumatic, they may not have related it to themselves or others repeatedly in the interim—such a practice by a similarly situated adult would help to reinforce and keep the memory alive.<sup>108</sup>

When a young child is the victim of an alleged crime, our justice system is put to its severest test. Beyond cavil we must be scrupulously fair to the person accused of abuse. In criminal cases we apply a presumption of innocence and impose a burden of persuasion beyond a reasonable doubt because we do not want to convict an innocent person. If the person accused of abuse is a parent, we do not want to lightly terminate parental rights.

Nor, however, do we want to create a group of helpless victims whom a perpetrator could “safely” harm, whom we could not protect, and to whom we could never offer recourse.<sup>109</sup> If the child is unable to testify at trial—or is permitted to testify, but is unable to testify effectively—the need for the fact-finder to hear, and the probative value of, the child's earlier statements is greatly heightened. The question arises: what parameters does the Constitution establish as to the admissibility of children's out-of-court statements when they either cannot testify, or cannot effectively testify, at trial?

105. Lyon, *supra* note 15, at 1070 & n.176. See *State v. D.R.*, 537 A.2d 667, 673 (N.J. 1988) (“Young children . . . do not necessarily regard a sexual encounter as shocking or unpleasant, and frequently relate such incidents to a parent or relative in a matter-of-fact manner”). Developmental psychology may be important here, too, to the child's understanding of the event. Funk, *supra* note 19, at 957-59, 964-65. See also *infra* notes 167 and text accompanying note 198.

106. *State v. Massengill*, 62 P.3d 354, 358-59 (N.M. Ct. App. 2002) (child was two-and-one-half years old at time of abuse and out-of-court statement, but had no memory at trial when five years old); *State v. Hunt*, 741 P.2d 566, 569 n.3 (Wash. Ct. App. 1987) (“In cases of child sexual abuse, there may often be a substantial delay between the alleged crime and the child's statement and another substantial delay between the statement and the time of trial.”); Natalie R. Troxel et al., *Child Witnesses in Criminal Court*, in Bottoms, *supra* note 6, at 159.

107. *State v. C.J.*, 63 P.3d 765, 769 (Wash. 2003) (en banc) (“[Y]oung children's memories fade with the passage of time.”).

108. See *infra* note 201.

109. See, e.g., Connally, *supra* note 15, at 1; C.M. Mahady-Smith, Commentary, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 DICK. L. REV. 721, 721-22 (1985) (reporting the dropping of a sexual abuse case due to inadmissibility of a child's statements identifying his abuser, when the three-year old boy had gonorrhea of the mouth, penis, and rectum); Mosteller, *supra* note 19; Jackie Powder, *Judge's Ban of Social Worker's Testimony in Child Abuse Case Upsets Investigators*, BALT. SUN (Aug. 9, 1992), [http://articles.baltimoresun.com/1992-08-09/news/1992222125\\_1\\_child-abuse-social-worker-charges-of-child](http://articles.baltimoresun.com/1992-08-09/news/1992222125_1_child-abuse-social-worker-charges-of-child) (the stepfather of a five-year old Maryland girl who contracted gonorrhea was acquitted when the State was not permitted to prove that the child had described to a police officer her stepfather's having had sexual intercourse with her).

III. THE CONFRONTATION AND DUE PROCESS RIGHTS: FOR DUE PROCESS PURPOSES, THE RELIABILITY OF AN EARLIER STATEMENT IS NOT DETERMINED BY TESTIMONIAL COMPETENCE AT TIME OF TRIAL

The Constitution’s confrontation and due process clauses establish the limits within which the rules of evidence may operate.

A. *The Confrontation Clause*

In a criminal trial the defendant has a constitutional right to confront the “witnesses against him.”<sup>110</sup> If a child called by the prosecution is—through no fault of the child’s—an ineffective witness at trial, but she does testify and is subject to cross-examination, the accused’s confrontation right will have been fully met.<sup>111</sup> Under *Crawford v. Washington* and its progeny *Davis v. Washington*, the confrontation clause applies only to “testimonial” statements, as only they are considered to be of “witnesses against” the accused within the meaning of the Sixth Amendment.<sup>112</sup>

If the child does not testify at the trial, but he has made a prior testimonial statement that inculcates the accused, the accused’s confrontation right will exclude the child’s earlier statement (unless either the accused had an earlier opportunity to cross-examine the child about the statement<sup>113</sup> or the accused has forfeited or waived her confrontation right<sup>114</sup>). But what restraints the Constitution imposes, post *Crawford*, on the admission of a child’s earlier, “nontestimonial”<sup>115</sup> statements has been less frequently addressed.

110. See *supra* note 18.

111. See *Crawford v. Washington*, 541 U.S. 36, 38, 68 (2004); *United States v. Owens*, 484 U.S. 554, 557 (1988).

112. *Davis v. Washington*, 547 U.S. 813, 823 (2006). See also *supra* note 19.

113. *Crawford*, 541 U.S. at 68. See, e.g., *State v. Hosty*, 944 So. 2d 255, 268 (Fla. 2006) (holding statutory hearsay exception unconstitutional as applied to testimonial out-of-court statement by mentally disabled adult to police officer, but constitutional as applied to nontestimonial statement to teacher); *State v. Ortega*, 175 P.3d 929, 930 (N.M. 2007) (holding statement to Sexual Assault Nurse Examiner (SANE) to be testimonial). The line between testimonial and nontestimonial remains unclear and difficult to define. In *Hosty*, for example, Judge Pariente, concurring in part and dissenting in part, would not have reached the question, but did not embrace the conclusion that the statements to the teacher were nontestimonial; inter alia, the teacher had a statutory duty to report the out-of-court statement to law enforcement. *Hosty*, 944 So. 2d at 265-66. Judge Quince, dissenting, joined by Judge Aistead, would have found the statements to the teacher testimonial. *Ortega*, 175 P.3d at 969-70. See generally Mosteller, *supra* note 19.

114. See *supra* note 21.

115. Abuse victims’ statements were found to be nontestimonial in several cases. E.g., *State v. Scacchetti*, 690 N.W.2d 393, 396 (Minn. Ct. App. 2005) (three-year-old’s response when a nurse practitioner asked her if anything had happened was not testimonial hearsay); *State v. Vaught*, 682 N.W.2d 284, 292 (Neb. 2004) (no error in admitting doctor’s testimony to nontestifying child’s statement to examining physician); *State v. Ladner*, 644 S.E.2d 684, 689-90 (S.C. 2007) (and cases cited therein); *State v. Shafer*, 128 P.3d 87, 90, 92 (Wash. 2006) (en banc) (holding that the mostly spontaneous statements of a three-year-old rape victim [who the parties stipulated was incompetent to testify] to her mother and a family friend were nontestimonial, when the witnesses to the statements were not acting on behalf of law enforcement and an objective declarant would have had no reason to believe the statements would be used in court); *State v. Fisher*, 108 P.3d 1262, 1269 (Wash. Ct. App. 2005) (no confrontation clause violation in admitting, under Wash. Evid. R. 803(a)(4), the statement of a



*B. The Due Process Clause: "Reliability"*

After the March 2004 decision in *Crawford*, no confrontation right issue can arise if a child's pretrial "nontestimonial" statements are admitted into evidence.<sup>116</sup> But a due process violation will result if a verdict is based on unreliable hearsay.<sup>117</sup> In 2011 the United States Supreme Court, in a majority opinion authored by Justice Sotomayor in *Michigan v. Bryant*, averted to the newly enhanced role of the due process clause.<sup>118</sup> This author has previously argued that appropriate implementation of the post-*Crawford* due process standard requires that the trial court examine the reliability of proffered hearsay, as to which the standards of *Ohio v. Roberts*<sup>119</sup> and *Idaho v. Wright*<sup>120</sup> remain applicable (until and unless they are overruled).<sup>121</sup> Can a child who does not understand, as an adult would, abstract concepts (such as "truth" and "falsehood") have made a reliable out-of-court statement?<sup>122</sup> The answer is "yes, perhaps." *Wright and Roberts* require that in

two-year-and-five-month-old child to physician that defendant had hit him; child was incompetent to testify at trial).

116. See *Davis*, 547 U.S. 813; see also *supra* note 19.

117. See *Nunley v. State*, 916 N.E.2d 712, 719 (Ind. 2010) (reversing child molestation convictions on two counts as to which the child victim's unreliable out-of-court statements provided the only supporting evidence); *Miller v. State*, 531 N.E.2d 466, 470-71 (Ind. 1988) (under all circumstances, reversible error to admit unreliable "tender years" statement); *State v. Wallace*, 524 N.E.2d 466, 475 (Ohio 1988) (Wright, J., dissenting) (based on "procedural due process protections," dissent would have reversed convictions based on hearsay that did not properly qualify for admission); *State v. Karpenski*, 971 P.2d 553 (Wash. Ct. App. 1999) (because under facts of case, child victim was neither competent to testify at trial nor competent when he made numerous inconsistent and fantastic out-of-court statements, it was reversible error to permit child to testify and to admit his out-of-court statements); see also *supra* note 25.

118. *Michigan v. Bryant*, --- U.S. ---, 131 S. Ct. 1143, 1162 n.13 (2011) ("Of course the Confrontation Clause is not the only bar to admissibility of hearsay statements at trial. State and federal rules of evidence prohibit the introduction of hearsay, subject to exceptions. Consistent with those rules, the Due Process Clause of the Fifth and Fourteenth Amendments may constitute a further bar to admission of, for example, unreliable evidence."). See also *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996) (plurality opinion) (erroneous evidentiary rulings can, in combination, rise to the level of a due process violation); *Dutton v. Evans*, 400 U.S. 74, 96-97 (1970) (Harlan, J., concurring) ("[T]he Fifth and Fourteenth Amendments' commands that federal and state trials, respectively, must be conducted in accordance with due process of law" is the "standard" by which to "test federal and state rules of evidence.").

119. 448 U.S. 56 (1980).

120. 497 U.S. 805 (1990).

121. See *McLain*, *supra* note 24, at 377, 416-30.

122. Regarding the reliability of children's testimony, see generally Roger V. Burton, *Honesty and Dishonesty*, in *MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH, AND SOCIAL ISSUES* 173 (Tom Lickona ed. 1976); Gilstrap et al., *supra* note 13; J. J. Haugaard et al., *Children's Definitions of the Truth and Their Competency in Legal Proceedings*, 15 *LAW & HUM. BEHAV.* 253 (1991); Thomas L. Henry, *Child Abuse Prosecutions—The Criminal Defense Lawyer's Viewpoint*, MD. B.J., Mar. 1985, at 9; Barbara Van Oss Marin et al., *The Potential of Children as Eyewitnesses: A Comparison of Children and Adults on Eyewitness Tasks*, 3 *LAW & HUM. BEHAV.* 295 (1979); MYERS, *supra* note 94; Colin H. Murray, *Child-Witness Examination*, 31 *LITIG.* 16 (2005); Faye A. Silas, *Would A Kid Lie?*, 71 *A.B.A. J.* 17 (1985); Charles B. Stafford, *The Child as a Witness*, 37 *WASH. L. REV.* 303 (1962); Alan D. Strasser, *Child Witnesses*, 14 *LITIG.* 30 (1988); Wagland & Bussey, *supra* note 103. See also *supra* notes 50, 72, 82.

gauging reliability of an out-of-court statement we look at the attendant circumstances *at the time* the statement was made.<sup>123</sup>

*C. Analysis of the Reliability of the Out-of-Court Statement Is Separate and Different from the Question of Competency to Testify at Trial*

Although the jurisdictions are divided, numerous courts have recognized, both before and after *Crawford*, that the determination of whether a child’s pretrial statement is reliable requires a separate and different analysis from whether the child is competent to testify at trial.<sup>124</sup> Most significantly, the United States Supreme Court embraced this proposition in *Idaho v. Wright*.<sup>125</sup> The appropriate standard for determining the reliability of a pretrial statement is the declarant’s “ability to receive, retain and relate accurate impressions of an occurrence” at the time of the statement.<sup>126</sup> A child declarant’s testimonial competence or lack of competence at trial is not determinative; it may be only “a factor” in that calculation.<sup>127</sup>

123. See *infra* Part III.C.

124. *E.g.*, *People v. Bowers*, 801 P.2d 511, 519 (Colo. 1990) (en banc) (“A finding, for example, that a very young child is incompetent to testify because of the child’s reluctance to answer questions in a formal courtroom environment does not necessarily impair any particularized guarantees of reliability that otherwise inhere in a child’s hearsay statement.”); *People v. Dist. Court*, 776 P.2d 1083, 1087 (Colo. 1989); *Perez v. State*, 536 So. 2d 206, 211 (Fla. 1989); *People v. Rocha*, 547 N.E.2d 1335, 1341 (Ill. App. Ct. 1989); *Miller v. State*, 517 N.E.2d 64, 72 n.7 (Ind. 1987); *Embry v. Holly*, 429 A.2d 251, 267-69 (Md. Ct. Spec. App. 1981) (identity of anonymous phone callers [and thus, this author posits, their mental capacity] was not necessary for admission of their out-of-court statements under state of mind exception to hearsay rule; only requirement was that statement was made with “apparent sincerity”), *aff’d in part & rev’d in part on other grounds*, 442 A.2d 966 (Md. 1982); *State v. Waddell*, 527 S.E.2d 644, 650 (N.C. 2000); *State v. Wallace*, 524 N.E.2d 466, 472-73 (Ohio 1988); *State v. Fisher*, 108 P.2d 1262, 1266, 1270 (Wash. Ct. App. 2005) (“Although Ty [three-and one-half- years-old at time of hearing] was not competent to testify as a witness, he was competent [at two years and five months] to understand that he had been hurt and to say who had injured him.”). *But see Huff v. White Motor Corp.*, 609 F.2d 286, 293-94 (7th Cir. 1979) (proponent must prove declarant’s mental capacity by preponderance of the evidence, to trial judge’s satisfaction); *Stoddard v. State*, 887 A.2d 564, 584, 600-601 (Md. 2005) (“outside the realm of excited or spontaneous utterances or statutory admissibility,” hearsay is inadmissible if the declarant would have been incompetent to testify); Raeder, *supra* note 95, at 1011-12 (accepting the rule of *King v. Brasier*, (1779) 168 Eng. Rep. 202 (K.B.), as “confirm[ing] that an incompetent child’s hearsay cannot be introduced because the child could not be a witness at trial,” and treating excited utterances as *sui generis* because their reliability is not premised on child’s ability to discern truth from a lie); Mosteller, *supra* note 19, at 986-87 nn.257-59; Eric Yamamoto, Address at the AALS Evid. Section Panel (Jan. 7, 2000) (citing a possible biological reason for strong memories of traumatic events: release of neurochemicals when experiencing trauma) (author’s notes on file with author).

125. 497 U.S. 805 (1990). See also *infra* Part III.C.1.

126. *State v. Gribble*, 804 P.2d 634, 642 (Wash. Ct. App. 1991) (Forrest, J., concurring) (referring to “the ability to receive, retain and relate accurate impressions of an occurrence” as the appropriate standard). See also *State v. Nunley*, 916 N.E.2d 712, 717-19 (Ind. 2009) (finding that child’s spontaneous statements made shortly after the event were reliable, but her statements made in a videotaped interview more than a year later were not reliable). *Cf. Shanks*, *supra* note 85, at 584 (referring to various states’ requirements as to testimonial competency “to evaluate the child’s mental capacity at the time of the occurrence in question”).

127. *State v. Doe*, 719 P.2d 554, 558 (Colo. 1986) (en banc) (“The child’s lack of competency may be a factor [as to reliability of her out-of-court statement], but it is not controlling.”). *Accord State v.*

This result takes into account principles of developmental psychology. A young child may be able, for example, to accurately relate recent events, but not events of a long time ago. In contrast, an Alzheimer's patient might have the opposite capacity. What matters are the circumstances and the declarant's capacity at the time of making the statement.<sup>128</sup>

### I. Idaho v. Wright

The United States Supreme Court held in *Idaho v. Wright* that corroborating evidence could not be considered in determining the reliability of a hearsay statement under the then applicable *Ohio v. Roberts* (pre-*Crawford*) confrontation clause jurisprudence.<sup>129</sup> The statements at issue in *Wright* had been made by a two-and-one-half year old child regarding her stepfather's sexual abuse of her and of her older sister and had been admitted under Idaho's residual hearsay exception, Idaho Rule of Evidence 803(24).<sup>130</sup> *Roberts* required a showing of "particularized guarantees of trustworthiness," which the *Wright* majority held, in an opinion by Justice O'Connor, "must . . . be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief."<sup>131</sup>

The Court "assume[d] without deciding" that the little girl was "unavailable" to testify,<sup>132</sup> and cited with approval various lower courts' consideration of "a number of factors"<sup>133</sup> regarding the reliability of such a child declarant's out-of-court statements:

The state and federal courts have identified a number of factors that we think properly relate to whether hearsay statements made by a child witness in child sexual abuse cases are reliable. See, e.g., *State v. Robinson*, 153 Ariz. 191, 201, 735 P.2d 801, 811 (1987) (spontaneity and consistent repetition); *Morgan v. Foretich*, 846 F.2d 941, 948 (4th Cir. 1988) (mental state of the declarant); *State v. Sorenson*, 143 Wis.2d 226, 246, 421 N.W.2d 77, 85 (1988) (use of terminology unexpected of a child of similar age); *State v. Kuone*, 243 Kan. 218, 221-222, 757 P.2d 289, 292-293 (1988) (lack of motive to fabricate). Although *these cases*

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Superior Court, 719 P.2d 283, 289 (Ariz. Ct. App. 1986); *People v. Dist. Court*, 776 P.2d 1083, 1987 (Colo. 1989) (trial court wrongly ruled that, because child was incompetent to testify at trial, her statements made when she was four years old were necessarily unreliable); *State v. Hosty*, 944 So. 2d 255, 260-61 (Fla. 2005); *State v. Townsend*, 635 So. 2d 949, 956 (Fla. 1994); *Perez v. State*, 536 So. 2d 206, 211 (Fla. 1988); *People v. Smith*, 604 N.E.2d 858, 869-71 (Ill. 1992); *State v. Lanam*, 459 N.W.2d 656, 659-62 (Minn. 1990); *State v. Waddell*, 527 S.E.2d 644, 650-51 (N.C. 2000); *State v. Rogers*, 428 S.E.2d 220, 224 (N.C. Ct. App. 1993); *State v. Ladner*, 644 S.E.2d 684, 692 (S.C. 2007); *State v. C.J.*, 63 P.3d 765, 770 (Wash. 2003) (en banc). See also *infra* text accompanying note 137 (quoting *Wright*).

Of course, this standard is not applicable if the particular rule or statute recognizing an exception to the rule against hearsay requires that the declarant be available to testify at trial. See, e.g., *Peters v. State*, 424 S.E.2d 372, 374 (Ga. Ct. App. 1992) (Georgia's tender years statute requires that the child declarant be available to testify at trial).

128. Cf. *State v. Uhler*, 608 N.E.2d 1091, 1094 (Ohio Ct. App. 1992) (noting that competency to testify is determined by competency at time of trial, not at time of incident).

129. *Idaho v. Wright*, 497 U.S. 805, 823 (1990).

130. *Id.* at 816-17.

131. *Id.* at 820 (internal quotation marks omitted).

132. *Id.* at 816.

133. *Id.* at 821.

(which we cite for the factors they discuss and not necessarily to approve the results that they reach) involve the application of various hearsay exceptions to statements of child declarants, we think the factors identified also apply to whether such statements bear “particularized guarantees of trustworthiness” under the Confrontation Clause. These factors are, of course, not exclusive, and courts have considerable leeway in their consideration of appropriate factors. . . . [T]he unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.<sup>134</sup>

Post-*Crawford*, the confrontation clause analysis has changed,<sup>135</sup> and these factors are relevant to the reliability of hearsay statements for purposes of compliance with the due process clause.<sup>136</sup>

The *Wright* Court’s emphasis on the time “when the statement was made” is of supreme importance to the due process analysis. Most significant for the thesis of this article is the following passage in the Court’s opinion:

Finally, we reject respondent’s contention that the younger daughter’s out-of-court statements in this case are *per se* unreliable, or at least presumptively unreliable, on the ground that the trial court found the younger daughter incompetent to testify at trial. First, respondent’s contention rests upon a questionable reading of the record in this case. The trial court found only that the younger daughter was “not capable of communicating to the jury.” Although Idaho law provides that a child witness may not testify if he “appear[s] incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly,” the trial court in this case made no such findings. Indeed, *the more reasonable inference is that, by ruling that the statements were admissible under Idaho’s residual hearsay exception, the trial court implicitly found that the younger daughter, at the time she made the statements, was capable of receiving just impressions of the facts and of relating them truly. In addition, we have in any event held that the Confrontation Clause does not erect a per se rule barring the admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial. Although such inability might be relevant to whether the earlier hearsay statement possessed particularized guarantees of trustworthiness, a per se rule of exclusion would not only frustrate the truth-seeking purpose of the Confrontation Clause, but would also hinder States in their own “enlightened development in the law of evidence.”*<sup>137</sup>

The rules of evidence provide the initial barrier to admissibility of evidence. Even if evidence has jumped those hurdles, a resulting verdict will not survive a *constitutional* due process challenge if it is based on untrustworthy evidence.<sup>138</sup>

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134. *Id.* at 821-22 (emphasis added).

135. Compare *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (the confrontation clause “commands that reliability be assessed in a particular manner: by testing in the crucible of cross-examination”), with *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (confrontation clause is satisfied if hearsay is reliable either because it falls within a “firmly rooted” hearsay exception or if “particularized guarantees of trustworthiness” of the out-of-statement are shown).

136. *McLain*, *supra* note 24, at 421-30.

137. *Wright*, 497 U.S. at 824-25 (citations omitted; emphasis added). See also *State v. Uhler*, 608 N.E.2d 1091, 1093-94 (Ohio Ct. App. 1992) (applying Ohio Evid. R. 601(a), containing language identical to that of Idaho R. Evid. 601(a), and finding no error in admission of nine-year-old victim’s testimony).

138. See *supra* note 25 and accompanying text.

The *Wright* Court (although speaking then in terms of the confrontation clause, which at that time was applied to both testimonial and nontestimonial statements)<sup>139</sup> explicitly declined to equate inability to testify at trial with an inability to have made a trustworthy pretrial statement.

## 2. General Caveats from the Rules of Evidence

In order to clear the initial hurdle of the rules of evidence, proof of an out-of-court statement must meet multiple criteria. For an out-of-court statement to be admissible under a non-hearsay category under Rule 801(d) or a hearsay exception under Rule 803, 804, or 807, its proponent must show that the foundation requirements for the category or exception have been met. Unless a particular hearsay exception requires that an out-of-court statement have been under oath (as does Rule 804(b)(1) regarding former testimony),<sup>140</sup> oath-worthiness of the declarant at the time of making the statement need not be shown by the proponent of the statement. The proponent, however, must provide proof sufficient to support a finding that the circumstances lent themselves to the declarant's having had first-hand knowledge of that of which he or she spoke.<sup>141</sup> The statements must be excluded under Rule 602 if the court finds that the declarant lacked first-hand knowledge.<sup>142</sup>

Additionally, the court should exclude proffered evidence under Rule 403 if it clearly lacks any probative value, as its admission would be misleading and confusing to the fact-finder.<sup>143</sup> If an out-of-court statement was made by a person

139. *See supra* note 135.

140. FED. R. EVID. 804(b)(1).

141. FED. R. EVID. 602. The advisory committee's note to Federal Rule of Evidence 803 states: "In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of first-hand knowledge. It may appear from his statement or be inferable from circumstances. *See* Rule 602." FED. R. EVID. 803, advisory committee's note. *See also* *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 790 (6th Cir. 2005) (finding no abuse of discretion in admitting crashing helicopter pilot's statement to pilot-in-command that "I think my gyro just quit"; statement was not unduly speculative, as pilot could see data in the cockpit regarding the gyroscopes in the nose of the helicopter.); *Parker v. State*, 778 A.2d 1096, 1103-07 (Md. 2001) (finding no abuse of discretion to admit out-of-court excited utterances of unnamed declarants, where the content of the statements and the surrounding circumstances showed that declarants had first-hand knowledge).

142. *See* *Brown v. Keane*, 355 F.3d 82, 91 (2d Cir. 2004) (ordering habeas writ to be granted when state court erroneously admitted evidence of an anonymous 911 call, whether as a present sense impression or an excited utterance, when material facts omitted by caller supported finding that caller was engaging in conjecture and lacked first-hand knowledge); *Bemis v. Edwards*, 45 F.3d 1369, 1372-74 (9th Cir. 1995) (finding no abuse of discretion in excluding statement, when there were affirmative indications that the declarant lacked first-hand knowledge); *Meder v. Everest & Jennings, Inc.*, 637 F.2d 1182, 1186 (8th Cir. 1981) (ruling that proof of statement of unidentified bystander was inadmissible under Federal Rule of Evidence 803(1) or (2), because trial court could not determine whether declarant had first-hand knowledge); *Cummiskey v. Chandris, S.A.*, 719 F. Supp. 1183, 1187-88 (S.D.N.Y. 1989) (concluding there was insufficient evidence that unidentified declarant had had personal knowledge), *aff'd*, 895 F.2d 107 (2d Cir. 1990); *Pillard v. Chesapeake S.S. Co.*, 92 A. 1040, 1040-41 (Md. 1915) (finding hearsay statement was properly excluded when, inter alia, there was "nothing to show that . . . [the declarant] had or was in a position to have had knowledge of his own upon the matter.").

143. Federal Rule of Evidence 403 provides in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." FED. R. EVID. 403. As restyled effective December 11, 2011,

whom the opponent shows to have lacked sufficient mental capacity to have made a rational statement at the time of its utterance, the court should exclude the statement under Rule 403.<sup>144</sup>

3. *Many Lower Courts’ Holdings as to Both Child and Adult Declarants are Consistent with Idaho v. Wright*

The reliability of the out-of-court statement requires a separate analysis from the question of competency of the declarant to testify at trial. As the *Wright* Court stated, there is no *per se* bar to admitting into evidence pretrial statements of a person who is incapable of testifying at trial.<sup>145</sup> The inability of the declarant to communicate at the time of trial merely “might be relevant to whether the earlier hearsay statement possessed particularized guarantees of trustworthiness.”<sup>146</sup> *Wright* is in accord on this point with the better reasoned lower courts’ decisions involving both child and adult declarants. The out-of-court statement’s reliability must be evaluated under the circumstances existing at the time it was made, not under the circumstances existing at the time of trial.

Just as *competency at an earlier time* does not make one *competent to testify at the time of trial*, incompetency at trial does not necessarily make one’s earlier statements incompetent. Competency is a question of fitness to testify at the time of trial, and is neither met nor not met by fitness at another time.<sup>147</sup> Cases involving adult declarants include those finding out-of-court statements that fell within hearsay exceptions to have been properly admitted if the statements had

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Rule 403 reads: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” FED. R. EVID. 403 (Proposed Official Draft 2011), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV\\_Rules.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf).

144. See *United States v. Barrett*, 8 F.3d 1296, 1300 (8th Cir. 1993) (“Another factor to consider in determining whether [the child victim’s] hearsay statements contain particularized guarantees of trustworthiness is the reason for [the child’s] inability to testify at trial. While the Confrontation Clause ‘does not erect a *per se* rule barring the admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial,’ the declarant’s inability to communicate may be relevant to whether the hearsay statements possessed particularized guarantees of trustworthiness. Should the district court determine that [the child] did not know the difference between the truth and a lie, this finding would have an obvious impact on whether [her] hearsay statements were trustworthy.”) (citations omitted); *Ring v. Erickson*, 983 F.2d 818, 820-21 (8th Cir. 1992) (ruling that admission of videotaped interview of three-year-old child victim, who the state court determined to be incompetent to testify at trial, and that was not shown to have adequate indicia of reliability, was violation of the accused’s confrontation right and reversible error); *Hutchcraft v. Roberts*, 809 F. Supp. 846, 849-50 (D. Kan. 1992) (finding that the state court violated defendant’s confrontation rights by admitting out-of-court statements of mentally retarded teenaged victim when, inter alia, the preliminary hearing judge found declarant unavailable to testify on ground that she could not discern the truth from falsehood); *State v. Karpenski*, 971 P.2d 553, 563-65 (Wash. Ct. App. 1999) (concluding that the child victim was neither competent to testify at trial nor competent when he made numerous inconsistent and fantastic out-of-court statements; reversible error to permit child to testify and to admit his out-of-court statements); see also *supra* note 117.

145. See *supra* note 137 and accompanying text.

146. *Idaho v. Wright*, 497 U.S. 805, 824-25 (1990).

147. See *United States v. Odom*, 736 F.2d 104, 109-12 (4th Cir. 1984) (indicating that witnesses’ abilities at trial, rather than at preliminary hearing, are critical).

been made at a time before trial when the declarant had been cogent, but by the time of trial had become insane or otherwise mentally incompetent.<sup>148</sup>

Cases from numerous lower courts have likewise affirmed the admission, under various hearsay exceptions, of children's out-of-court statements without the children having been qualified as competent to testify at trial. The admission of such statements under the hearsay exception for excited utterances (Rule 803(2)) has been affirmed by the United States Supreme Court,<sup>149</sup> the United States Courts of Appeals for the District of Columbia Circuit,<sup>150</sup> the Fourth Circuit<sup>151</sup> and the Eighth Circuit,<sup>152</sup> and state appellate courts of Idaho,<sup>153</sup> Maryland,<sup>154</sup> North Carolina,<sup>155</sup> Ohio<sup>156</sup> and South Carolina.<sup>157</sup>

The United States Supreme Court,<sup>158</sup> the Ninth Circuit,<sup>159</sup> and courts in Nebraska,<sup>160</sup> New Mexico<sup>161</sup> and North Carolina<sup>162</sup> have reached the same result as

148. *Contee v. State*, 184 A.2d 823, 825-26 (Md. 1962) (ruling prior testimony admissible of declarant who had subsequently become insane); *Johnson v. State*, 492 A.2d 1343, 1345-48 (Md. Ct. Spec. App. 1985) (holding admissible excited utterance of elderly victim, who was incompetent at trial, but who had been "apparently capable of maintaining herself in her own apartment" at the time of the statement; appellate court stated that a "hard and fast rule" would be inappropriate); *Hensley v. Rich*, 380 A.2d 252, 255 (Md. Ct. Spec. App. 1977) (finding out-of-court declarant's statements were "cogent, knowledgeable, and clearly responsive" and did not indicate incompetence at the time the statements were made).

149. *White v. Illinois*, 502 U.S. 346, 357 (1992).

150. *Jones v. United States*, 231 F.2d 244, 245 (D.C. Cir. 1956).

151. *Morgan v. Foretich*, 846 F.2d 941, 946-47 & n.9, 949-50 (4th Cir. 1988) (holding child's spontaneous declarations, her excited utterances, and statements made for purposes of medical treatment, were properly admitted, regardless of whether child was competent to testify at trial).

152. *United States v. Dorian*, 803 F.2d 1439, 1442-44 (8th Cir. 1986) (affirming the admission of child's statement under the residual exception to the hearsay rule, even though child was ruled incompetent to testify at trial). *See also* *United States v. Nick*, 604 F.2d 1199, 1202 (9th Cir. 1979) (per curiam) (affirming admission of three-year-old's statement to mother; no discussion of competency of child).

153. *State v. Giles*, 772 P.2d 191 (Idaho 1989) (admission under the residual exception to the hearsay rule, even though the defendant was not competent to testify at trial).

154. *Johnson v. State*, 492 A.2d 1343, 1345-48 (Md. Ct. Spec. App. 1985) (holding admissible statement of 89-year-old victim); *Jackson v. State*, 356 A.2d 299, 300-02 (Md. Ct. Spec. App. 1976) (ruling excited utterance of four year old child was admissible); *Moore v. State*, 338 A.2d 344, 347 (Md. Ct. Spec. App. 1975) (finding excited utterance of three-and-a-half-year-old child was properly admitted; child's competence is "irrelevant since the testimonial qualifications do not apply to spontaneous declarations"); *Smith v. State*, 252 A.2d 277, 280 (Md. Ct. Spec. App. 1969).

155. *State v. Rogers*, 428 S.E.2d 220, 222, 226 (N.C. Ct. App. 1993).

156. *State v. Wallace*, 524 N.E.2d 466, 468-70, 473 (Ohio 1988).

157. *State v. Ladner*, 644 S.E.2d 684, 691-93 (S.C. 2007).

158. *White v. Illinois*, 502 U.S. 346, 356-57 (1992).

159. *United States v. Nick*, 604 F.2d 1199, 1201-02 (9th Cir. 1979) (per curiam) (affirming admission under Rule 803(4) of three-year-old's out-of-court statements to doctors although the discussion of competence of child is not discussed). *See also* *Ring v. Erickson*, 983 F.2d 818, 820 n.2 (8th Cir. 1992) (concluding that although child interviewed on videotape by doctor was found not competent to testify, others could have testified to provide proper foundation, for admission under Fed. R. Evid. 803(4), that treating doctor's role was explained to child and that she understood it).

160. *State v. Vaught*, 682 N.W.2d 284, 288 (Neb. 2004) (admitting four-year-old's statements to physician).

161. *State v. Massengill*, 62 P.3d 354, 361-62 (N.M. Ct. App. 2002); *State ex rel. Children, Youth & Families Dept. v. Frank G.*, 108 P.3d 543, 553-54 (N.M. Ct. App. 2004), *aff'd sub nom.* In re Pamela A.G., 134 P.3d 746 (N.M. 2006).

to evidence qualifying under the hearsay exception for statements made when seeking medical diagnosis or treatment (Rule 803(4)).<sup>163</sup> Appellate courts construing the state law of Arizona,<sup>164</sup> Arkansas,<sup>165</sup> Colorado,<sup>166</sup> Florida,<sup>167</sup> Indiana,<sup>168</sup> Kansas,<sup>169</sup> Minnesota,<sup>170</sup> Ohio,<sup>171</sup> Oregon<sup>172</sup> and Washington<sup>173</sup> have

162. *State v. Waddell*, 527 S.E.2d 644, 650-51 (N.C. 2000); *State v. Rogers*, 428 S.E.2d 220, 226-29 (N.C. Ct. App. 1993).

163. FED. R. EVID. 803(4).

164. *State v. Superior Court*, 719 P.2d 283, 289 (Ariz. 1986) (“[W]e reject the notion that the testimonial incapacity of a child renders the child’s out-of-court assertions inadmissible under § 13-1416.”)

165. *Cogburn v. State*, 732 S.W.2d 807, 809-10 (Ark. 1987) (seven-year-old victim).

166. *People v. Diefenderfer*, 784 P.2d 741, 745-51 (Colo. 1989) (en banc) (three-year-old victim); *People v. Dist. Court*, 776 P.2d 1083 (Colo. 1989) (en banc) (four-year-old victim); *People v. Hansen*, 920 P.2d 831, 838-39 (Colo. App. 1995) (no abuse of discretion in admitting child victim’s out-of-court statements). *See also e.g.*, *People v. Bowers*, 801 P.2d 511, 519-20 (Colo. 1990) (en banc) (four-and-one-half-year old victim’s testimony could have been admitted, ultimately affirming lower court’s non-admission), *aff’g* 773 P.2d 1093, 1096 (Colo. App. 1988) (if four-and-one-half year-old’s incompetence at trial was caused only by her fear in courtroom setting, rather than an “inability, at the time of the alleged event, to receive just impressions of fact,” her out-of-court statements may have been inherently trustworthy, but in this particular instance were properly not admitted.).

167. *Perez v. State*, 536 So. 2d 206, 209 (Fla. 1989) (upholding, under *Ohio v. Roberts*, 448 U.S. 56 (1980), the constitutionality, under the federal and Florida constitutions, of the Florida tender years statute and a conviction obtained with the admission under that statute of mother’s and police officer’s testimony to three-and-one-half-year-old’s statements—first made innocently and spontaneously to his baby sister in the bathtub, and repeated to his mother and the officer about an act that the child “didn’t think was wrong”—which trial court found to be reliable, as well as corroborated by other evidence, when the trial court found that the child was unavailable due to “a substantial likelihood of severe emotional or mental harm if required to participate in the trial or hearing”; appellate court “reject[ed] the argument that the child must be found to be competent to testify before the child’s out-of-court statements may be found to bear sufficient safeguards of reliability”). *See State v. Hosty*, 944 So. 2d 255, 263 (Fla. 2006) (upholding statute making admissible reliable, nontestimonial hearsay of a mentally disabled adult).

168. *Howard v. State*, 853 N.E.2d 461, 470 (Ind. 2006).

169. *Myatt v. Hannigan*, 910 F.2d 680, 682, 685 (10th Cir. 1990) (Kansas’s child hearsay statute did not violate confrontation clause, nor did admission of “unqualified” child’s reliable out-of-court statements to social worker and police officer; psychiatrist had testified that child knew difference between right and wrong and that his statements were reliable).

170. *State v. Bobadilla*, 709 N.W.2d 243, 248, 256 (Minn. 2006) (child does not have to be competent to testify at trial in order for his statement to be admitted under the Minnesota “tender years” hearsay exception); *State v. Lanam*, 459 N.W.2d 656, 661 (Minn. 1990) (three-year-old victim).

171. *State v. Silverman*, 906 N.E.2d 427, 428 (Ohio 2009) (Ohio’s tender years exception does *not* require a finding of child declarant’s competency to testify).

172. *State v. Campbell*, 705 P.2d 694, 703-06 (Or. 1985) (if trial court holds competency hearings and finds alleged victim of child abuse incompetent to testify, child’s out-of-court statements may be admitted under hearsay exception for complaints of sexual misconduct).

173. *Swan v. Peterson*, 6 F.3d 1373, 1382 (9th Cir. 1993) (Washington state court committed no error in admitting out-of-court tender years statement of young child who was incompetent to testify at trial); *State v. Shafer*, 128 P.3d 87, 93 (Wash. 2006) (en banc) (affirming conviction based on out-of-court statements of three-year-old who parties stipulated was incompetent to testify); *State v. C.J.*, 63 P.3d 765, 767-73 (Wash. 2003) (en banc) (affirming conviction of juvenile for child abuse of three-year-old cousin, who at age four was found incompetent to testify at trial, where he was “very uncomfortable and frightened,” “unable to express a memory of the incident in words,” and “unable to characterize the difference between truthful and false statements”; trial court did not abuse its discretion in finding tender years’ statutory requirement of reliability met, when statements were spontaneous and made the



affirmed the admission of children's out-of-court statements under "tender years" statutory exceptions applicable to victims of child abuse. Several courts also have affirmed the admission of similar evidence under the "catch-all" or residual hearsay exception (Rule 807).<sup>174</sup>

All of these courts properly look at the touchstone for admissibility as whether the declarant appears to have been capable of perceiving facts accurately and relating them rationally at the time of the making of the out-of-court statement. They recognize that the rationale for the applicable hearsay exception differs from the criteria for time-of-trial competency. As Judge Madsen, writing for the Supreme Court of Washington in *State v. C.J.*, explained:

The different standards for determining testimonial competency and the reliability of an out of court statement are justifiably tailored to satisfy different purposes. The trial setting requires that a witness give reliable testimony and fully participate in cross examination, thus the witness' ability to distinguish truthful statements from false statements, and knowledge of his sworn obligation to tell the truth, is paramount. On the other hand, hearsay exceptions necessarily contemplate that the declarant's perception, memory, and credibility will not be explored through the use of cross examination. Instead, the trial court must find that the circumstances surrounding the making of the statement render the statement inherently trustworthy.<sup>175</sup>

These cases implicitly recognize that young children can accurately report concrete facts close in time to a startling event, even if they are not competent to testify under oath at a trial.

On the other hand, some lower courts have stated that a young child's testimonial incompetence at trial necessarily means that the child's earlier statements are unreliable.<sup>176</sup>

#### 4. *Authority Apparently in Conflict with Wright Ought Not Be Relied On*

For several reasons, the lower courts' opinions which have stated that a child's incompetence at trial necessarily requires the exclusion of her out-of-court

day after the incident "to adults he knew and trusted in informal, comfortable circumstances"); *State v. Doe*, 719 P.2d 554, 557-59 (Wash. 1986) (en banc) (trial court erroneously "believed that if the child were incompetent at the time of trial, the statement the child made would not be reliable as a matter of law" and inadmissible under tender years statute); *State v. Gribble*, 804 P.2d 634, 640 (Wash. Ct. App. 1991); *State v. Hunt*, 741 P.2d 566, 572 (Wash. Ct. App. 1987); *State v. Gitchel*, 706 P.2d 1091, 1096 (Wash. Ct. App. 1985).

174. *United States v. Doe*, 976 F.2d 1071, 1082 (7th Cir. 1992) (no abuse of discretion in admitting children's hearsay statement under federal rules' catch-all hearsay exception, even though district court conducted no inquiry to determine competency of three-year-old declarants); *In re Pamela A.G.*, 134 P.3d 746, 751-53 (N.M. 2006); *State v. Massengill*, 62 P.3d 354, 360 (N.M. 2003). *Cf.* *United States v. Dorian*, 803 F.2d 1439, 1444-45 (7th Cir. 1986) (affirming admission of evidence under residual exception, when child's trial testimony had been ineffective).

175. *State v. C.J.*, 63 P.3d 765, 771 (Wash. 2003) (en banc).

176. *See infra* Part III.C.4. *Cf.* *Hutchcraft v. Roberts*, 809 F. Supp. 846, 850 (D. Kan. 1992) (state court violated defendant's confrontation right [under then-applicable *Ohio v. Roberts*] by admitting out-of-court statements of mentally retarded teenaged victim when court failed to make finding of particularized guarantees of trustworthiness of the statements and, inter alia, preliminary hearing judge found declarant unavailable to testify on ground that she could not discern truth from falsehood).

statements ought not be followed. First, they are at odds with, and thus trumped by, the *Wright* Court’s reasoning.<sup>177</sup>

Second, they often rely on Wigmore as support for their equation of incompetence at trial with inadmissibility of pretrial statements.<sup>178</sup> Yet Wigmore himself not only reported that the existing law permitted the admission of excited utterances regardless of the declarant’s testimonial competency, he advocated that courts “let the child testify” without delving into the child’s competency.<sup>179</sup>

Third, a lawyer researching the question might find an A.L.R. annotation which cites several cases for the proposition that a child must be competent to testify in order for his hearsay statement to come in.<sup>180</sup> This annotation should be discredited as, upon close analysis, the *holding* in several of these cases was that the statements did not fall within a hearsay exception.<sup>181</sup> Thus the statements were inadmissible under the rules of evidence, regardless of whether the declarant was competent to testify, and the courts did not have to reach the issue of whether such competency was required. Other cases cited in the annotation have been limited or overruled.<sup>182</sup>

Both the Supreme Court in *Wright* and the vast majority of lower court cases directly addressing the issue opine that time-of-trial incompetence does not *ipso facto* preclude the admission of a declarant’s out-of-court statement. As applied to child declarants, this approach is consonant with research in the field of developmental psychology, which this author argues ought be more consciously folded into the courts’ analysis.

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177. See *supra* Part III.C.1.

178. E.g., *State v. Said*, 644 N.E.2d 337, 340 (Ohio 1994).

179. See *supra* notes 50-51.

180. Uehlein, *supra* note 89, § 28. See also Jay M. Zitter, Annotation, *Admissibility of Testimony Regarding Spontaneous Declarations Made by One Incompetent to Testify at Trial*, 15 A.L.R. 4th 1043 (1982 & Supp. 2010); E. J. Spires, Annotation, *Declarant’s Age as Affecting Admissibility of Res Gestae*, 83 A.L.R. 2d 1368 (1962 & Supp. 2001).

181. *State v. Campbell*, 579 P.2d 1231, 1233-34 (Mont. 1978) (evidence did not qualify under any exception to hearsay rule, and could not be offered as to credibility of a declarant who did not testify; evidence also violated the propensity rule); *Martin v. State*, 393 P.2d 141, 143 (Nev. 1964); *Mitchell v. State*, 279 S.W. 1112, 1113 (Tex. Crim. App. 1926) (statement by child that hat shown to child was “Uncle Adolph’s,” was offered as a tacit admission of the uncle, for which it did not qualify).

182. *State v. Ryan*, 691 P.2d 197, 204 (Wash. 1984) (en banc), was later rejected by the same court, which stated in *State v. Doe*, 719 P.2d 554, 557 (Wash. 1986) (en banc), that *Ryan* did not really hold that competency at trial was required for the “tender years” exception’s use; rather, the hearsay should not have been admitted because it did not meet the statutory requirement that the children be shown to be unavailable before their statements could be admitted without their testimony. The underlying passage in *Ryan* is “admittedly confusing.” *State v. Hunt*, 741 P.2d 566, 568-69 (Wash. Ct App. 1987). *Doe’s* reading was adhered to in *State v. C.J.*, 63 P.3d 765, 770-71 (Wash. 2003) (en banc).

*State v. Silverman*, 906 N.E. 2d 427, (Ohio 2009) characterized the court’s earlier position in *State v. Said*, 644 N.E.2d 337 (Ohio 1994) as dicta and disavowed it: “The plain text of Evid. R. 807, the cogent dissent in *Said*, and the reasoning of *C.J.* and *El Paso* provide compelling reasons to find that the dicta in *Said* that judicially grafted the competence requirement onto Evid. R. 807 is improper and does not effectuate the rule.” *Silverman*, 906 N.E.2d at 433.

IV. COURTS SHOULD BE INFORMED BY RESEARCH PERFORMED BY  
DEVELOPMENTAL PSYCHOLOGISTS

The judicial system's treatment of child victims and child declarants may be legitimately criticized as having underutilized knowledge that can be gained from research in the social sciences field of developmental psychology.<sup>183</sup> Recent research in that field continues to shed new light on the abilities of children to perceive, relate, and remember events.<sup>184</sup> Piaget was the ground-breaker in this field, but post-Piaget research shows that younger children have more competencies than he had concluded. As Professor Lyon has pointed out, "competencies first believed to emerge later in childhood have been exhibited by very young children if the verbal demands of the tasks are minimized and if the tasks are stripped of extraneous complications."<sup>185</sup> Yet the courts lag behind, and tend to hold children at an unjustified disadvantage.

First, our judicial system often mistreats and misunderstands children by treating them as "little adults," as when it requires them to demonstrate an understanding of abstract concepts or to answer complex or hypothetical questions. Secondly (and without noticing the logical inconsistencies), our system views children's recollection or testimony with greater suspicion than it does adults.<sup>186</sup> In so doing, it overlooks the fact that adult witnesses' memories and testimony are

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183. Cf. Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 365 (2006) (urging, in the context of children's capacity to act so as to be legally bound, that the law be greater informed by the psychological literature as to how children think and behave); Raeder, *supra* note 3, at 256 (proposing that children's testimonial competency be evaluated by a court-appointed psychologist who is "knowledgeable about child development," who then would make a recommendation to the judge).

184. See generally PATRICIA J. BAUER, *Early Memory Development*, in BLACKWELL HANDBOOK OF CHILDHOOD COGNITIVE DEVELOPMENT 127 (Usha Goswami ed., 2002) [hereinafter BAUER, *Early Memory*]; PATRICIA J. BAUER, REMEMBERING THE TIMES OF OUR LIVES: MEMORY IN INFANCY AND BEYOND 3 (2006) [hereinafter BAUER, REMEMBERING].

185. Lyon, *supra* note 15, at 1035 & n.67. See EPSTEIN, *supra* note 6, § 31.03; Gilstrap et al., *supra* note 13, at 61 & n.4, 65-67, 79 (discussing memory capabilities from ages two to five, "on average"); Andrea Follmer Greenhoot & Sarah L. Brunnell, *Trauma and Memory*, in Bottoms, *supra* note 6, at 37-38 (research shows that "the ability to provide coherent verbal recollections seems to emerge between 2 and 3 years of age . . . [but] evidence for the translation of preverbal memories into verbal form is slim. . . ."; "the core of [one-time traumatic] events tends to be remembered quite well; and research regarding children's memory of repeated maltreatment supports the conclusion that memory for abuse is related to a number of well-established predictions of memory from the basic memory literature, such as child age, reexposure, and generic autobiographical memory skills").

186. See *Kennedy v. Louisiana*, 554 U.S. 407, 443-44 (2009) (holding that Eighth Amendment precluded capital punishment for rape of a child not resulting in, nor intended to result in, child's death; Court stated: "There are . . . serious systemic concerns in prosecuting the crime of child rape that are relevant to the constitutionality of making it a capital offense. The problem of unreliable, induced, and even imagined child testimony means there is a special risk of wrongful execution in some child rape cases. . . . Similar circumstances pertain to other cases involving child witnesses; but child rape cases present heightened concerns because the central narrative and account of the crime often comes from the child herself.") Fiona E. Raitt, *Judging Children's Credibility—Cracks in the Culture of Disbelief, or Business as Usual*, 13 NEW CRIM. L. REV. 735 (2010) (discussing Scottish trial system); Sugarman, *supra* note 15. See also, e.g., Shanks, *supra* note 85, at 575-76 (arguing that "[c]riminal trials involving allegations of the sexual abuse of a young child are particularly susceptible to wrongful convictions" and proposing that child competency determinations be greatly strengthened).

subject to many of the same weaknesses as children’s.

Fairness dictates that the reliability of both children’s and adult’s out-of-court statements be evaluated in light of their ability at the time of the statements to have “received just impressions of the facts and [to have] relat[ed] them truly.”<sup>187</sup> If the record shows that they could not have had this ability, so that the statements are necessarily unreliable, the statements ought be excluded under Rule 403 or by the due process clause.<sup>188</sup>

But the evaluation of children’s competency to testify at trial should be made by using age-appropriate language; words that they are familiar with; and concrete, simple sentence structure. For example, rather than asking them, “If I told you I was wearing a red dress, would that be a lie?” one might ask, one at a time, “Tell me about my dress.” “What color is it?” “Is that the real color?” “Is it ‘make believe’?” “Is it ‘pretend’?”

*A. In Some Ways, Children Are Different from Adults, and Courts Must Treat Them Differently*

The Supreme Court has properly recognized, in some contexts, that children are different from adults and that society owes children special protection.<sup>189</sup> It has noted, with regard to punishment of juveniles, that young persons’ brains function differently than do those of mature adults.<sup>190</sup> Numerous states’ adoption of “tender years” hearsay exceptions,<sup>191</sup> too, is a manifestation that the courts and legislatures sometimes recognize that children are different from adults.<sup>192</sup>

Yet we continue—despite commentators’ valid criticisms—to examine, and to permit the examination of, child witnesses with questions that are developmentally inappropriate.<sup>193</sup> Although testimony by child victims may impede their recovery,<sup>194</sup> the rights of others sometimes requires it; in that event, the

187. See *supra* text accompanying note 137.

188. See *supra* notes 125, 143-44.

189. See *Graham v. Florida*, --- U.S. ---, 130 S. Ct. 2011 (2010) (holding that the Eighth Amendment prohibits imposition of life without parole sentence on juvenile offender who did not commit homicide); *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (“It is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’”) (quoting *New York v. Ferber*, 458 U.S. 747, 756-58 (1982) (citations omitted)); *Maryland v. Craig*, 497 U.S. 836, 852 (1990) (“[A] State’s interest in ‘the protection of minor victims of sex crimes from further trauma and embarrassment’ is a ‘compelling’ one”) (citation omitted).

190. *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005) (striking down the death penalty for juvenile offenders).

191. See Lynn McLain, *Children Are Losing Maryland’s “Tender Years” War*, 27 U. BALT. L. REV. 21, 22 n.3 (1997) (collecting statutes).

192. See, e.g., *Kritsings v. State Farm Mut. Auto. Ins. Co.*, 984 A.2d 395, 404 (Md. Ct. Spec. App. 2009) (“[W]ith respect to contributory negligence, children under the age of 10 are evaluated according to their ‘age, experience, and training.’”) (citation omitted). As to the need for “tender years” exceptions, see Clark, *supra* note 15, at 262; McLain, *supra* note 191, at 25.

193. See Lyon, *supra* note 15, at 1027 n.42 (describing “convoluted and developmentally inappropriate” questioning of children).

194. Some child advocates have argued that public testimony by abused children is harmful to them. Patton, *supra* note 22, at 375-77. See also *State ex rel. Children, Youth & Families Dept. v. Frank G.*, 108 P.3d 543, 549 (N.M. Ct. App. 2004) (concluding that courtroom testimony by young, sexually

examination should be appropriately aimed at discovering the truth. This author urges trial courts to exercise their authority under Rule 611(a)<sup>195</sup> to preclude confusing, developmentally inappropriate questioning, as it does not further the pursuit of a trial's overarching goals of the ascertainment of the truth and the furtherance of justice.<sup>196</sup> Counsel should be informed of this policy before trial, so as to have time to prepare proper questions.

Secondly, in evaluating the reliability of young children's hearsay statements, the courts should take into account developmental psychology research that shows that children's abilities of perception, recall, and linguistic abilities may make them capable of having made accurate statements under different circumstances than those they would be required to satisfy if called to testify under oath at trial.<sup>197</sup> Each situation must be evaluated under the criteria pertinent to it. One would not measure distance with a thermometer, or temperature with a yardstick. When performing surgery, a competent physician would not accept a year-old blood pressure reading instead of one taken just before the operation.

Similarly, one ought not equate the admissibility or inadmissibility of an earlier out-of-court statement to the admissibility or inadmissibility of the

abused child would be harmful to her recovery through therapy), *aff'd sub nom. In re Pamela A.G.*, 134 P.3d 746 (N.M. 2006).

Indeed, biological research is being conducted that is related to, or premised upon, the therapeutic value of *repressing* memories of abuse. See Meredith Cohn, *Method to Erase Traumatic Memories May be on the Horizon*, BALTIMORE SUN (Nov. 2, 2010), [http://articles.baltimoresun.com/2010-11-22/health/bs-hs-erasing-memories-20101122\\_1\\_fearful-memory-proteins-researchers](http://articles.baltimoresun.com/2010-11-22/health/bs-hs-erasing-memories-20101122_1_fearful-memory-proteins-researchers) (noting that developing research demonstrates that removing certain proteins from the brain and behavioral therapy may soon allow for the erasing of traumatic memories).

195. Federal Rule of Evidence 611(a) provides:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

FED. R. EVID. 611. As restyled effective December 1, 2011, Rule 611 reads:

The Court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.

FED. R. EVID. 611 (Proposed Official Draft 2011), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV\\_Rules.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Rules.pdf).

196. See Bussey, *supra* note 84, at 225-26 (Research shows that cross-examination by "confusing and leading questions," "complex language," and "credibility-challenging comments" does "not serve the truth-seeking function of the court," but "only serves to increase the unreliability of children's testimony.").

The current Federal Rule of Evidence 102 (captioned "Purpose and Construction") provides: "These rules [of evidence] shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102. As restyled effective December 1, 2011, Rule 102 reads: "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." FED. R. EVID. 102 (Proposed Official Draft 2011).

197. Cf. Lyon, *supra* note 15, at 1027 (discussing application of developmental psychology research in the context of qualifying children to be competent witnesses at trial).

declarant's in-court testimony at the time of trial. Those courts that have recognized that the two inquiries are distinct from each other find strong support in recent research in the field of developmental psychology.

### 1. Perception

Both adults and children can accurately perceive a concrete event such as being touched by another person. Many parents and teachers of young children no doubt can remember their reporting that "Johnny hit me!" or "He touched me first!" Adult and children's perceptions of an event may differ in one sense, because of their different understandings of the context of the event. Our perception of an event as ordinary or extraordinary—"worth remembering" or not—can affect whether our brains' chemical processes sear it into our long-term memory. Young children's understanding of certain events—such as sexual fondling—as wrong and therefore noteworthy, may well be lacking.<sup>198</sup> This can contribute to failure to report the event, delayed reporting, or "offhand," "matter of fact" reporting, as well as to lack of long-term memory of the event. But it has not been shown to mean that a child does not perceive the fondling in the first place.

### 2. Memory

Memory capabilities may vary with age. Anyone who has spent time with elderly people—or who has grown older oneself—has seen firsthand that "short-term memory" seems to fade with advancing age. Hence such questions are voiced as, "Where did I put my keys?" "Where did I put my glasses?" "Why did I go upstairs?" "Was I looking for something?" An older person may well remember the name of his fifth grade teacher but not the name of his current cardiologist. The "long-term memory" is strong, but the short-term memory capacity is fading.

Anecdotal observations of young children lead to the opposite conclusions as to their capacities. When asked, they often recount many details about their activities of that day, including details which an adult listener would have found insignificant and promptly forgotten. This may be because "everything is new" to a young child, so that the short-term memory is strong, or it may be that adults have learned to cull the "important" or "interesting" events from the insignificant ones, so as not to attempt to remember the unimportant ones.

Most adults can remember very little, if anything, before they turned three or four,<sup>199</sup> leading us to conclude that children have little long-term memory. Recent psychological research suggests, however, that young children have the capacity for greater long-term memory,<sup>200</sup> and that the reason that we recall so little from our early years is that those memories were not reinforced.<sup>201</sup> Repeating a story or relating an event at dinner with family can help to single out that memory for more permanent storage. The longer memory an adult may have for an event may be a

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198. See *supra* notes 105, 167.

199. BAUER, REMEMBERING, *supra* note 184, at 17.

200. *Id.* at 229, 232, 236, 252; BAUER, *Early Memory*, *supra* note 184; USHA GOSWAMI, COGNITION IN CHILDREN 177, 180 (1998).

201. BAUER, REMEMBERING, *supra* note 184, at 249-52.

function not of inherent ability, but of the importance attributed to the event.<sup>202</sup> If perceived to be important, it will be reiterated and reinforced. If not, it may slide away into the subconscious.

A child's not remembering an event by the time of trial does not necessarily invalidate a child's report at a time much closer to the event. This remains true even if an *adult* would have perceived the event as traumatic. A judge's looking at the issue through his or her adult eyes could cause the judge to misassess the situation, absent being informed about the pertinent research.

One must also be careful to look at the research regarding children in light of corollary research regarding adults.

### B. All Witnesses' Memories are Fallible

Much of the psychological research on children focuses on whether they are suggestible, and what kinds of interviews may implant false memories.<sup>203</sup> The use of improper interviewing techniques adversely impacts the reliability of the interviewee's responses. But the broader psychological research shows that this is a phenomenon that is not restricted to child interviewees. False memories in adults, due to suggestion, have been well documented in decades of research by Elizabeth Loftus and others.<sup>204</sup> In fact, the results of some experiments show that kindergarteners were no more influenced by leading questions than were young adults, and that the younger children's reports were more often accurate than were the adults'.<sup>205</sup>

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202. *Id.* at 34-39.

203. E.g., Iris Blandón-Gitín & Kathy Pezdek, *Children's Memory in Forensic Contexts: Suggestibility, False Memory, and Individual Differences*, in Bottoms, *supra* note 6, at 57-59 (discussing "factors associated with children's . . . increased accuracy: prior event knowledge [of type of event recalled, such as a doctor's examination], repeated experience, multiple nonsuggestive interviews, and source monitoring [i.e., real experience, imagination, or suggestion] and training [of children regarding sources]" and citing "five factors found to have a strong association with children's suggestibility and relevant to forensic contexts: age, language ability, inhibitory control, working memory capacity, and attachment styles [of their mothers]"); STEPHEN J. CECI & MAGGIE BRUCK, *JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY* (Am. Psychol. Ass'n., Wash., D.C. 1995); EPSTEIN, *supra* note 6, § 31.04; GABRIELLE F. PRINCIPE, STEPHEN J. CECI & MAGGIE BRUCK, *CHILDREN'S MEMORY: PSYCHOLOGY AND THE LAW (UNDERSTANDING CHILDREN'S WORLDS)* (2011). See also *State v. Michaels*, 642 A.2d 1372, 1379-80 (N.J. 1994) (reversing conviction due to jury's necessarily having relied on fantastic statements elicited from children during improperly suggestive and coercive interrogations, and remanding for pretrial hearing at which state would be required to prove reliability of statements and resultant testimony by clear and convincing evidence before it could be admitted at retrial). But see Gilstrap, *supra* note 13, at 68-77 (stressing suggestibility of children; noting, however, that some children are quite resistant to suggestion).

204. E.g., Elizabeth F. Loftus, David G. Miller & Helen J. Burns, *Semantic Integration of Verbal Information into a Visual Memory*, 4 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 19 (1978).

205. See Dominic J. Foté, Comment, *Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform*, 13 PEPP. L. REV. 157, 158-59 (1985). Several experiments proceeded as follows:

[C]hildren and adults ranging in age from 5 to 22 watched the experimenter and a confederate engage in a heated conversation. At varying intervals, those viewing the argument were asked to narrate exactly what they had seen, to answer objective questions about the incident, including a leading question, and to identify the confederate from a

Dr. Loftus and others have also documented how one memory can supplant another in an adult.<sup>206</sup> For example, after one makes an identification of a particular suspect as an assailant, as in a line-up, the memory will harden, and each time one sees that person one’s certainty that this was the assailant will increase,<sup>207</sup> though there is no increase in the underlying accuracy. (This should ring true to anyone who has lost a bet on something one was “sure” of.)

The pertinent research on this topic is of adult victims. This kind of information is used in court to attack the weight to be given the identification, not to exclude it altogether from evidence. The same approach is properly used with regard to adult witnesses’ prior inconsistent statements or inconsistencies during their testimony. They may be used to impeach the witness.<sup>208</sup>

The scientific literature demonstrates that some inconsistencies in recollection over time are normal for both adults and children.<sup>209</sup> Fallibility of children’s memory ought not preclude probative evidence of their testimony or out-of-court statements any more than it ought preclude evidence provided by adults; rather, it is

photo array. . . . The duration of a subject’s exposure to the confederate was fifteen seconds, from a distance of approximately seven feet. At intervals of ten or thirty minutes, the subjects were evaluated on free recall, direct questions including one leading question, and photo identification. Two weeks later, the subjects returned and were reassessed, this time using a non-leading question.

*Id.* at 158-59 & n.8 (citing Marin et al., *supra* note 122, at 297-98) This “Marin” study:

[I]ndicated that very young children were as capable as adults in answering direct questions about the incident. Also, young children scored as well as adults in identifying from a photo array. Perhaps most surprising was the data indicating that *children were no more easily swayed to answer incorrectly by the use of leading questions than were adults*. One finding did indicate that children were not as capable as adults to freely articulate their version of what occurred. Nonetheless, while the youngest children tended to say little, *what they did say was three times more likely to be accurate than what the adults said*.

The Marin study concluded that the main problem with young witnesses is not their ability to accurately perceive events, but their ability to accurately and meaningfully report their perceptions. Given certain external prompts and cues, however, “the young witness would be expected to perform quite adequately.” In the final analysis, “it would seem, then, that *children as young as five years of age are no less competent or credible as eyewitnesses than are adults when responding to direct objective questions*.”

*Id.* at 159 (footnotes omitted) (emphasis added).

206. Loftus, et al., *supra* note 204, at 30. *See also* Lyon, *supra* note 15, at 1030 n.50 (reporting a study noting “some evidence of a recency effect” in adults).

207. Loftus, et al., *supra* note 204, at 30.

208. *See, e.g.*, FED. R. EVID. 613 (permitting impeachment of witnesses by their prior inconsistent statements); *State v. Lanam*, 459 N.W.2d 656, 660 (Minn. 1990) (“Whether a child is easily led goes more to credibility than to competency. Even adults at trial become inconsistent upon cross-examination. It is the jury’s province to sort out the inconsistencies and determine credibility . . .”).

209. *See Tate ex rel Tate v. Bd. of Educ.*, 346 F. Supp. 2d 536, 538 (S.D.N.Y. 2004) (finding child competent despite his having made some inconsistent statements); Gilstrap, *supra* note 13, at 76-77; Bradley D. McAuliff, *Child Victim and Witness Research Comes of Age: Implications for Social Scientists, Practitioners, and the Law*, in Bottoms, *supra* note 6, at 104-05 (“Children, like adults, usually are able to remember details of single and ongoing traumatic events quite well, but at the same time these memories are vulnerable to distortion and forgetting . . .” “Realistically we can expect victims to forget the details of events over time, especially in cases of chronic maltreatment . . .”). *Cf. Kennedy v. Louisiana*, 554 U.S. 407, 414, 417 (2008) (where child victim’s prior inconsistencies apparently arose from defendant’s instructions to her to inculcate individuals other than him).



a proper subject of impeachment. Moreover, there is some evidence that adults are more likely than young children to “lie” intentionally.<sup>210</sup>

*C. The Better Reasoned Cases Regarding Children’s Statements Are Consonant with the Scientific Research in Developmental Psychology*

Those cases, like *Idaho v. Wright*,<sup>211</sup> which clearly distinguish between a child’s ability to testify at trial and the child’s ability to have made an accurate statement at the time of an out-of-court statement (that falls within a hearsay exception), have acted in accord with developmental psychology research. A child may have had the ability to make a concrete, accurate report well before trial, yet may have no memory of the underlying facts at trial.

Similarly, a young child’s inability to explicate, or demonstrate in an adult-like way an understanding of abstract concepts of “truth” and “lies” at the time of trial is developmentally appropriate.<sup>212</sup> Courts should use and permit only developmentally appropriate language and sentence structure when evaluating the child’s competency to testify. But even if the child is properly found incompetent, those cases that automatically equate testimonial incompetence at time of trial to unreliability of the child’s out-of-court statement have failed to perform adequate analysis.

The proper approach, instead, is to look at the child’s ability to have made a reliable statement of the type made, at the time made. If the child had that capacity, her out-of-court statement should not be rejected out of hand. Rather, the courts must evaluate the statement’s reliability under all the pertinent circumstances and exclude it under Rule 403 or the due process clause only if no reasonable fact-finder could find it to be reliable. This is the same approach that is universally followed with regard to adult declarants. Children, who are in greater need of protection, ought not be treated less respectfully than adults.

## V. CONCLUSION

Cases where children are the key witnesses—especially child abuse cases—are the most challenging cases facing our justice system. We have special duties both to protect children and to prevent the wrongful conviction, or the wrongful termination of parental rights, of an alleged abuser. We must work to keep refining our approaches in light of advancing knowledge about children—their thought processes, how they perceive and remember, and their linguistic abilities—to make the system as fair as possible to all parties, so that “the truth may be ascertained and proceedings justly determined.”<sup>213</sup> The questioning of children as to their competency to testify and, if permitted to testify, on direct and cross examination,

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210. Lyon, *supra* note 15, at 1036 n.71.

211. See discussion *supra* Part III.C.1.

212. See generally Lyon, *supra* note 15. Professor Lyon has argued that the oath-taking requirement for children, as presently enforced, does little to advance its intended objective: that only testimony of those who are sincere witnesses will be received. *Id.* at 1027-28 & nn.42-43, 1047-48 & nn.98 & 103. He has proposed an alternative form of the oath which is “developmentally sensitive,” and which his empirical research has shown can enhance accuracy. *Id.* at 1021.

213. FED. R. EVID. 102. See also *supra* note 196.

should be developmentally appropriate in content and structure.

If a child is found incompetent to testify at trial, her out-of-court statements should not be automatically excluded. Instead, their reliability should be evaluated in light of developmental psychology research as to whether the child was capable, at the time of making the statement, of having accurately perceived and reported the underlying facts. If the child had that capability (and there is no confrontation clause barrier), the evidence generally should be admitted, and the fact-finder tasked with determining what weight to give it. Evidence Rule 403 and the due process clause provide the two final safeguards against a verdict being based on clearly unreliable hearsay. Applying these parameters will enable us to best fulfill our duties to all affected by the trial system, whether children or adults.

