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BABE IN THE WOODS: WHY THE FEDERAL RULES OF EVIDENCE SHOULD ADOPT A NEW HEARSAY EXCEPTION TO PROTECT CHILDREN

Marlee Rowe*

Introduction

“What did the man do when he pushed you down, Lucy?”

“What did he do?”

“Did he hurt you any place?”

“Do you remember that?”¹

The dialogue above reflects the prosecutor’s direct examination of nine-year-old Lucy in *United States v. Iron Shell*.² Each question was followed by a long hesitation as Lucy attempted to detail the encounter during which the defendant sexually assaulted her.³ Unfortunately, this is not a rare occurrence, but rather a commonplace issue in the prosecution of child abuse cases.⁴

Because abusive crimes against children are often committed in secrecy and typically are not reported until well after the crime is committed, these cases are particularly difficult to prosecute and rely heavily on the child victim’s testimony.⁵

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1. *United States v. Iron Shell*, 633 F.2d 77, 82 n.7 (8th Cir. 1980).

2. *Id.*

3. *Id.*

4. “[E]ven if permitted to testify at trial, young children are unlikely to be able to testify to an earlier event with the degree of memory that an adult could” Lynn McLain, *Children are Losing Maryland’s “Tender Years” War*, 27 U. BALT. L. REV. 21, 25 (1997).

5. *See id.* at 29.

While forcing an individual of any age to testify in front of their abuser is scarring, it can be especially traumatizing for young children.⁶

“Child abuse and neglect is a public health problem that affects millions of children and adults in the [United States].”⁷ Statistics suggest that “[a]bout 1 in every 4 girls and 1 in every 13 boys . . . experience sexual abuse at some time in their childhood.”⁸ In response to the pervasiveness of child abuse cases, many states have adopted hearsay exceptions to prevent children like Lucy from being forced to testify in front of their abusers.⁹ Although these exceptions vary by state, they all seek to protect children by providing an alternative means to admissibility for child hearsay statements.¹⁰ While 38 states have taken steps to protect children in this way, the Federal Rules of Evidence has failed to show the same initiative.¹¹ It is time to

6. More specifically, “direct and cross-examination is a strong source of emotional stress” for child victims. Jennifer E. Rutherford, *Unspeakable! Crawford v. Washington and Its Effects on Child Victims of Sexual Assault*, 35 SW. U. L. REV. 137, 148 (2005). “Eileen Vizard, a child psychiatrist, has said, ‘As an experienced expert witness, I can confirm that there is not the slightest chance of a traumati[z]ed sexually abused child surviving cross-examination by a[n] experienced [lawyer].’” *Id.* (quoting Rhona H. Flin, *Hearing and Testing Children’s Evidence*, in CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY 279, 291 (Gail S. Goodman & Bette L. Bottoms eds., 1993)).

7. Arpita Basu, *Assessing Symptoms of Post-Traumatic Stress in Primary Caregivers of Sexually Abused Children* (2008) (MPH Capstone, Univ. of Pa.) [<https://perma.cc/36KM-R2KU>].

8. *Facts for Families: Sexual Abuse*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (May 2020), [<https://perma.cc/8FDB-9MG7>] [hereinafter “AACAP”].

9. The 38 U.S. states with some type of legislation governing a child’s out-of-court statement include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. The 12 states without legislation governing child hearsay are: Connecticut, Idaho, Iowa, Maine, Michigan, Nebraska, North Carolina, New Hampshire, New Mexico, New York, West Virginia, and Wyoming. See NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE, NAT’L DIST. ATT’Y ASS’N, *RULES OF EVIDENCE OR STATUTES GOVERNING OUT OF COURT STATEMENTS OF CHILDREN 2-5* (2014), [<https://perma.cc/VB6U-E4AX>]; ARIZ. REV. STAT. ANN. § 8-237 (1999); HAW. REV. STAT. ANN. § 626-1, R. 804(b)(6) (West 2002); KAN. STAT. ANN. § 60-460(dd) (2021); KRE 804A (2018); LA. CHILD. CODE ANN. arts. 323(2)-(3) (2007) & 325 (1992).

10. See Alison G. Geter, *Hearing the Unheard: Crafting a Hearsay Exception for Intellectually Disabled Individuals*, 87 MISS. L.J. 469, 475 (2018).

11. The Federal Rules of Evidence include two provisions for exceptions to the rule against hearsay, but neither of these provisions provides an exception for child hearsay specifically. See FED. R. EVID. 803 (providing a list of exceptions applicable regardless of

enact similar legislation on a federal level, ensuring every child abuse victim is afforded the same protections under the law, regardless of which state they reside in.

First, Part I of this comment provides a general overview of the Rule Against Hearsay, its history, and its relationship to the Confrontation Clause of the Sixth Amendment. Part II discusses the Federal Rules of Evidence, underscoring the exceptions to the Rule Against Hearsay it currently provides. Part III addresses the need for a child hearsay exception, offering policy arguments in support of such an exception and highlighting state exceptions to child hearsay that currently exist. Finally, Part IV explains the proposed exception and briefly describes its connection to the Confrontation Clause.

I. General Overview of Hearsay and the Confrontation Clause

The concept of hearsay is arguably the most difficult evidentiary concept to understand within the rules of evidence at both the state and federal levels.¹² It is defined as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.”¹³ Said differently, hearsay is an out-of-court statement used to prove the truth of the matter asserted.¹⁴ To simplify the concept, it can be compared to a children’s game of telephone in which information is being passed from one person to another. When a witness seeks to introduce a statement made to them by another person outside of the courtroom, and the testimony is used to prove the truth of that statement, it is considered hearsay.¹⁵ As provided by the Federal Rules of Evidence, hearsay is generally inadmissible at trial, though subject to various exceptions.¹⁶

whether the declarant is available as a witness); *see also* FED. R. EVID. 804(b) (providing a list of exceptions applicable only when the declarant is unavailable as a witness).

12. *See* Richard A. Posner, *On Hearsay*, 84 *FORDHAM L. REV.* 1465, 1466-67 (2016).

13. FED. R. EVID. 801(c).

14. *See id.*

15. *See id.*

16. FED. R. EVID. 802.

The reasons for excluding hearsay at trial turn on a reliability analysis.¹⁷ Hearsay is excluded for the same reason witnesses are placed under oath and an opposing party is given the opportunity to cross-examine the witness—to ensure the reliability of the witness’s testimony.¹⁸ If witnesses are permitted to provide hearsay testimony, the original declarant of the statement is not subjected to typical procedural safeguards such as: the oath, observation by the jury, and cross-examination by the opposing party.¹⁹ Without these safeguards, the statement’s reliability is brought into question.²⁰ Thus, while generally admitting hearsay would simplify the rules of evidence, it may also weaken the reliability of testimony.²¹

There are situations in which courts are willing to relax this reliability analysis and permit hearsay testimony in light of other considerations.²² This is why both state and federal rules of evidence include a list of hearsay exceptions.²³ In the civil context, a statement falling under one of these defined exceptions may be admitted with no further issues.²⁴ In the criminal context, however, the hearsay statement must overcome a second barrier to admissibility—the Confrontation Clause.²⁵

The Confrontation Clause of the Sixth Amendment provides the accused the right to confront the witnesses against him in a criminal prosecution.²⁶ This clause often underlies objections to hearsay testimony admitted under the various exceptions because the statement was not subjected to the safeguards (such as observation and cross-examination) discussed above.²⁷ Accordingly, in criminal cases, courts are called to interpret the

17. See Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 55 (1987).

18. See *id.*

19. See *id.*

20. See *id.*

21. Geter, *supra* note 10, at 472.

22. Eileen A. Scallen, *Coping with Crawford: Confrontation of Children and Other Challenging Witnesses*, 35 WM. MITCHELL L. REV. 1558, 1559 (2009).

23. Geter, *supra* note 10, at 472.

24. See David Alan Sklansky, *Hearsay’s Last Hurrah*, 2009 SUP. CT. REV. 1, 78, 80 (2009) (“Nowadays invocations of the Confrontation Clause are rejected out of hand in civil cases, no matter how high the stakes.”).

25. See *id.* at 78-79; Geter, *supra* note 10, at 493.

26. U.S. CONST. amend. VI.

27. See Park, *supra* note 17, at 55.

admissibility of such statements under the Confrontation Clause.²⁸ This task presents great challenges, as the guidance provided by the Supreme Court is unclear and outdated.²⁹

While many caveats present opportunities to craft a hearsay exception in a way that avoids implicating the Confrontation Clause, that is not the focus of this comment. However, it is worth noting that the argument presented in this comment would offer the Supreme Court an opportunity to reexamine the issue and provide clarity for lower courts assessing the admissibility of hearsay statements falling under such exceptions in the criminal context.

II. Federal Rules of Evidence and Exceptions to the Rule Against Hearsay

Almost 50 years ago, in 1975, President Ford signed the Federal Rules of Evidence into law.³⁰ The newly drafted set of rules endeavored to create a uniform system across all federal courts for admitting and excluding evidence in criminal and civil trials.³¹ While the Federal Rules of Evidence only apply in federal courts, many states use the federal rules as a model for their own rules of evidence.³² Section eight of the Federal Rules of Evidence addresses hearsay, establishing that its introduction is inadmissible absent an exception provided by the rules, by statute, or by other Supreme Court rules.³³ Section eight has been amended to add new rules twice since its adoption in 1975.³⁴ However, there have been no new rule additions to the hearsay

28. *Id.* at 93.

29. See Michael D. Cicchini & Vincent Rust, *Confrontation After Crawford v. Washington: Defining “Testimonial”*, 10 LEWIS & CLARK L. REV. 531, 533 (2006) (“The new Crawford framework . . . has done little to fulfill the intent of the Framers. Crawford’s ineffectiveness is largely due to the Court’s failure to define the term ‘testimonial.’”).

30. Jon R. Waltz, *The New Federal Rules of Evidence: An Overview*, 52 CHI.-KENT. L. REV. 346, 346 (1975).

31. See *id.* at 347.

32. Lauren Gailey, “I’m Sorry” as Evidence? Why the Federal Rules of Evidence Should Include a New Specialized Relevance Rule to Protect Physicians, 82 DEF. COUNS. J. 172, 173 (2015).

33. See FED. R. EVID. 802.

34. Eileen A. Scallen, *Analyzing “The Politics of [Evidence] Rulemaking”*, 53 HASTINGS L.J. 843, 855 (2002) (In 1997, Rule 801(d)(2) was amended, Rule 804(b)(6) was added, and Rule 807 was adopted to replace both Rules 803(24) and 804(b)(5). Rule 803(6) was amended in 2000).

section of the Federal Rules of Evidence in over 20 years.³⁵ As it stands today, there are 24 exceptions to the general prohibition against hearsay outlined in section eight, regardless of whether the declarant is available as a witness.³⁶ However, none of the exceptions specifically include protection for children.³⁷

Federal Rule of Evidence 803 outlines exceptions to the rule against hearsay, regardless of whether the declarant is available as a witness.³⁸ There are 23 exceptions carved out under this rule.³⁹ These carveouts include things like: present sense impression; excited utterance; then-existing mental, emotional, or physical condition; statements made for medical diagnosis or treatment; and various other exceptions pertaining to things like records, certificates, and reputations.⁴⁰ Rule 804 establishes additional exceptions.⁴¹ However, the exceptions contained in Rule 804 all require that the declarant be unavailable.⁴²

Although the federal hearsay exceptions related to excited utterances and medical diagnoses can sometimes be used as a pathway to admissibility for child hearsay statements, that is rarely the case and is often very difficult to achieve.⁴³ In light of the overwhelming number of child abuse cases—and to follow the examples of the many states who have already created such

35. *See id.*

36. FED. R. EVID. 803 & 807.

37. *See* FED. R. EVID 803 (providing a list of exceptions applicable regardless of whether the declarant is available as a witness); FED. R. EVID. 804(b) (providing a list of exceptions applicable only when the declarant is unavailable as a witness); FED. R. EVID. 807 (the residual exception).

38. FED. R. EVID. 803.

39. *Id.* (The 24th exception was moved to Rule 807).

40. *Id.*

41. FED. R. EVID. 804.

42. *See id.* (providing that “[a] declarant is considered to be unavailable as a witness if the declarant: (1) is exempted from testifying about the subject matter of the declarant’s statement because the court rules that a privilege applies; (2) refuses to testify about the subject matter despite a court order to do so; (3) testifies to not remembering the subject matter; (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or (5) is absent from the trial or hearing and the statement’s proponent has not been able, by process or other reasonable means, to procure: (A) the declarant’s attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or (B) the declarant’s attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).”).

43. Jonathan Scher, *Out-of-Court Statements by Victims of Child Sexual Abuse to Multidisciplinary Teams: A Confrontation Clause Analysis*, 47 FAM. CT. REV. 167, 188 n.210 (2009).

an exception—the Federal Rules of Evidence should incorporate an exception for child hearsay.

III. The Need for a Child Hearsay Exception

The need for a child hearsay exception at the federal level is substantiated by the damaging effects abused children face after they are forced to testify at trial. While most states have some type of legislation governing child hearsay, the scope of these exceptions varies widely by state, leaving courts without a uniform approach to apply.⁴⁴ Amending the Federal Rules of Evidence to include an exception for child hearsay would address the shortcomings of state exceptions, promote uniformity, and ensure that all child abuse victims in the United States are afforded the same protections under the law.

A. Policy Justifications for New Child Hearsay Exception

Millions of American children are affected by child abuse and neglect.⁴⁵ From 1976 to 1991, “the number of reported cases of child sexual abuse in the United States . . . increased at a rate of approximately 2300%.”⁴⁶ Today, about eight percent of males and twenty-five percent of females in the United States experience sexual abuse at some point in their childhood.⁴⁷ According to the American Academy of Child & Adolescent Psychiatry, “[c]hildren who experience sexual abuse and other ‘adverse childhood experiences’ (ACEs) such as physical abuse or neglect, have a higher chance of developing depression, posttraumatic stress disorder, drug addiction, and suicidal behaviors later in life.”⁴⁸ Additionally, the economic burden

44. See generally NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE, *supra* note 9.

45. Basu, *supra* note 7.

46. Dyane L. Noonan, *Where Do We Go from Here? A Modern Jurisdictional Analysis of Behavioral Expert Testimony in Child Sexual Abuse Prosecutions*, 38 SUFFOLK U. L. REV. 493, 493 (2005) (citing Lynn M. Marshall, Note, *Hutton v. State: Whose Rights are Paramount, the Defendant’s or the Child Victim’s?*, 27 U. BALT. L. REV. 291, 292 (1997)).

47. See AACAP, *supra* note 8.

48. See *id.*

imposed by child sexual abuse is “estimated to be at least \$9.3 billion[.]” though this is likely an underestimate.⁴⁹

Convictions in child abuse cases are especially difficult to secure.⁵⁰ When a child is abused, particularly when they are *sexually* abused, the crime is almost always committed in secret.⁵¹ And more often than not, the abuse is unfortunately committed by a family member or family friend, deterring the child from disclosing information about the abuse.⁵² Furthermore, “there is typically no physical evidence” in cases that do not involve physical penetration.⁵³ Even where a child has been raped, the physical evidence will likely still expire “because children heal quickly and the crime is often reported well after it occurred.”⁵⁴ Because of this, the outcome of the case usually relies heavily on the child victim’s out-of-court statement.⁵⁵

Children are already treated differently than adults in the courtroom.⁵⁶ The reliability of a child’s testimony is often viewed much more skeptically due to concerns about “suggestibility, manipulation, coaching, or confusing fact with fantasy.”⁵⁷ Moreover, children may not fully understand the meaning of an oath, are generally more susceptible to nerves, and are often unable or unwilling to remember the details of a crime.⁵⁸

Furthermore, children may become further traumatized when they are forced to testify in court.⁵⁹ Small things such as

49. *Fast Facts: Preventing Child Sexual Abuse*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://perma.cc/T2WQ-5CHM] (last visited Feb. 8, 2022). This figure is calculated using “the estimated lifetime cost per child that experiences abuse or neglect (including health care, special education, criminal justice costs) in a given area paid by public payers (for example, state government budget . . .) and society . . .” *Child Abuse and Neglect Prevention Program Cost Calculator*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://perma.cc/7GHH-2GJP] (last visited Feb. 8, 2022).

50. Myrna Raeder, *Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases*, 71 *BROOK. L. REV.* 311, 374-75 (2005).

51. *Id.*

52. The Rape, Abuse, and Incest National Network found that 93% of perpetrators in sexual abuse cases are known to the victim. See *Children and Teens: Statistics*, RAINN, [https://perma.cc/J8L8-VALM] (last visited Feb. 11, 2022).

53. See Raeder, *supra* note 50, at 375.

54. *Id.* at 374-75.

55. McLain, *supra* note 4, at 29.

56. See Raeder, *supra* note 50, at 375.

57. *Id.*

58. Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, *U. ILL. L. REV.* 691, 769 (1993).

59. See Scher, *supra* note 43, at 170.

the “dimensions of the room, the elevation of the judge, [and] the isolation of the witness box” can intimidate small children.⁶⁰ Then, the child is asked to recount an embarrassing and terrifying experience, which “increase[s] the child’s sense of stigma and cause[s] the child to feel more responsible for the events that followed disclosure.”⁶¹ Additionally, confrontation has been recognized as a “primary stress factor” for many child victims, making direct and cross-examination particularly scarring.⁶² “[A] child psychiatrist . . . said ‘As an experienced expert witness, I can confirm that there is not the slightest chance of a traumati[z]ed sexually abused child surviving cross-examination by a[n] experienced [lawyer]. That is not to be unduly critical of lawyers but simply to state plain common sense.’”⁶³

When these factors are all combined with presenting the testimony in the presence of the defendant—“one of the most disturbing aspects of giving evidence”—children may become severely emotionally distressed.⁶⁴ At the seven-month mark in a study examining 218 sexual assault victims at various stages in the prosecutorial process, children who testified demonstrated “greater behavioral disturbance” than those who did not testify.⁶⁵ Of the testifying children, some reported that “the testimonial experience had significantly affected them,” as their fear of the defendant had rendered them unable “to express themselves when

60. Rutherford, *supra* note 6, at 148 (quoting Rhona H. Flin, *Hearing and Testing Children’s Evidence*, in CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY, 279, 288 (Gail S. Goodman & Bette L. Bottoms eds., 1993)).

61. *See id.* at 146 (quoting Desmond K. Runyan, *The Emotional Impact of Societal Intervention into Child Abuse*, in CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY, 263, 270 (Gail S. Goodman & Bette L. Bottoms eds., 1993)).

62. *See id.* at 148 (quoting Rhona H. Flin, *Hearing and Testing Children’s Evidence*, in CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY, 279, 289 (Gail S. Goodman & Bette L. Bottoms eds., 1993)).

63. *See id.* (quoting Rhona H. Flin, *Hearing and Testing Children’s Evidence*, in CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY, 279, 291 (Gail S. Goodman & Bette L. Bottoms eds., 1993)).

64. *See id.* (quoting Rhona H. Flin, *Hearing and Testing Children’s Evidence*, in CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY, 279, 289 (Gail S. Goodman & Bette L. Bottoms eds., 1993)).

65. Rutherford, *supra* note 6, at 147 (citing Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS SOC’Y FOR RSCH. CHILD DEV., no. 5, at v (1992)).

answering questions.”⁶⁶ It is for these reasons that requiring a child to testify should be prevented at all costs.

B. State Hearsay Exceptions

Many states have implemented hearsay exceptions in their rules of evidence aiming to protect vulnerable persons, with the most notable exception being the tender years exception.⁶⁷ In some jurisdictions, this exception to the hearsay rule allows the use of an out-of-court statement by a young child in an abuse or neglect case if the time, content, and circumstances of the statement provide sufficient indications of reliability, with the majority of these jurisdictions establishing, “the exception only applies if the child either testifies or is unavailable [as a witness] and there is corroborating evidence of the statement.”⁶⁸

Exceptions like these have become increasingly more prevalent over the years, presumably in response to the staggering number of child abuse cases across the United States.⁶⁹ However, the exceptions vary by state in both the elements they require, the individuals they protect, and the ways in which they are codified. For example, some states codify the exception into their state rules of evidence, while others codify it into the rules governing criminal procedure or enact a statute for child hearsay specifically.⁷⁰

The states also differ in the age they require for a child to qualify for the exception. Arkansas, Michigan, and Nevada require that the child is under ten years of age, while Minnesota

66. *See id.*

67. Geter, *supra* note 10, at 475.

68. *Id.*

69. *See id.* at 475-476; *see also Child Abuse Statistics*, CHILD HELP [https://perma.cc/5SSR-6DZC] (last accessed June 1, 2022) (On average, the U.S. loses “5 children every day to child abuse and neglect” with state agencies identifying “over 656,000 victims of child maltreatment” in 2019 alone.).

70. Arkansas, California, Kentucky, Mississippi, New Jersey, North Dakota, Ohio, Oregon, and Vermont all have child hearsay exceptions codified in their respective states’ rules of evidence, whereas twenty-five additional states have hearsay exceptions codified in some other statutory form, such as their rules of criminal procedure. *See* NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE, *supra* note 9; ARIZ. REV. STAT. ANN. § 8-237 (1999); HAW. REV. STAT. ANN. § 626-1(b)(6), R. 804 (West 2002); KAN. STAT. ANN. § 60-460(dd) (West 2021); KRE 804A (2018); LA. CHILD. CODE ANN. art. 325 (1992). For more information on state exceptions protecting vulnerable persons *other* than children, *see generally* Geter, *supra* note 10.

only requires that the victim is a minor.⁷¹ North Dakota, Oregon, and Ohio all require that the statement is made by a child twelve years of age or less.⁷² In Illinois and Maryland, the requirement is thirteen years of age or less, while the age is set at fourteen years or less in Texas and Utah.⁷³ Florida, Hawaii, and Georgia all provide an exception for individuals sixteen years of age or less, while Mississippi simply states that the proponent of the statement must be of “tender years.”⁷⁴ Because the states are so incongruous regarding at what age their “tender years” exceptions apply, a federal child hearsay exception is necessary to resolve this inconsistency.

Although almost all state exceptions require the court to conduct a hearing outside the presence of the jury to determine the statement’s validity, but the states differ in how they articulate that validity. Some states require “an indicia of reliability” while others require “sufficient guarantees of trustworthiness.”⁷⁵ Furthermore, several states require that the declarant either be available to testify, or that the declarant is unavailable to testify and there is corroborating evidence of the alleged abuse.⁷⁶ Some states, like Oregon, Ohio, and Michigan, take this a step further and require that additional elements be met.⁷⁷

For example, Oregon requires that the statement’s proponent disclose “the particulars of the statement no later than 15 days before trial,” and Ohio requires that “the child’s testimony is not

71. ARK. R. EVID. 803(25) (1992); MICH. R. EVID. 803A (1991); NEV. REV. STAT. § 51.385 (West 2001); MINN. STAT. ANN. § 595.02(n) (West 2020).

72. N.D. R. EVID. 803(24) (2019); OR. REV. STAT. ANN. § 40.460(18a)(a)-(b) (West 2018); OHIO R. EVID. 807(A) (2018).

73. 725 ILL. COMP. STAT. ANN. 5/115-10 (West 2017); MD. CODE ANN., CRIM. PROC. § 11-304 (2017); TEX. CODE CRIM. PROC. ANN. art. 7B.004 (West 2021); UTAH R. CRIM. P. 15.5 (2008).

74. FLA. STAT. ANN. § 90.803(23) (West 2014); HAW. REV. STAT. ANN. § 626-1(b)(6), R. 804 (West 2002); GA. CODE ANN. § 24-8-820 (2019); MISS. R. EVID. 803(25) (2020).

75. Arkansas, Nevada, North Dakota, Ohio, and Hawaii all require that the court determine the statement is “trustworthy,” while Mississippi, Illinois, and Oregon provide that the statement possess “indicia of reliability.” *See* ARK. R. EVID. 803(25) (1992); NEV. REV. STAT. § 51.385 (West 2001); N.D. R. EVID. 803(24) (2019); OHIO R. EVID. 807(A)(1) (2018); HAW. REV. STAT. ANN. § 626-1(b)(6), R. 804 (West 2020); MISS. R. EVID. 803(25) (2020); 725 ILL. COMP. STAT. ANN. 5/115-10 (West 2017); OR. REV. STAT. ANN. § 40.460(18a)(a)-(b) (West 2018).

76. *See* FLA. STAT. ANN. § 90.803(23) (West 2014); MISS. R. EVID. 803(25) (2020); N.D. R. EVID. 803(24) (2019); 725 ILL. COMP. STAT. ANN. 5/115-10 (West 2017).

77. *See* OR. REV. STAT. ANN. § 40.460(18a)(a)-(b) (West 2018); OHIO R. EVID. 807(A) (2018); MICH. R. EVID. 803A (1991).

reasonably obtainable by the proponent of the statement[.]”⁷⁸ Michigan requires that “the statement is shown to have been spontaneous and without indication of manufacture;” that the declarant either made the statement immediately after the abuse or any delay was “excusable as having been caused by fear or other equally effective circumstance;” and that only the first corroborative statement made by the proponent is admitted, if more than one statement was made.⁷⁹ A few states will not allow such hearsay to be admitted at all unless the declarant is subjected to cross-examination.⁸⁰

Additionally, several states have particularly specific requirements.⁸¹ The analysis conducted by Arkansas, North Dakota, and Michigan turns on the *type* of crime, admitting only those statements concerning *sexual* abuse.⁸² Minnesota codifies an exception focusing on *who* the statement was made to, allowing medical personnel, therapists, and social workers to testify relating to the abuse or neglect of a minor if there is a reasonable likelihood the information will prove material and the public interest in obtaining the information outweighs any harm to the patient-health professional relationship.⁸³

Illinois and Hawaii require either the court or the jury to consider specific factors.⁸⁴ Illinois admits hearsay statements regarding abuse only if the child victim makes the statement within three months of the offense or prior to turning thirteen, and the jury is instructed to determine the credibility considering

78. OR. REV. STAT. ANN. § 40.460(18a)(b) (West 2018); OHIO R. EVID. 807(A)(2) (2018).

79. MICH. R. EVID. 803A (1991).

80. *See, e.g.*, GA. CODE ANN. § 24-8-820 (West 2019) (providing that child hearsay will be admitted only if made by a child under 16 years of age and the “person to whom the child made such statement is subject to cross-examination regarding the out-of-court statements”).

81. *See* ARK. R. EVID. 803(25) (1992); N.D. R. EVID. 803(24) (2019); MICH. R. EVID. 803A (1991); MINN. STAT. ANN. § 595.02(2)(b) (West 2020); 725 ILL. COMP. STAT. ANN. 5/115-10 (West 2017); HAW. REV. STAT. ANN. § 626-1, R. 804 (West 2002); UTAH R. CRIM. P. 15.5 (2008); ALASKA R. EVID. 801(d)(3) (2014); FLA. STAT. ANN. § 90.803(23) (West 2014).

82. *See* ARK. R. EVID. 803(25) (1992); N.D. R. EVID. 803(24) (2019); MICH. R. EVID. 803A (1991).

83. MINN. STAT. ANN. § 595.02 (West 2020).

84. *See* 725 ILL. COMP. STAT. ANN. 5/115-10(c) (West 2017); HAW. REV. STAT. ANN. § 626-1(6), R. 804 (West 2002).

factors such as the age and maturity of the child.⁸⁵ Hawaii courts consider various factors such as whether the statement was recorded.⁸⁶ Utah allows child hearsay statements into evidence *only* if they were previously recorded, and Alaska provides that a previously recorded statement is not hearsay at all when the child is available for cross-examination.⁸⁷ Moreover, Florida and Illinois extend their hearsay exception to the intellectually disabled.⁸⁸ While the states approach the hearsay exceptions in different ways, they all serve the same objective—protecting society’s most vulnerable individuals.

C. The Need to Amend the Federal Rules of Evidence for a Child Hearsay Exception

As demonstrated above, states are incredibly inconsistent in the application of their child hearsay exceptions.⁸⁹ Additionally, some of these exceptions are insufficient, as they require a long list of requirements to be met before a child’s statement qualifies for the exception.⁹⁰ Therefore, the Federal Rules of Evidence should amend its rules and implement a federal exception for child hearsay.

Although states are not forced to adopt the Federal Rules of Evidence and are free to depart from them when enacting their own evidence rules at the state level, many states do model their rules after the Federal Rules of Evidence.⁹¹ Should Congress choose to amend the federal rules to enact a child hearsay exception, many states would likely adopt the additional exception at the state level. Even if a state declined to adopt such an exception, the federal rules will govern in most cases, deeming evidence admissible that would otherwise be inadmissible under state law.⁹² Regardless, this would help create a uniform way of

85. 725 ILL. COMP. STAT. ANN. 5/115-10(b)(3), (c).

86. HAW. REV. STAT. ANN. § 626-1(6), R. 804.

87. UTAH R. CRIM. P. 15-5(a) (2008); ALASKA R. EVID. 801(d)(3)(B) (2014).

88. FLA. STAT. ANN. § 90.803(24) (West 2014); 725 ILL. COMP. STAT. ANN. 5/115-10(a).

89. *See supra* notes 67-88 and accompanying text.

90. MICH. R. EVID. 803A (1991).

91. *See* Gailey, *supra* note 32, at 173.

92. *See* United States v. Van Metre, 150 F.3d 339, 347 (4th Cir. 1998) (“[E]vidence admissible under federal law cannot be excluded because it would be inadmissible under state law.”) (quoting United States v. Clyburn, 24 F.3d 613, 616 (4th Cir. 1994)); *see also*

applying child hearsay exceptions across all jurisdictions, ensuring that no child is subjected to a more vigorous trial process simply due to the location in which they live. Furthermore, codifying a child hearsay exception at the federal level would demonstrate Congress's firm resolve to protect children.

Amending the Federal Rules of Evidence to include an exception for child hearsay is also consistent with the rationale for the other exceptions currently provided in the rules of evidence. Although a child hearsay exception does not share the same entrenchment as other exceptions, such as dying declarations and excited utterances, it does find support under a reliability analysis. Psychologists have found that "the majority of children have the capacity to recall accurate and relevant information."⁹³ While age, the complexity of the details, and delay may all play into the child's ability to recall an event, studies have found that by age three, children can generally recall personally significant details quite well.⁹⁴

These studies also reveal that children are more likely to withhold details or give inaccurate information in instances where they feel they are in trouble or where they feel embarrassed by an event.⁹⁵ Allowing children to disclose these statements to an objective third party who can then relay the statements to the court furthers the reliability objective that hearsay exceptions are designed to achieve.⁹⁶ Further, children are much more apt to provide honest answers to a professional asking non-biased and non-leading questions in a private setting than they are to an attorney in an intimidating setting, such as in a courtroom in front

Stoots v. Werner Co., No. Civ.A. 7:04CV00531, 2005 WL 3547122, at *4 (W.D. Va. 2005) ("application of the federal rule of evidence, although beyond argument procedural, may encroach upon a State's substantive law") (quoting *Hottle v. Beech Aircraft Corp.*, 47 F.3d 106, 110 (4th Cir. 1995)).

93. John E.B. Myers et al., *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 L. & CONTEMP. PROBS. 3, 22 (2002).

94. *Id.*

95. *Id.* at 40.

96. This would likely present an issue as to who this third party should be. While Congress may choose to leave this up to the states' discretion, it could also include a comment providing guidance on this issue. Should it choose to do so, scholarship and empirical data suggest that forensic interviewers would be best suited for this position. Because forensic interviewers are trained to avoid asking leading questions, placing these individuals in this position would help to negate the suggestibility concerns surrounding child hearsay statements. See OFFICE OF JUSTICE PROGRAMS, DOJ, CHILD FORENSIC INTERVIEWING: BEST PRACTICES (Sept. 2015).

of their abuser. The time is long overdue for Congress to recognize the need for a new exception and follow the states in their initiative to provide a child hearsay exception.

IV. Proposed Exception and the Confrontation Clause

Congress should amend the Federal Rules of Evidence to provide a new exception for child abuse victims under Rule 803: Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant is Available as a Witness.⁹⁷ This exception should provide that an out-of-court statement made by a child twelve years of age or younger pertaining to physical abuse will be admissible, regardless of whether the declarant is available to testify in court. Setting the age at twelve will reflect the ages required by many state exceptions and remain consistent with the “tender years” age used by most states in various proceedings.⁹⁸

Additionally, this exception will encompass *all* physical abuse, addressing the inadequacies of the state exceptions limiting the type of crime to sexual abuse only.⁹⁹ Furthermore, the proposed exception will not require that the declarant be unavailable, as many of the state exceptions currently require, allowing a greater number of children to benefit from the exception.¹⁰⁰ Moreover, the adoption of such an exception will afford those children in states that have thus far failed to implement an exception the same opportunity to forgo testifying in court.

Most importantly, this exception will help prove the elements of an abuse claim by utilizing the child’s testimony *without* requiring him or her to testify. In fact, this approach will likely make a child’s testimony *more* reliable, because it will mitigate the nerves the child experiences by allowing him or her to testify in a location less intimidating than a courtroom. It will also mitigate the issues pertaining to the child’s memory and ability to accurately recount details of the abuse months, or even years, later. Notably, the trauma sustained by the child will be

97. FED. R. EVID. 803.

98. *See supra* text accompanying notes 67-74.

99. *See supra* note 82 and accompanying text.

100. *See supra* note 76 and accompanying text.

substantially lessened because the victim is not forced to face the abuser, likely allowing him or her to be more forthcoming in the absence of the perpetrator, who is typically someone the child knows and may be hesitant to “tell” on.¹⁰¹

This proposed exception would provide substantial assistance in the civil context to ensure that a greater number of child abuse perpetrators are held liable. While the proposed exception would likely implicate the Confrontation Clause in the criminal context, Congress’s adoption of such an exception would give the Supreme Court a pathway to provide further guidance on child hearsay in the criminal context, an area in which the case law still remains murky.¹⁰²

V. Conclusion

“Childhood should be carefree, playing in the sun; not living a nightmare in the darkness of the soul.”¹⁰³ Unfortunately, nearly 700,000 American children will suffer the nightmare of child abuse within the next year.¹⁰⁴ Some of these children will be fortunate enough to reside in states that have already implemented rules favorable to child hearsay admissibility, allowing them to escape recounting their traumatizing experiences in the presence of their abusers *if* they meet a long list of requirements. Congress can—and should—take the opportunity to remedy this egregious imbalance and adopt a federal hearsay exception so that *all* child abuse victims are afforded the same courtesy.

101. *Preventing Child Sexual Abuse*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 30, 2021), [<https://perma.cc/T92Z-TSNP>] (estimating that ninety-one percent of child sexual abuse is committed by someone the child or child’s family knows).

102. See Park, *supra* note 17, at 105.

103. DAVE PELZER, A CHILD CALLED “IT” 166 (1995).

104. *National Statistics on Child Abuse*, NAT’L CHILD.’S ALL., [<https://perma.cc/GE94-7A74>] (last visited Feb. 11, 2022).