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ARTICLES

THE CHILD VICTIM AS A WITNESS IN SEXUAL ABUSE CASES

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I. INTRODUCTION

In recent years there has been a dramatic increase in the number of criminal cases involving sexual abuse of children. The expanding case load stems from a growing awareness within our society of child molestation. With society's encouragement and recognition of the problem, children are starting to speak out and parents, social service agencies, teachers, health care professionals, law enforcement personnel, and prosecutors are beginning to listen.[1] Commentators differ as to the reasons for this new awareness, but cannot deny that prosecutions initiated as a direct result of it have had a significant impact on the criminal justice system in Montana and throughout the nation.[2]

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1. Teachers, medical personnel, and other individuals having contact with children are required to report suspected incidents of child abuse. MONT. CODE ANN. §§ 41-3-201, -202 (1983); *see also id.* § 41-3-207, *amended by* 1985 Mont. Laws ch. 367.

2. There were 5,628 cases of child abuse and neglect referred to the Montana Department of Social and Rehabilitation Services in 1984. Of these, 528 were cases in which sex abuse was substantiated. Report of Community Services Division, Montana Department of Social and Rehabilitation Services (data compiled Jan. 29, 1985) [hereinafter cited as *SRS Report*].

The factor that makes child sexual abuse dramatically different from other criminal cases is that the victims are children. Often these victims are very young, even preschoolers.[3] They find it difficult to understand and to communicate their experiences. When thrust into the criminal justice system, the trauma they experience often becomes even more severe.

The system must adapt to the special needs of these child victims. It is the purpose of this article to outline some of the available techniques for prosecuting sexual abuse cases, to discuss some deficiencies that are presently handicapping the system, and to propose a partial solution that we feel should be incorporated into the system. The use of videotape testimony, anatomically correct dolls, and other procedures are instrumental in easing the child's fears of the courtroom process. The skillful use of the rules of evidence, particularly the traditional exceptions to the hearsay rule, are essential to a successful prosecution. In our view, however, the admission of reliable hearsay statements of the child victims would make the criminal justice system more responsive to the needs of these children and yet avoid conflict with the constitutional rights guaranteed every citizen charged with a criminal offense.

II. Evidentiary Problems with Child Sexual Abuse Victims

A successful sexual abuse prosecution generally requires that the child victim testify against the offender. Often in cases of this nature, there is very little, if any, evidence to corroborate the child's account of the offense, because of the secretive nature of the crime itself. Most sex offenses therefore must be proved by the testimony of the victim, corroborated, if the prosecutor is lucky, by medical or laboratory evidence. Thus, the victim's testimony or testimony regarding the victim's statements about the incident is absolutely critical.[4]

Cases involving young victims often are complicated further by delayed reporting of the offense. It is not unusual for a child to keep the fact of the incident secret for weeks, or even months.

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3. Of the 528 cases of substantiated sexual abuse reported to the Department of Social and Rehabilitation Services, 26% of the victims were age five and younger. Fifty-six percent were under the age of ten. *Id.*

4. Until recently, many states required corroboration of a victim's testimony, and consequently many cases were not able to be prosecuted at all. Now, however, corroboration is no longer required in most states. B. Morasco, The Prosecution and Defense of Sex Crimes § 2.05(2) (1984). Montana law provides that the uncorroborated testimony of the victim, if believed, is sufficient to support a conviction. State v. A.D.M., ___ Mont. ___, 701 P.2d 999 (1985); State v. Metcalf, 153 Mont. 369, 457 P.2d 453 (1969); Mont. Code Ann. § 26-1-301 (1983).

Typically, the offender has threatened the child with physical harm and the threats are taken seriously. Moreover, children often feel ashamed of their involvement and will not immediately tell their parents or other adults what has happened to them. This is especially true if the offender is a member of the child's household.[5]

One unfortunate consequence of the child's silence is that a physician's examination is not conducted until long after the incident. Thus medical reports and the results of laboratory tests often are not available to corroborate the statements of the victim. Under these circumstances, the child's testimony or statement is even more crucial.

The extremely young child victim presents other special problems as a witness. The problems may arise either from disqualification because of age or other infirmity or the child's refusal to testify out of fear, shyness, or trauma. The latter is especially problematic if the offender is a parent or a member of the victim's household, as there is often subtle pressure placed on the child not to testify.[6]

Since 1895, children have been allowed to testify in court proceedings provided certain minimum foundation qualifications are established.[7] Although many states fix an age above which a child is presumed to be competent,[8] the Montana Rules of Evidence provide that everyone is a competent witness unless disqualified.[9] A child, or any other witness, however, will be disqualified if he is incapable of expressing himself concerning the matter so as to be understood by the judge and jury, or if he is incapable of understanding the duty to tell the truth.[10] The determination whether the witness is competent to testify is made by the judge,[11] outside the presence of the jury.[12] The party seeking disqualification bears the burden of proof.[13]

Thus, in Montana, a factual determination must be made to establish whether a child is qualified to testify. The child who is

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5. L. Berliner, L. Blick, & J. Bulkley, *Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development*, in CHILD SEXUAL ABUSE AND THE LAW 166 (4th ed. 1983) [hereinafter cited as Berliner].

6. *Id.*

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

8. G. Melton, J. Bulkley, & D. Wulkman, *Competency of Children as Witnesses*, in CHILD SEXUAL ABUSE AND THE LAW 125 (4th ed. 1983).

9. MONT. R. EVID. 601; State v. Rogers, ___ Mont. ___, 692 P.2d 2 (1984).

10. MONT. R. EVID. 601(b); State v. D.B.S., ___ Mont. ___, 700 P.2d 630, 636 (1985).

11. State v. Smith, ___ Mont. ___, 676 P.2d 185 (1984).

12. *Id.*

13. State v. Coleman, 177 Mont. 1, 579 P.2d 732 (1978).

incapable of expressing himself concerning the offense so as to be understood by a judge and jury may be disqualified, even if he can appreciate the distinction between truth and fiction. This is often the case in sexual offenses because children become confused by the passage of time between the commission of the offense and the trial. Shyness, fear of repercussions, or serious disruption within the family after the child's allegations become known also can make the testimonial experience very traumatic for the child involved.[14]

Without the testimony of the child or the admission of the child's statement, however, no prosecution can be consumated and the offender will go free. It is incumbent upon the criminal justice system to protect child victims and to prevent future injury to other children. These victims should not be denied their legal redress merely because they are of tender age. Fortunately, several legal procedures are available to assist the prosecution of sexual offenders.

III. Prosecutorial Methods

There are methods of approaching the prosecution of child sexual abuse which ease the trauma to the victim and allow the prosecution to introduce crucial evidence. Montana law allows the prosecution to introduce the victim's testimony on videotape. Additionally, numerous exceptions to the hearsay rule provide for the admission of evidence which can add credence to the child's testimony, or take the place of a child's direct testimony altogether. Finally, the Montana Rules of Evidence provide for the admission of a child's prior statements, which may be used to bolster the child's testimony, if the child offers direct testimony in court.

A. *Use of Videotaped Testimony*

Since 1977, Montana law has permitted the videotaped testi-

14. In their article on the dynamics of sexual abuse within the family, Berliner, Blick, and Bulkley note other problems, even if the child is qualified to testify:

> [e]ven if the child is willing and competent to testify, the legal system's lack of knowledge of children's developmental stages may lead to an erroneous decision that the child is an incompetent witness . . . or, such lack of knowledge can result in a failure to elicit the necessary information for successful legal action. Because most police and prosecutors do not understand the various stages of a child's cognitive or communicative ability, questions to the child may not be understood. Thus, the child may either be unresponsive or unable to provide the correct or desired answers.

Berliner, *supra* note 5, at 166.

mony of a victim of a sexual offense to be presented at trial.[15] The court must admit the videotape, and the victim need not be present in the courtroom when the evidence is introduced.[16] The use of this type of taped testimony has limited application in the prosecution of a sexual abuse case, however. The taping must be conducted in front of the judge, the prosecuting attorney, the defendant, and the defendant's attorney.[17] In order to preserve the defendant's right of confrontation as guaranteed by the United States and Montana Constitutions,[18] the defendant's attorney is entitled to cross examine the child witness.[19] Thus, while the child witness may testify on videotape, he still must undergo cross examination by the defense attorney. Significantly, all of this must be done in the defendant's presence, potentially making the procedure extremely intimidating, particularly if the defendant is a family member.[20]

B. *Other Testimony Aids*

There are other techniques which can make it easier for the qualified child witness to testify. The child may testify while sitting on the lap of a parent, a prosecutor, or a social worker.[21] To provide the jury with the explicit detail necessary to establish proof beyond a reasonable doubt, the child also may use anatomically correct dolls to explain the offense and how he was injured.[22] California recently enacted legislation allowing a child victim under the age of ten to testify by two-way closed circuit television. If certain conditions are satisfied, the child is not required to testify in the physical presence of the judge, jury, defendant, or the

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15. MONT. CODE ANN. § 46-15-401 (1983) (enacted by 1977 Mont. Laws ch. 384).

16. MONT. CODE ANN. § 46-15-401 (1983).

17. MONT. CODE ANN. § 46-15-402(2) (1983).

18. The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"; similarly, in article II, § 24, the Montana Constitution provides that "[i]n all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face." *See also* California v. Green, 399 U.S. 149 (1970); Pointer v. Texas, 380 U.S. 400 (1965). Although the Montana Supreme Court has not specifically addressed the constitutionality of this procedure, other states have upheld it, so long as sixth amendment rights have been preserved. State v. Hewett, 86 Wash. 2d 487, 545 P.2d 1201 (1976); State v. Melendez, 135 Ariz. 390, 661 P.2d 654 (1982).

19. MONT. CODE ANN. § 46-15-402(1) (1983).

20. In 1984, 40% of all the cases of sexual abuse substantiated by the Department of Social and Rehabilitation Services involved a parent or other member of the child's household. *SRS Report*, *supra* note 2.

21. State v. Rogers, ___ Mont. ___, 692 P.2d 2 (1984).

22. *See, e.g., D.B.S.*, ___ Mont. ___, 700 P.2d 630; State v. Tuffree, 35 Wash. App. 243, 666 P.2d 912 (1983).

defendant's attorney.[23]

None of these techniques, however, resolves the problem of getting a child's testimony to the jury if he is disqualified or unable to testify because of fear or excessive shyness. In those situations, the child's statement of the offense will be excluded, unless the court can be persuaded to admit it through one of the exceptions to the rule precluding hearsay evidence.

C. *Hearsay Exceptions*

Numerous exceptions to the hearsay rule under the present Montana Rules of Evidence are helpful in the successful prosecution of child sexual abuse. Spontaneous statements to another following an incident, statements of then-existing mental or physical conditions, or statements to a physician taken for medical history are allowed into evidence even though they are hearsay and the witness is available to testify.[24] Specifically, statements made by a child victim describing the offense while perceiving it or made immediately after to his mother or to another individual,[25] or the child's statements made while under the stress or excitement caused by the offense[26] are admissible. These statements are admissible because they have particular guarantees of reliability and trustworthiness that justify excepting them from the general rule disallowing hearsay. Because these statements carry their own indicia of reliability, the child victim need not testify at all.[27] Yet although these exceptions are helpful, they have limited application in many cases involving young children.

One obstacle to these exceptions' more frequent use is the Montana Supreme Court's ruling that the passage of time is an important element when the exceptions are involved. Although it has not stated a precise time requirement, the court has indicated that the statements must be made at a time close to the commission of the offense.[28] Courts in other jurisdictions have made similar rulings. With regard to the excited utterance exception, some states have held that, if the delay can be explained, a lapse of one to seven days between the statement and the offense is accept-

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23. 1985 Cal. Stat. Ch. 43.

24. MONT. R. EVID. 803(1)-(4).

25. MONT. R. EVID. 803(1).

26. MONT. R. EVID. 803(2).

27. Ohio v. Roberts, 448 U.S. 56 (1980) (daughter's prior testimony at the preliminary hearing bore "sufficient reliability" that her absence at trial did not render father's testimony impermissible); MCCORMICK ON EVIDENCE Ch. 29 (2d ed. 1972).

28. *See, e.g.*, State v. Norgaard, ___ Mont. ___, 653 P.2d 483, 488 (1982).

able,[29] while other jurisdictions have limited the exception to instances in which the child was noticeably upset or crying when making the statement.[30]

Many incidents of sexual abuse are not reported until long after they have taken place. Because the trauma of the sexual abuse may last far longer than several hours or several days, a stringent rule concerning the passage of time may prevent the use of what should qualify as an excited utterance. Indeed, many courts have recognized that, in dealing with children, the time element should not be construed strictly,[31] but rather the source of the stress and the age and capacity of the child under stress should be considered in determining what constitutes sufficient excitement.[32] It is the reliability of the statement that forms the basis for the exception, not nearness in time, and the indicia of reliability of course vary when young children are involved. Despite this recognition, however, most courts continue to consider statements to be excited utterances only within a limited time frame.

Statements made for purposes of medical diagnosis or treatment are admissible into evidence and can be of significant assistance in the prosecution of child abuse cases.[33] Medical evidence is not always probative in these cases, however. Unless the incident is reported shortly after it occurs and the child examined immedi-

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29. People v. Dickinson, 2 Mich. App. 646, 141 N.W.2d 360 (1966) (one day); State v. Padilla, 110 Wis. 2d 414, 329 N.W.2d 263 (1982) (three days); State v. Lovett, 85 Mich. App. 534, 272 N.W.2d 126 (1978) (seven days).

30. State v. Brown, 341 N.W.2d 10, 13 (Iowa 1983) (citing State v. Ogilvie, 310 N.W.2d 192, 196 (Iowa 1981)).

31. The Colorado court pointed out the differences in dealing with a child's "excited utterance" in People in Interest of O.E.P., ___ Colo. ___, 654 P.2d 312, 318 (1982), stating:

> Although the temporal interval between the "startling event" and the child's statement is not without significance, it is not conclusive on the question of admissibility. The element of trustworthiness underscoring the excited utterance exception, particularly in the case of young children, finds its source primarily in "the lack of capacity to fabricate rather than the lack of time to fabricate."

32. In *Dickinson*, 2 Mich. App. 646, 652, 141 N.W.2d 360, 363, the Michigan court determined that a spontaneous statement was admissible despite a lapse of time, if the delay is explained. In Lancaster v. People, 200 Colo. 448, 453, 615 P.2d 720, 723 (1980), the Colorado court noted that the latitude in temporal proximity allowed by courts in cases involving children recognizes that young children are not adept at reasoned reflection and concoction of false stories in stressful situations. Similarly in *Padilla*, 110 Wis. 2d 414, 419, 329 N.W.2d 263, 266, the Wisconsin court noted that in dealing with child witnesses, courts have given a broad interpretation to what constitutes an excited utterance. Stress may continue for a longer time, in that: (1) children are apt to repress this type of incident, (2) children will be unlikely to report this kind of incident to anyone but the mother, and (3) children's declarations are "free of conscious fabrication" for a longer period of time than are adults.

33. MONT. R. EVID. 803(4).

ately, or unless physical injury is involved, there is little evidence other than medical history that a physician can provide. Many jurisdictions, including Montana, admit victims' statements through this exception.[34] The question that has not been specifically answered in Montana, though, is whether the child's identification of the defendant to a physician is admissible, because such identification is not specifically required for the medical history.[35] Without other evidence specifically identifying the offender, the child still would have to be called as a witness to make the identification.

Finally, under the existing Montana Rules of Evidence, two catchall provisions allow the admission of hearsay statements not enumerated in the Rules' specific exceptions but which have comparable guarantees of trustworthiness.[36] At least one court has relied on a catchall provision identical to Rule 804(b)(5) of the Montana rules as the basis for admitting a six year old's "sleep talk" to corroborate the child's direct testimony concerning abuse.[37] Concluding that a young child is not likely to fake a bad dream, the court determined that the hearsay was sufficiently trustworthy to fall within this exception.[38] There is very little case law defining the use of these two catchall exeptions, however, leaving their successful use to a case-by-case basis. With such uncertainty surrounding the admissibility of a child's statement through these recognized catchall exceptions, a prosecutor would be ill-advised to ground a case on one of them.

All of the above hearsay statements are admissible, even though in reality they deny the defendant his right to confront the witness against him. A child witness need not be present in the courtroom if his statement can be admitted through one of the exceptions. Yet in many cases a child victim's out-of-court statement does not fit into one of these recognized exceptions.

If the child does testify, certain hearsay exclusions permit the child's previous out-of-court statement to be admitted if it is a

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34. *See, e.g.*, United States v. Nick, 604 F.2d 1199 (9th Cir. 1979); *Dickinson*, 2 Mich. App. 646, 141 N.W.2d 360; Goldade v. State, 674 P.2d 721 (Wyo. 1983).

35. United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980) (statements concerning identity of perpetrator not sufficiently related to treatment); State v. Fleming, 27 Wash. App. 952, 621 P.2d 779 (1981) (physician can testify to cause of injury, but not to fault); *Goldade*, 674 P.2d 721 (identification of perpetrator allowed because of court's concern over child abuse).

36. MONT. R. EVID. 803(24) and 804(b)(5). The two rules differ only in that Rule 803 exceptions can be used when the out-of-court declarant is available but does not testify, while Rule 804 exceptions require the unavailability of the out-of-court declarant.

37. State v. Posten, 302 N.W.2d 638, 641 (Minn. 1981).

38. Absent additional evidence of the sexual abuse, the hearsay testimony would not have sustained a conviction. *Id.* at 641.

prior consistent or prior inconsistent statement.[39] Prior consistent statements may be introduced if the statements are consistent with in-court testimony and are offered to rebut a charge of subsequent fabrication, improper influence, or motive.[40] The Montana Supreme Court has recognized the use of these statements in sexual assault cases, as have other jurisdictions.[41] The Montana rule does not specify, however, and the court has not addressed whether the prior consistent statement also can be used to rehabilitate a forgetful witness or one who lacks the ability to easily express himself. Other jurisdictions with the same rule seem to allow this use of prior consistent statements.[42]

Previously made inconsistent statements can be used similarly, but again, only if the declarant testifies at trial.[43] For example, if while testifying in court a young child denies having been molested,[44] earlier statements describing the incident may be introduced.[45] These prior inconsistent statements, as well as prior consistent statements, may be considered as substantive evidence,[46] although a conviction cannot be grounded solely on a prior inconsistent statement.[47]

Thus, if the child does testify, many procedural devices are available to the prosecution to help establish the guilt of the offender. Serious impediments to prosecution arise, however, when the child is unable or unwilling to be a witness.

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39. MONT. R. EVID. 801(d)(1).

40. MONT. R. EVID. 801(d)(1)(B).

41. State v. Mackie, ___ Mont. ___, 622 P.2d 673 (1981); State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983).

42. State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983); State v. Messamore, 639 P.2d 413 (Hawaii Ct. App. 1982).

43. MONT. R. EVID. 801(d)(1)(A).

44. In the discussion of the dynamics of sexual abuse within the family, Berliner, Blick, and Bulkley note some of the reasons why a child may change his story:

> The family often pressures the child to retract the story, by, for example, telling her she will split up the family, send her father to jail, and cause her mother to lose financial support. The legal process can also exacerbate the situation and contribute to a child's retraction or refusal to testify. Moreover, the child may have ambivalent feelings toward the abusive parent, which might lead to his or her changing the story initially given at a later date or at trial.

Berliner, *supra* note 5, at 172.

45. If a child does change his story or denies the incident on the witness stand, the prosecutor's rebuttal can present expert testimony to explain the family dynamics that could cause the inconsistent testimony. *Id.*

46. State v. Fitzpatrick, 186 Mont. 187, 198, 606 P.2d 1343, 1349 (1980).

47. State v. White Water, ___ Mont. ___, 634 P.2d 636, 638 (1981).

IV. A New Hearsay Exception Is Warranted

Victims of sexual abuse are often children of very young age. These children may not report that they have been molested until days, weeks, or even months have passed from the time the offense occurred. Frequently, the offender is a member of the child's own household or may have threatened the child with serious harm if the offense is reported. For these reasons, it is often impossible for a child to testify on direct examination in a criminal proceeding. Sexually abused children have a right to be heard, however, and to legal redress. There are two possible responses to this need. The Montana courts could make use of the exceptions provided in Rules 803(24) and 804(b)(5) of the Montana Rules of Evidence, which allow the use of reliable hearsay testimony. Alternatively, other states recently have adopted, through legislation, an additional exception to the hearsay rule specifically addressing child sexual abuse.[48] Both of these options can put crucial evidence before the judge or jury, while recognizing the problems related to young victim witnesses.

In order to accommodate the child witness, the courts and the legislature must resolve the conflict between two competing interests: the defendant's right to confront the witnesses against him and the need to provide protection for the child victim within the criminal justice system. The use of any hearsay statement allows a technical violation of the confrontation clause. The U.S. Supreme Court, however, long has recognized that in certain cases hearsay statements can be used without offending the defendant's confrontation rights.[49] If admissibility is not grounded on one of the recognized exceptions to the hearsay rule,[50] the evidence may be admitted only upon a showing of unavailability of the witnesses and then, only if the statement contains adequate guarantees of trustworthiness and reliability.[51] Additionally, there must be a demon-

48. Such legislation was introduced in the 49th Montana Legislative Session early this year. House Bill 69 passed second reading in the House of Representatives on a vote of 52-48 but was killed on the third reading, 51-48.

49. Mattox v. United States, 156 U.S. 237 (1895); *Roberts*, 448 U.S. 56; Dutton v. Evans, 400 U.S. 74 (1970) (availability of cross examination is not the sole criterion by which to test admissibility of hearsay over confrontation clause).

50. *Roberts*, 448 U.S. at 66.

51. The Court outlined its approach in *Roberts*:

> The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.
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> The second aspect operates once a witness is shown to be unavailable. Re-

strated need for the evidence.[52]

Clearly, there is a demonstrated need for the use of a young child's out-of-court statement in sexual abuse cases. Frequently the child is unavailable as a witness and there is often little, if any, evidence other than the child's out-of-court statement. This need for the child victim's out-of-court statements and the availability of means to test the statements' reliability would allow the Montana court to rely on Rules 803(24) and 804(b)(5) to fashion[53] an exception to the hearsay rule which protects the child witness and yet does not offend the defendant's state and federal constitutional rights. In fact, the rules themselves contemplate the use of these exceptions when necessary to expand the law of evidence in the area of hearsay:

> The preceding 23 exceptions of Rule 803 and the first five exceptions of Rule 804(b), are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. Exception (24) and its companion provision in Rule 804(b)(6) are accordingly included. They do not contemplate an unfettered exercise of judicial discretion, but *they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness* within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purpose expressed in Rule 102.[54]

While there is little case law in Montana defining the parameters of these rules,[55] Justice Harrison has indicated in *Jacques v. National Guard*[56] that the Montana court can and should rely on these exceptions in cases in which the hearsay evidence sought to

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flecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule."

448 U.S. at 65 (citations omitted).

52. *Nick*, 604 F.2d 1199.

53. In its comments to MONT. R. EVID. 803(24), the Commission stated: "There is no equivalent Montana law to this exception. The adoption of this exception changes existing Montana law to the extent that it allows a court to admit hearsay because an equivalent guarantee of trustworthiness exists even though there is no specific exception allowing it."

54. FED. R. EVID. 803(24) advisory committee note, *reprinted in* 56 F.R.D. 183, 320 (1973) (emphasis added).

55. *Norgaard*, ___ Mont. ___, 653 P.2d 483; Jacques v. Montana Nat'l Guard, ___ Mont. ___, 649 P.2d 1319, 1327 (1982) (Harrison, J., dissenting).

56. ___ Mont. ___, 649 P.2d 1319 (1982).

be admitted is essential, material, and reliable.[57] Reviewing the Montana version of the rule, Justice Harrison concluded that the drafters intended a rule even broader than the federal rule,[58] thereby allowing the Montana court to provide more liberal hearsay exceptions.[59]

To insure reliability and trustworthiness of the statements to be admitted under this exception, the court can test the child's statement by the means used to test the trustworthiness of any hearsay evidence, that is, by looking at the circumstances in which the statement was made, to whom it was made, when it was made, and whether the witness had any reason to lie.[60] Additionally, our experience and the literature support the proposition that children's statements about sexual matters are inherently reliable because very young children without actual sexual experience are unable to lie or fantasize about sexual experiences, especially in the explicit detail in which they often describe what has happened to them.[61] Expert testimony, of course, can be admitted on these points to support the claim of reliability.[62]

When the Minnesota Supreme Court relied on Rule 804(b)(5) to allow the admission of a child's "sleep talk," it found that evidence from a child is trustworthy.[63] Other courts considering state-

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57. *Id.* at ____, 649 P.2d at 1330.

58. The Montana version does not contain the requirements for admissibility that are set out in the federal rules. FED. R. EVID. 803(24) and 804(b)(5) require the court to determine that:

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

59. *Jacques*, ____ Mont. at ____, 649 P.2d at 1330.

60. United States v. Bailey, 581 F.2d 341, 349 (3d Cir. 1978).

61. In his article on corroboration of victim testimony, David Lloyd points to a child's inability to fantasize about sexual matters:

> [F]antasies are based on [children's] daily experiences, and [are] used as tools in the development of cognitive social skills and morality. Since knowledge through observations or hearing is the basis for fantasy, children are unlikely to fantasize about sexual activity using adult terms because sexual matters are generally not discussed between parents and their children in an informative way. The child who can describe an adult's erect penis and ejaculation has had direct experience with them.

D. Lloyd, *The Corroboration of Sexual Victimization of Children*, in SEXUAL ABUSE AND THE LAW 103, 105 (4th ed. 1983). *See also* People in the Interest of W.C.L., ____ Colo. App. ____, 650 P.2d 1302 (1982), *rev'd on other grounds*, ____ Colo. ____, 685 P.2d 176 (1984).

62. *See, e.g., Middleton*, 294 Or. 427, 657 P.2d 1215, 1218-20.

63. In considering this evidence, the Minnesota court noted, "It may be that generally evidence of this sort would be untrustworthy. Here, however, we are not dealing with a conniving person who was out to get someone by faking a bad dream, but a child who had

ments sought to be admitted under Rules 803(24) or 804(b)(5) have set forth specific criteria by which the hearsay is to be evaluated:

> The circumstances under which the statement was made must indicate a very high degree of reliability and trustworthiness; the statement must be offered as evidence of a material fact; the statement, although not essential for proof of the point for which it is offered, must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts;" and the interest of justice will be best served by admission of the statement into evidence.[64]

These cases present a workable means by which a trial court could admit reliable statements while preserving the defendant's right of confrontation. The trial court could evaluate the child's statement prior to trial, using the above criteria, to determine the statement's reliability. If the statement was found to be reliable, the case could proceed without the child appearing as a witness.

Washington and Kansas, by legislation, have adopted a similar exception to the hearsay rule that allows hearsay statements made by the victims of child abuse to be admitted in trial, even though the child does not testify.[65] Both statutes recently were upheld by their respective supreme courts,[66] and both essentially reflect a codification of each state's case law surrounding Rule 803(24) and Rule 804(b)(5).

The Washington statute permits an out-of-court statement by a child under the age of ten to be admitted, if after a hearing conducted outside the presence of the jury, the court finds that the circumstances surrounding the statement provide sufficient indicia of reliability, and the child either testifies or is unavailable. If the child is unavailable as a witness, the statement may be admitted only if there is corroborative evidence of the act.[67]

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obviously suffered." *Posten*, 302 N.W.2d at 641.

64. *Nick*, 604 F.2d at 1203. There the court concluded that the child's statement was an "excited utterance," but used the criteria for 803(24) admissibility to determine whether there was a sixth amendment violation. See also *Brown*, 341 N.W.2d at 14-15, for a similar analysis of Rules 803(24) and 804(b)(5).

65. KAN. STAT. ANN. § 60-460(dd) (1983); WASH. REV. CODE ANN. § 9A.44.120 (1985).

66. State v. Ryan, 103 Wash. 2d 165, 691 P.2d 197 (1984); State v. Pendelton, 10 Kan. App. 2d 26, 690 P.2d 959 (1984).

67. WASH. REV. CODE ANN. § 9A.44.120 (1985) provides:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the State of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury

The Kansas statute is very similar. It also allows out-of-court statements made by a child victim, if, following a hearing, the child is disqualified or is unavailable as a witness and his statement is apparently reliable and trustworthy. The jury is to determine the weight and credit to be given the statement, considering the age and maturity of the witness and the circumstances under which the statement was made. The Kansas statute does not require corroboration.[68]

The Kansas Supreme Court, in *State v. Pendelton*,[69] upheld the constitutionality of the statutory hearsay exception and allowed the mother of a seven year old boy to testify concerning her son's allegation to her of sexual solicitation by the defendant. The victim had been disqualified as a witness because he was unable to relate the facts of the offense in a logical progression. Nevertheless, the victim's out-of-court statement was allowed, because it was made under circumstances from which a strong inference of reliability could be drawn: the child had, at his first opportunity, initiated a conversation with his mother in which he related the facts of the offense to her. Additionally, the mother had not made any threats or promises to elicit the statement from her son.[70]

The Washington statute, in *State v. Ryan*,[71] similarly survived

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that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

68. KAN. STAT. ANN. § 60-460(dd) (1983) provides:

In a criminal proceeding or in a proceeding to determine if a child is a deprived child under the Kansas juvenile code or a child in need of care under the Kansas code for care of children, a statement made by a child, to prove the crime or that the child is a deprived child or a child in need of care, if:

(1) The child is alleged to be a victim of the crime, a deprived child or a child in need of care; and

(2) the trial judge finds, after a hearing on the matter, that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises.

If a statement is admitted pursuant to this subsection in a trial to a jury, the trial judge shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, any possible threats or promises that might have been made to the child to obtain the statement and any other relevant factor.

69. 10 Kan. App. 2d 26, 690 P.2d 959 (1984).

70. *Id.* at ____, 690 P.2d at 962-63.

71. 103 Wash. 2d 165, 691 P.2d 197 (1984).

a confrontation clause claim, although the Washington Supreme Court held that the application of the statute was in violation of the defendant's sixth amendment right and the case was reversed. The court held that the mere fact of a child's youth did not render the child incompetent and under the terms of the statute an individual determination of competency had to be made in each case.[72] In addition, a specific showing of unavailability had to be made.[73] Neither determination was made in *Ryan*, leading to the case's reversal. The Washington court, however, specifically upheld the statute's constitutionality under both the federal and state constitutions.[74]

Thus, at least two state legislatures have recognized the need for increased flexibility in the hearsay rule when young children have been victimized, and the constitutionality of these laws has been upheld. Montana would be well advised to follow these states' lead.

V. CONCLUSION

The developing awareness of the broad scope of child sexual abuse has led to increased social pressure to do something to stop it. Offenders must be prosecuted and treated. Unfortunately, all too often the offender cannot be prosecuted because the principal witness, the child victim, is unable to testify under current rules of evidence.

The present rules of evidence were not developed with a full recognition of the problems presented when it is necessary for very young children to testify. Fortunately, the law is flexible and can be adapted to the needs of our changing society. We long have accepted the doctrine that all hearsay does not necessarily offend constitutional guarantees of confrontation. When out-of-court statements bear sufficient trappings of reliability and trustworthiness, they should be presented to the jury. The jury then has the task of assigning the proper weight and credibility to the statements. It is now time that the criminal justice system recognize the problems of child sexual abuse victims. The reliable hearsay statements of these children should be admitted into evidence. To do less is to turn our backs on one of the most pressing social problems of our day.

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72. *Id.* at ____, 691 P.2d at 203.
73. *Id.* at ____, 691 P.2d at 202-03.
74. *Id.* at ____, 691 P.2d at 202, 207.