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Confrontation in the Balance: The Protection of Child Witnesses in West Virginia

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CONFRONTATION IN THE BALANCE: 
THE PROTECTION OF CHILD WITNESSES 
IN WEST VIRGINIA

I. INTRODUCTION

In light of the heightened public awareness of the problems faced in prosecuting sexual abuse cases where a child is a victim or a witness, both courts and legislatures alike have recognized the need for flexibility when the admissibility of an extra-judicial statement made by a child is at issue. In an effort to accommodate this need, it has been proposed that West Virginia Rule of Evidence (WVRE) 804 be amended to include an exception by which the

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant—
(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
(3) testifies to a lack of memory of the subject matter of his statement; or
(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same
extra-judicial statements of a child victim or witness may be admitted when the child declarant is unavailable to testify.5

or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under Belief of Impending Death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man [person] in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible [admissible] unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of Personal or Family History. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines 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 purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

5. The text of the proposed amendments to W. Va. R. Evid. 804 is as follows: Rule 804. Hearsay Exceptions, Declarant Unavailable.

(a)(6) Is a child under the age of twelve who made a hearsay statement describing an act of sexual conduct or physical violence performed by or with another on or with that child or any other person;

(a)(7) Is a child between the ages of twelve and sixteen who made a hearsay statement describing an act of sexual conduct or physical violence performed by or with another on or with that child or any other person for whom the court finds there is a substantial likelihood that the child will suffer severe emotional or psychological distress if required to testify in open court.

(b)(6) Statement of child victims or witnesses.

A hearsay statement describing an act of sexual conduct or physical violence performed by or with another on or with that child or any other person is not excluded by the hearsay rule if the court determines that (a) the statement was made prior to the preparation of any criminal charge or legal proceeding; (b) the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; (c) the statement was not made in response to questioning calculated to lead the child to make a particular statement or is clearly shown to be the child's statement and not the product of improper suggestion; (d) the person who heard or
In an attempt to forecast the effectiveness of the above rule, this article will examine the impact that such a rule would have on present West Virginia law and the constitutional soundness of the rule itself. Although it will become necessary to view the rule against a backdrop of case law from other jurisdictions, a conscious effort will be made where similar rules have been adopted to accommodate the needs of the West Virginia practitioner.

II. ADMISSIBILITY OF CHILD HEARSAY STATEMENTS UNDER PRESENT WEST VIRGINIA LAW

The general rule under which child hearsay statements are currently being admitted is West Virginia Rule of Evidence (WVRE) 803(2). Under this excited utterance exception to the hearsay rule, "a statement relating to a startling event or condition" may be admitted into evidence as long as the statement was "made while the declarant was under the stress of excitement caused by the event took the hearsay statement of the child is present in court and is available for examination or cross-examination by any party; (e) the proponent of the statement makes known to the adverse party his intention to offer the statement and the copy of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement; and (f) except for the death of the child, the child is available for examination or cross-examination by the parties in such a manner as the court may direct.

Upon request, the court will direct whether examination by closed circuit television or testimony videotaped outside the courtroom for showing in the courtroom before the court and the finder of fact in the proceeding is to be used. During the use of two-way closed circuit television or the videotaping of the testimony, only the judge, the attorneys for the parties, the parties, persons necessary to operate the equipment and any persons the court finds would contribute to the welfare and well-being of the child may be present. If the court finds that placing the child and one or more of the parties in the same room during the testimony of the child would present a substantial risk of trauma to the child which would substantially impair the ability of the child to testify, the court may order that the defendant be situated in such a way that, except as may be necessary for purposes of identification, the child cannot hear or see the defendant.

Although the proposed amendments to the West Virginia Rules of Evidence include a minor change in the language of W. VA. R. Evid. 801, namely the addition of the words "or electronic assertion" at the end of the rule, these words were added merely to ensure that courts would apply hearsay analysis to electronically recorded statements. The merits of this amendment will not be addressed in this article.

6. W. VA. R. Evid. 803(2) provides that:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

7. Id.
or condition." It is important to note that this exception to the hearsay rule is applicable regardless of whether or not the declarant is available as a witness.

A. The History and Present Application of the Excited Utterance Exception to the Hearsay Rule

The excited utterance exception to the hearsay rule developed out of the verbal act rule. "As originally conceived, the verbal act rule was limited to declarations made during the transaction and did not include any declarations which were made after the act." Thus, in determining whether or not a statement could be admitted into evidence under the verbal act rule, the West Virginia courts looked primarily to see if the statement had been made contemporaneously with the act itself. Gradually, however, West Virginia courts departed "from the strict requirement of contemporaneity in favor of a less technical approach based more upon the spontaneity of the utterance than its timing." In Starcher v. South Penn Oil Co., the movement away from the strict requirement of contemporaneity was solidified as the court held that a statement made after the transaction itself was admissible. Once the distinction between the verbal act rule and the excited utterance exception to the hearsay rule became firmly rooted, the court felt the need to establish guidelines by which the spontaneity of a hearsay statement could be evaluated. The need was intensified by the "confusion generated by the intermingling of the generic term 'res gestae' and the specific term 'spontaneous utterance . . . .'

8. Id.
9. Id.
10. West Virginia courts often use the term res gestae and spontaneous exclamation interchangeably when referring to the excited utterance exception to the hearsay rule. See F. Cleckley, Handbook on Evidence for West Virginia Trial Lawyers, § 8.7(B) (2d ed. 1986).
12. Id. at 315, 273 S.E.2d at 597 (citing Beckwith v. Mollohan, 2 W. Va. 477 (1868)).
13. Id.
14. Id. at 315-16, 273 S.E.2d at 597.
16. Young, 166 W. Va. at 316, 273 S.E.2d at 598.
17. Id.
18. Id. at 599, 273 S.E.2d at 318; see also F. Cleckley, supra note 10.
Consequently, in *Ward v. Raleigh County Park Bd.*,¹⁹ the West Virginia Supreme Court set forth a six factor test by which the courts could determine the admissibility of an alleged excited utterance.²⁰ The factors included in the *Ward* test are as follows:

(1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past completed affair; (3) it must be a statement of fact, and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation; and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.²¹

Although the West Virginia Supreme Court has not had occasion to conduct a thorough analysis of the applicability of the above factors in the context of a child sexual abuse proceeding, it did address the issue summarily in *State v. Swiger*.²² In *Swiger*, a five-year-old girl was determined to have been sexually assaulted after she was found "lying seriously injured"²³ on the floor. The child had also sustained injuries to her neck resulting from choking or strangulation.²⁴ While the doctor examined her at the hospital, he asked her what had happened.²⁵ The child "stated that 'Bobby' [the accused] had attacked her."²⁶ On appeal, the appellant contended that the trial court erred in admitting the child's statement under the *res gestae* exception to the hearsay rule.²⁷ Although not

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²⁰. *Id.* at 937, 105 S.E.2d at 885.
²¹. *Id.*
²². *State v. Swiger*, 336 S.E.2d 541 (W. Va. 1985). The issue in *Swiger* was whether or not the accused was competent to stand trial for first degree sexual assault. In holding that the accused was incompetent to stand trial, the West Virginia Supreme Court addressed the accused's objection to the admissibility of the five-year-old victim's statement to her doctor in footnote 8 of the opinion. See infra note 33.
²³. *Swiger*, 336 S.E.2d at 544.
²⁴. *Id.* at 549 n.8.
²⁵. *Id.*
²⁶. *Id.*
²⁷. *Id.*
essential to the holding in the case, the supreme court took care to indicate that the trial court had not so erred, emphasizing that "at the time the statement to Dr. Montgomery was made, . . . [the child] was still under the influence of the alleged sexual assault and choking incident." The court then pointed out that, '[s]tatement by a participant in a transaction are admissible as part of the res gestae, if spontaneous and made while under the influence of the transaction itself.' Lastly, the court reiterated the six factor test set forth in Ward.

Thus, the court did not explicitly apply the six factor test to the facts of Swiger. However, given the conclusions reached by the court regarding the admissibility of the statement, it can be logically inferred that the test was implicitly relied upon. In addition to emphasizing that the child was still under the influence of the alleged assault at the time the statement was made, the court also indicated that factors four and five weigh most heavily in its analysis. Thus, it logically follows that if a child hearsay statement possesses significant indicia of spontaneity, it is likely that such a statement will be admitted, even if the other four factors are satisfied by a modicum of evidence.

B. The Impact of the Proposed Child Hearsay Exception on Present West Virginia Law

One of the principle differences between the Excited Utterance exception to the hearsay rule and the proposed Child's Exception is that the latter requires the declarant to be unavailable as a condition precedent for its application. Given the fact that the issue

28. Id.
29. See supra note 22.
30. Swiger, 336 S.E.2d at 549 n.8 (quoting State v. Coram, 116 W. Va. 492, 182 S.E. 83 (1935) (statements made by a five-year-old to her mother twenty minutes after alleged attempted rape held admissible under res gestae exception to the hearsay rule)).
31. Id. See supra notes 19-21 and accompanying text.
32. Id.
34. See W. VA. R. EVID. 803(2) & 804.
of unavailability and the Sixth Amendment right of confrontation are inextricably intertwined, both will be discussed together in the section of this article dealing with the constitutionality of the proposed rule. Assuming arguendo that the condition precedent of unavailability has been satisfied, this article will now focus on the requirements set forth in proposed WVRE 804(b)(6).

Initially, the proposed rule requires that the hearsay statement offered into evidence be one “describing an act of sexual conduct or physical violence performed by or with another on or with that child or any other person.” Secondly, the rule requires that the court make six specific determinations before the statement can be admitted into evidence.

The first determination which must be made by the court is that “the statement was made prior to the preparation of any criminal charge or legal proceeding.” Although no case law involving this determination has been located, it can be logically inferred that such a determination would be closely related to the second determination to be made by the court—that “the time, content and circumstances of the statement provide sufficient guarantees of trustworthiness.” Thus, the existence of this fact contributes significantly toward establishing the trustworthiness of the statement.

Secondly, the court must determine that “the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness.” The gist of this requirement is firmly rooted in present West Virginia law, perhaps best exem-

36. See supra note 5.
37. Id.
38. Id.
39. Id. (emphasis added).
40. Interview with Franklin D. Cleckley, Original Reporter of the West Virginia Rules of Evidence and Member of the Ad-hoc Committee which drafted the Proposed Child Hearsay Exception (Aug. 28, 1987).
41. See supra note 5.
plified by State v. Ray.43 Returning home five to ten minutes after being released from the car where the alleged assault took place, the alleged victim in Ray told her stepmother of the assault.44 The victim's appearance described as "being emotionally distraught, shaking all over with tears in her eyes."45 Holding the victim's hearsay statement to her stepmother admissible as a spontaneous declaration under the six factor test of Ward,46 the court reasoned that "[t]he testimony indicate[s] that the victim was pale and shaking. She was obviously under the influence of the event and we believe that the statement was made at a time and under circumstances which exclude the view that it was made as a result of deliberation."47 Although the alleged victim in Ray was seventeen years old, there is authority which indicates that where a young child is involved, evidence of a less weighty character may be held to provide sufficient circumstantial guarantees of trustworthiness.48

The third determination which must be made by the court is that "the statement was not made in response to questioning calculated to lead the child to make a particular statement or is clearly shown to be the child's statement and not the product of improper suggestion."49 There is no case directly on point with the requirement. However, in State v. Young,50 the West Virginia Supreme Court dealt peripherally with the issue of whether or not a hearsay statement made in response to questions should have been admitted into evidence51 as an excited utterance. In Young, a woman ran into a store exclaiming that she had been shot, whereupon the store owner called the authorities and asked the victim her name and

43. Ray, 298 S.E.2d 921.
44. Id. at 923.
45. Id.
46. See Ward, 143 W. Va. 931, 105 S.E.2d 881.
47. Ray, 298 S.E.2d at 924. See also Withrow, 142 W. Va. at 546, 96 S.E.2d at 926.
49. See supra note 5.
50. Young, 166 W. Va. 309, 273 S.E.2d 592.
the name of the person who shot her. After the woman’s death, her ex-husband was convicted of murder and on appeal he contended that the statement made by his ex-wife to the store owner should not be admitted under the excited utterance exception because the statement was made calmly and in response to questions. In upholding the admission of the statement, the court reasoned that “[t]he fact that the statement was in response to questions ... is not fatal to its admissibility ...” The court buttressed its position by quoting language from a New York case which stated, “if the question propounded or the identity of the questioner may suggest or influence the response or if it is asked an appreciable length of time after the startling event, the declarations might very well lack the inherent reliability basic to the rule.” Thus, although the declarant in Young was a woman as opposed to a child, the third requirement appears to be fundamentally consistent with prior West Virginia law. However, it is probable that when the declarant is a child the court will support a liberal application of the proposed rule.

To satisfy the fourth requirement of the proposed child exception, the court must determine that “the person who heard or took the hearsay statement of the child is present in court and is available for examination or cross-examination by any party.” This section marks a departure from present law in that it is not now required that such person be present in court and available for examination or cross-examination. The most pronounced effect

52. Young, 166 W. Va. at 312-13, 273 S.E.2d at 596.
53. Id. at 314, 273 S.E.2d at 597.
54. Id. at 320, 273 S.E.2d at 600.
56. Young, 166 W. Va. at 321, 273 S.E.2d at 600.
57. This proposition is grounded in the fact that the drafters of the proposed rule intended it to be a vehicle by which statements that were spontaneous, but which did not rise to the level of an excited utterance could be admitted into evidence. Interview with Franklin D. Cleckley, Original Reporter of the West Virginia Rules of Evidence and Member of the Ad-hoc Committee which drafted the Proposed Child Hearsay Exception (Aug. 28, 1987).
58. See supra note 5. It is important to note that should the person to whom the statement was made or the person by whom the statement was taken die, the rule becomes inapplicable.
59. See Swiger, 336 S.E.2d 541 (statement was revealed by doctor, but there was no indication
of the rule is that it operates to prevent the admission of multiple hearsay statements into evidence. This segment of the rule provides for the defendant's right to confrontation and ultimately was designed to ensure the constitutionality of the proposed rule.

The fifth determination to be made by the court is that "the proponent of the statement makes known to the adverse party his intention to offer the statement and the copy of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement." This requirement has never before been imposed in the areas of excited utterance hearsay exceptions. However, this notice requirement was adopted from the residual hearsay exception. With regard to the residual exception, "courts generally have been willing to dispense with notice if the need for the hearsay arises on the eve of trial or in the course of trial when possible injustice is avoided by the offer of a continuance or other circumstances." There is no indication as to whether this trend will continue in the area of child hearsay statements.

The final determination to be made by the court is that "except for the death of the child, the child is available for examination or cross-examination by the parties in such a manner as the court may direct." This requirement stands in sharp contrast to present West Virginia law wherein no such requirement exists. In addition, the rule states that he may be examined by close circuit tel-

that he was required to be available before statement could be admitted); see also Withrow, 142 W. Va. 522, 96 S.E.2d 913. Although the hearsay statement in each case was testified to at trial by one with whom the child spoke, there is no mention of a requirement that such person had to be present and available.

60. See W. Va. R. Evid. 805.
62. Interview with Franklin D. Cleckley, Original Reporter of the West Virginia Rules of Evidence and Member of the Ad-hoc Committee which drafted the Proposed Child Hearsay Exception (Aug. 28, 1987).
63. See supra note 5.
64. See W. Va. R. Evid. 803(2).
65. See W. Va. R. Evid. 803(24), 804(b)(5).
67. See supra note 5.

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Eviction or by testimony videotaped outside of the courtroom. The rule also provides that:

[i]f the court finds that placing the child and one or more of the parties in the same room during the testimony of the child would present a substantial risk of trauma to the child which would substantially impair the ability of the child to testify, the court may order that the defendant be situated in such a way that, except as may be necessary for purposes of identification, the child cannot hear or see the defendant. 69

Depending upon how it is applied, the constitutional validity of this provision may be tenuous in light of United States v. Benfield. 70 In Benfield, a case involving the videotaped deposition of an adult woman, the Eighth Circuit Court of Appeals held that where the defendant was not allowed to be an active participant in the videotaped deposition, and where he could neither hear, nor view the testimony, his sixth amendment right to confrontation was violated. 71 The court in Benfield emphasized that, "[t]he right of cross-examination reinforces the importance of physical confrontation... . . . This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel." 72 Although the United States Supreme Court has on occasion indicated that it views "physical confrontation as an element of the sixth amendment guarantees," 73 it has likewise acknowledged that "an adequate opportunity for cross-examination may satisfy the [confrontation] clause even in the absence of physical confrontation."

Therefore, it is not constitutionally impermissible for the child witness to testify without being able to hear or see the defendant. However, in order to afford the defendant's sixth amendment right adequate protection, the foregoing provision should be applied in such a manner as to ensure that the defendant can at all times both see and hear the child witness.

69. See supra note 5.
70. United States v. Benfield, 593 F.2d 815 (8th Cir. 1979).
72. Benfield, 593 F.2d at 821.
In short, the proposed child hearsay exception requires the trial judge to make a number of determinations before admitting a child’s hearsay statement into evidence. Although not required by present law, these determinations are not inconsistent with West Virginia precedent. Should the proposed rule be adopted, the end result would be an expansion, not an eradication, of current West Virginia law.

III. THE CONSTITUTIONALITY OF THE PROPOSED CHILD HEARSAY EXCEPTION

As was noted earlier, a hearsay statement may not be admitted under WVRE 804(b) unless the condition precedent of unavailability has been satisfied under WVRE 804(a). Consequently, the proposed child hearsay exception includes two amendments to WVRE 804(a) which provide additional means by which a child may be declared unavailable as a witness in sexual abuse cases. This article will now focus on the constitutionality of these proposed provisions.

A. Effect of the Confrontation Clause Upon the Admissibility of Hearsay Statements

The sixth amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." If construed literally, the confrontation clause would render all hearsay statements inadmissible. In rejecting such a construction, the United States Supreme Court has emphasized that:

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu

75. W. Va. R. Evid. 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."
76. W. Va. R. Evid. 804.
77. See supra note 5.
78. U.S. Const. amend. VI. The confrontation clause was made applicable to the states in Pointer v. Texas, 380 U.S. 400 (1965). Art. III, § 14 of the West Virginia Constitution contains a provision similar to the confrontation clause.
79. Roberts, 448 U.S. at 56, 63.
of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.80

The right of cross-examination is therefore a primary interest protected by the confrontation clause.81 In contrast, the hearsay rule seeks to prevent the admission of the extra-judicial statements into evidence when they are offered to "prove the truth of the matter asserted."82 Therefore, while the confrontation clause and hearsay rule protect similar interests, they are by no means co-extensive.83 This is illustrated by the fact that the confrontation clause may be violated where a statement is admitted under a recognized hearsay exception.84 Conversely, where evidence is erroneously admitted under a hearsay exception, a violation of the confrontation clause does not necessarily follow.85

In California v. Green,86 the Supreme Court was faced with a situation where prior inconsistent statements made at a preliminary hearing by a declarant, who was not subject to extensive cross-examination at that hearing, were admitted into evidence.87 In rejecting the defendant's contention that his right of confrontation had been denied because he was unable to cross-examine the witness at the time the prior statement was made,88 the Supreme Court held that the confrontation clause does not require the exclusion of hearsay statements where the declarant is subject to "full and effective cross-examination at the time of trial."89 It logically follows that, under certain circumstances, where the declarant does not testify at trial or where he does testify, but is not subject to

82. W. Va. R. Evid. 801(d).
84. Id. at 155-56.
85. Id. at 156.
86. Id. at 149.
87. Id. at 151-52.
88. Id. at 161.
89. Id. at 159.
full and effective cross-examination, the confrontation clause may require the exclusion of hearsay statements.\(^{90}\)

Although a precise formula for determining the validity of all hearsay exceptions has not been developed,\(^{91}\) the Supreme Court in *Ohio v. Roberts*\(^{92}\) set forth the requirement under the confrontation clause for admitting a hearsay statement where the "declarant is not present for cross-examination at trial."\(^{93}\) The confrontation clause requires (1) a showing by a preponderance\(^{94}\) of the evidence that the declarant is unavailable\(^{95}\) and (2) that the statement bears adequate "indicia of reliability."\(^{96}\) The Court went on to add that, "[r]eliability can be inferred . . . where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."\(^{97}\)

In applying the second part of the *Roberts* test to the proposed child exception,\(^{98}\) it is apparent that the requirement for a showing of particularized guarantees of trustworthiness\(^{99}\) has been incorporated into proposed rule 804(b)(6)(a-f).\(^{100}\) Once the court makes the determinations required by the proposed rule, the second prong of the *Roberts* test has been satisfied. Therefore, proposed rule 804(b)(6)(a-f) complies with the constitutional requirement of the confrontation clause and is not unconstitutional *per se*. However,
a condition precedent to the foregoing analysis is that the requirement of unavailability be satisfied.

B. Unavailability and the Proposed Child Hearsay Exception

When a declarant cannot be present at trial for cross-examination, his hearsay statement cannot be admitted into evidence unless he is shown to be unavailable. The proposed child hearsay exception contains two provisions under which a child may be declared unavailable — 804(a)(6) and 804(a)(7).

Proposed rule 804(a)(6) generally provides that "a child under the age of twelve who made a hearsay statement describing an act of sexual conduct or physical violence . . ." is unavailable. Under this rule, a judge is to make his determination of unavailability based upon (1) the age of the declarant and (2) the content of the hearsay statement. Thus, this rule affords the trial judge little discretion in making his determination of unavailability.

Although case law on this point is virtually nonexistent, there are striking parallels between the above rule and the statute examined by the Supreme Court in Globe Newspaper v. Superior Court. In Globe, a Massachusetts statute requiring "the exclusion of the press and public during the testimony of a minor victim in a sex-offense trial" was held unconstitutional. In focusing its analysis of the "mandatory closure rule" on the first amendment, the Court indicated that "safeguarding the physical and psychological well-being of a minor" is a compelling state interest, but that it "does not justify a mandatory closure rule." Instead the Court posited that "[a] trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor

102. See supra note 5.
103. Id.
104. Id.
106. Id.
107. Id. at 602.
108. Id. at 607.
109. Id. at 607-08.
victim." 110 The Court went on to list factors to be considered in making such a determination. Included among them are "the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." 111 The Court then contrasted this approach with that of the statute stating that the statute "requires closure even if the victim does not seek the exclusion of the press and general public, and would not suffer injury by their presence." 112

In light of the analysis in Globe, the flaws present in proposed rule 804(a)(6) are readily discernible in that the rule does not afford the trial judge discretion to consider factors other than those set forth in the rule, such as the child's "psychological maturity and understanding, the nature of the crime, the desires of the victim, [or] the interests of parents and relatives" 113 in making his determination of unavailability. Instead the rule makes a finding of unavailability mandatory where a child declarant "under the age of twelve" 114 makes a "hearsay statement describing an act of sexual conduct or physical violence." 115 Thus, like the statute in Globe which required that the public and the press be excluded from trial testimony where a minor testified regarding a sexual offense, the proposed rule makes a finding of unavailability mandatory when the above two requirements are satisfied. Given the striking similarity between the subject matter and structure of the proposed rule and the Globe statute, it can be reasonably concluded that the constitutional vitality of proposed rule 804(a)(6) is at the very least questionable. 116

The second unavailability provision of the proposed exception is 804(a)(7), which provides for the unavailability of "a child be-

110. Id. at 608.
111. Id.
112. Id.
113. Id.
114. See supra note 5.
115. Id.
116. Aside from its questionable constitutional status, the proposed rule also appears to be inconsistent with the underlying rationale of W. VA. R. EVID. 601, which provides that, "[e]very person is competent to be a witness except as otherwise provided for by statute or these rules." This rule was aimed at eliminating the presumption against competency for certain categories of witnesses (i.e., those under 14 years of age). See F. CLECKLEY, supra note 10, at § 2.2B.
between the ages of twelve and sixteen who made a hearsay statement describing an act of sexual conduct or physical violence... for whom the court finds there is a substantial likelihood that the child will suffer severe emotional or psychological distress if required to testify in open court." 117 This provision affords the trial judge considerably more discretion than does 804(a)(6) in that it requires the judge to make a finding that "there is a substantial likelihood that the child will suffer severe emotional or psychological distress..." 118 Such a finding necessarily requires the trial judge to consider the attending circumstances 119 of the act either directly or indirectly via the testimony of an expert witness. However, the trial judge's discretion under this provision is limited because the provision itself extends only to children between the ages of twelve and sixteen. 120

Although 804(a)(7) seems to comport with the holding of Globe, the provision presupposes that severe emotional or psychological distress constitutes unavailability for confrontation purposes. Although case law in this area is sparse, the California Supreme Court dealt with a similar issue in People v. Stritzinger. 121 In Stritzinger, a case in which a stepfather performed various acts of child molestation on his fourteen-year-old stepdaughter, 122 the court was faced with the issue of whether the victim's mother's testimony regarding "her daughter's mental health is legally insufficient to support a finding of witness unavailability." 123 The mother of the victim testified that her daughter suffered from emotional difficulties, experienced hallucinations, and was hospitalized after intentionally cutting herself. 124 The court held that such testimony was insufficient to render the victim unavailable as a witness under

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117. See supra note 5.
118. Id.
119. Included among such attending circumstances are the child's "psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." Globe, 457 U.S. at 608.
120. See supra note 5.
122. Id. at 509, 668 P.2d at 741, 194 Cal. Rptr. at 434.
123. Id. at 516, 668 P.2d at 746, 194 Cal. Rptr. at 439.
124. Id.
the mental illness or infirmity provision of the Evidence Code.\textsuperscript{125}

The court emphasized that the determination that a witness is unable to testify because of mental illness or infirmity "generally calls for expert opinion, with supporting reasons, as to the likely effect of the court appearance on the physical or mental health of the witness."\textsuperscript{126}

Although the constitutionality of a provision such as 804(a)(7) has not been ruled upon, a great deal can be surmised regarding the manner in which such a provision should be applied if it is to pass constitutional muster. Viewing 804(a)(7) in light of the reasoning in \textit{Stritzinger}, a finding of a substantial likelihood of severe emotional or psychological distress in most cases should be supported by expert testimony\textsuperscript{127} proffered by the proponent of the child hearsay statement. A preponderance of the evidence is sufficient to support such a finding.\textsuperscript{128} In addition, an expert should have equal access to the child for the purpose of conducting an examination of the child on behalf of the defendant in order to satisfy the defendant's due process rights.\textsuperscript{129}

In sum, the constitutionality of proposed rule 804(a)(6) is tenuous in light of the holding in \textit{Globe Newspaper v. Superior Court}. In contrast, 804(a)(7) may well survive constitutional scrutiny if it is applied in the above manner.

\textbf{IV. CONCLUSION}

Mindful of the difficulties encountered in prosecuting child sexual abuse cases, the drafters of West Virginia’s Proposed Child Hearsay Exception sought to protect child witnesses and to preserve the defendant’s right to confrontation as well.\textsuperscript{130} Although at first

\textbf{Footnotes:}

\textsuperscript{125} Id. A similar provision is contained in W. VA. R. EVID. 804(a)(4).
\textsuperscript{126} \textit{Stritzinger}, 34 Cal. 3d at 518, 668 P.2d at 747, 194 Cal. Rptr. at 440.
\textsuperscript{127} Id.
\textsuperscript{128} \textit{Bourjaily}, 107 S. Ct. at 2777.
\textsuperscript{129} Special problems arise in cases involving indigent defendants who do not have adequate funds to employ an independent expert. On this point see \textit{State ex rel. Foster v. Luff}, 164 W. Va. 413, 264 S.E.2d 477 (1980).
glance the proposed exception appears to be one which will benefit prosecutorial forces, upon closer examination of the res gestae exception to the hearsay rule, this initial reaction proves faulty. For proposed rule 804(b)(6) would require the trial judge to make a number of determinations before a child hearsay statement could be admitted into evidence. Such determinations were not required under the res gestae exception.\textsuperscript{131} The introduction of these factors into hearsay analysis will provide the defendant with additional means by which he may prevent the introduction of child hearsay statements. Thus, the defendant is the favored party under the proposed rule.

Although the defendant’s preferred status under the rule may not be looked upon as beneficial, it is in the area of unavailability that the harshest criticism of the proposed rule can be leveled. Given the constitutional vulnerability of 804(a)(6)\textsuperscript{132} and the age restrictions present in 804(a)(7),\textsuperscript{133} the unavailability provisions of the proposed rule are replete with problems. Perhaps, a partial solution would be achieved by eliminating proposed provision 804(a)(6) in favor of broadening proposed provision 804(a)(7) to include children up to the age of sixteen. If such a change were to be effected, proposed rule 804(a)(7) would (1) establish appropriate guidelines in terms of the declarant’s age and (2) provide the trial judge with the means by which he could, in his discretion, consider the factors enumerated in Globe in making his determination of unavailability. Under this approach, the trial judge could determine the unavailability of the declarant on a case-by-case basis in conformity with constitutional requirements.

In the final analysis, West Virginia’s Proposed Child Hearsay Exception represents an effort to balance the needs of child witnesses against the constitutional protection afforded to the criminal defendant. Whether this delicate balance has been achieved largely depends on how the proposed exception is applied in individual

\textsuperscript{131}. See supra notes 6-74 and accompanying text.  
\textsuperscript{132}. See supra notes 103-16 and accompanying text.  
\textsuperscript{133}. See supra notes 117-20 and accompanying text.
cases. Although the child exception is by no means free of flaws, it is certainly worthy of experimentation.134

134. At the time of this article's printing, the West Virginia Supreme Court handed down its decision in State v. Jones, No. 17374 (W. Va. Oct. 22, 1987), a case in which the Court held that a child's hearsay statement regarding an incident of sexual abuse was inadmissible under the excited utterance exception to the hearsay rule. Id. slip op. at 7. In Jones, the child sexual abuse victim was a witness at trial, but "refused to testify in any detail about the sexual assault beyond acknowledging that the sexual contact had occurred." Id. slip op. at 5. "The trial court permitted Trooper Butler to testify about a conversation he had with Rachel Jones [the victim and daughter of the defendant] six months after the alleged abuse and to explain by gestures what the child had told him." Id. slip op. at 5. In holding the statement inadmissible, the Court emphasized that "[u]sually, the length of time between the occurrence and the victim's statement decides whether the statement is admissible as evidence." Id. slip op. at 7. In addition, after examining the underlying rationale of the the excited utterance exception, the Court concluded that the statement was inadmissible since the child victim "spoke to Trooper Butler six months after the alleged molestation took place and after having discussed the matter with both her grandmother and a case worker." Id. slip op. at 7.

The factual circumstances present in the Jones case are typical of those envisioned by the drafters of the proposed rule as being appropriate for its application. See supra note 57.