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It's Not a "Get Out of Jail Free" Card: Prosecuting International Sex Crimes When the Victim Does Not Testify

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NOTE

IT'S NOT A "GET OUT OF JAIL FREE" CARD: PROSECUTING INTERNATIONAL SEX CRIMES WHEN THE VICTIM DOES NOT TESTIFY

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ABSTRACT

The United States court system has many safeguards in place to protect the rights of both the victim and the defendant. But what if those safeguards fail to keep the parties safe? In cases of international sex crime, the victim is often unable to testify. If the court finds victims' critical statements inadmissible due to hearsay or Confrontation Clause concerns, the perpetrator remains "safe" from punishment. Ironically, in many of those instances, the very policies on which the hearsay exceptions and the Confrontation Clause were built are not achieved. This Note analyzes how prosecutors can use current hearsay exceptions to admit critical statements made by an unavailable witness. It also discusses Confrontation Clause concerns at length, in order to provide prosecutors the necessary history and policies behind the Clause to respond to concerns presented in court. Finally, the Note proposes that the Federal courts adopt an exception to hearsay for victims of international sex crimes.

I. INTRODUCTION

Sex crimes against children rage rampant.[1] United States citizens are

† Christiana Johnson, Juris Doctor Candidate, Liberty University School of Law, May 2020. Thank you Professor Tchividjian for proposing this idea to me and more importantly fueling the fire within me to advocate for the victimized. An enormous thank you to my family and friends, without whom I would not have made it through law school. All glory to my Savior, Jesus Christ, who has called me to "proclaim liberty to the captives."

1. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 1, 55–60 (2018), https://www.state.gov/reports/2018-trafficking-in-persons-report/. The report addresses sex (and labor) trafficking and its prosecution on a global scale. *Id.* at 55–60. In 2017, there were 24,138 identified victims of sex trafficking, and only 1,733 prosecuted in Africa. *Id.* at 55. In that same year, between East Asia and the Pacific, there were 10,819 victims and 2,949 prosecutions. *Id.* at 56. In Europe, there were 12,750 victims and 2,548 prosecutions. *Id.* at 57. In the Near East, there were 1,834 victims and 974 prosecutions. *Id.* at 58. In South and Central Asia, there were 40,857 victims and 8,105 prosecutions. *Id.* at 59. In the Western Hemisphere, which includes the United States, there were 10,011 victims and 1,571 prosecutions. *Id.* at 60. Other sex crimes rage rampant as well: The World Health Organization has reported that "One in 5 women and 1 in 13 men report having been sexually abused as a child." *Child Maltreatment*, WORLD HEALTH ORG. (Sept. 30, 2016), https://www.who.int/news-room/fact-sheets/detail/child-maltreatment.

commonly found among the perpetrators.[2] While legislatures have strategically implemented several laws to combat these crimes,[3] the laws prove futile if prosecutors do not use them. For example, the PROTECT Act provides jurisdiction to prosecute United States citizens who commit sex crimes against children outside the United States.[4] But the Act is worthless if not used by prosecutors to hold perpetrators accountable.

However, executing these laws may prove difficult. "Translating legislation into meaningful action demands dedication, focus, and resources and requires that those implementing it truly understand both the underlying letter and the spirit of the law."[5] While perhaps preferable to prosecute the crime in the country in which it occurred, host countries may fail to do so.[6] When a United States citizen commits sexual abuse in a foreign country, and

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2. Basyle Tchividjian argues that "United States citizens are sexually victimizing a large number" of the children abused overseas. Basyle J. Tchividjian, *Catching American Sex Offenders Overseas: A Proposal for a Federal International Mandated Reporting Law*, 83 UMKC L. REV. 687, 712 (2015). He notes that United States citizens' travel to foreign countries in recent years has grown and that "many United States citizens temporarily or permanently reside in foreign jurisdictions." *Id.* at 713 (footnotes omitted). In a 2004 article by Katherine Breckenridge, she cited to the Australian Human Rights and Equal Opportunity Commission, that estimated that "over 250,000 sex tourists visit Asia every year, with twenty-five percent coming from the United States and thirteen percent from Australia." Karen D. Breckenridge, *Justice Beyond Borders: A Comparison of Australian and U.S. Child-Sex Tourism Laws*, 13 PAC. RIM L. & POL'Y J. 405, 413 (internal citations omitted). *See also* Daniel Edelson, Note, *The Prosecution of Persons Who Sexually Exploit Children in Countries Other Than Their Own: A Model for Amending Existing Legislation*, 25 FORDHAM INT'L L.J. 483, 484–85 (2002).

3. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 1, 6 (2019), https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf ("[I]n just two decades, 168 governments have implemented domestic legislation criminalizing all forms of human trafficking whether the crime happens transnationally or nationally.").

4. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (2003).

5. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 1, 6 (2019), https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf.

6. A country may not prosecute:

> [I]f the conduct in question is not prosecutable under the host state's laws. The host state may have a stricter standard of proof for crimes such as rape, may impose an unduly light sentence for the offense, may be barred from prosecuting by its own statute of limitations, or may not regard certain conduct, such as child abduction or fraud, as criminal. The host state may fail to prosecute for reasons based on the nationality of the parties involved, or on the cost of prosecution.

Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41, 57 (1992)

that country does not prosecute, the United States should step in to ensure justice. While prosecuting a crime that occurred on foreign soil may not be ideal due to evidentiary challenges,[7] it is an important step in the administration and assurance of justice for the victimized.

Prosecuting sex crimes within the United States poses unique challenges. More specifically, "testimony and other evidence reveals that prosecutors must approach these cases differently from more traditional criminal cases since victims may be unavailable, unwilling, or in too much danger to testify."[8] When these same crimes occur outside the United States, these, and other logistical issues, arise. Unique challenges confront the prosecutor, especially in regard to evidence[9] and acquiring witnesses.[10] This Note will attempt to provide helpful arguments for prosecutors to use when the child-victim of an international sex crime is unable, unwilling, or unavailable to testify.

First, this Note considers hearsay exceptions relevant to international sex crime cases. It analyzes various cases that discuss hearsay exceptions to determine how prosecutors may successfully enter necessary statements from the victim into evidence. This analysis assists in determining which current exceptions may be effective for prosecutors and whether the current exceptions effectuate the policies behind the Federal Rules of Evidence.

Second, this Note discusses the Confrontation Clause, outlining the evolution of relevant case law and pertinent exceptions. While the prosecution of international sex crimes must prove effective, it must also maintain fairness for the defendant. Similar to the analysis of hearsay exceptions, a discussion of Confrontation Clause issues will assist in determining which out-of-court statements may be entered into evidence and whether current case law achieves the purposes of the Confrontation Clause.

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7. *Id.* at 54–55 (noting that prosecution in the state in which the crime occurred makes the most sense, since "it ensures that the offender's trial takes place near the scene of the crime (thus minimizing evidentiary problems), and avoids a conflict of jurisdiction with the host state.").

8. *See, e.g.*, NAT'L RESEARCH COUNCIL, CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES 219 (Ellen Wright Clayton et al. eds., 2013).

9. *See, e.g.*, Heather C. Giordanella, *Status of 2423(b): Prosecuting United States Nationals for Sexually Exploiting Children in Foreign Countries*, 12 TEMP. INT'L & COMP. L.J. 133, 154 (1998) ("Holding a trial close to where the offense occurred enables law enforcement to collect necessary evidence to prosecute the offender." (citations omitted)).

10. Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41, 73 (1992) ("Securing the attendance of a witness from abroad, particularly one who is recalcitrant, raises difficult problems." (citations omitted)).

Third, the Note hypothesizes solutions for admitting victim statements if the victims in *United States v. Durham* had not testified. The Note considers hearsay and Confrontation Clause issues surrounding the case. This analysis is meant to help apply the previous discussion in the Note to a similar set of facts in order to demonstrate how the arguments may pan out in a real case.

Finally, this Note proposes an exception to the prohibition on hearsay. Not only does the exception ensure that the policies behind the Federal Rules of Evidence and the Confrontation Clause are satisfied, it enables prosecutors to hold defendants accountable for the heinous crimes they commit overseas. The exception provides a new layer of protection for children across the globe and accountability for perpetrators.

II. BACKGROUND

Manners are mostly associated with saying "please" and "thank you." When someone has bad manners, usually he or she failed to communicate those pleasantries, open a door for another, or speak politely. The girls in Upendo Children's Home used the phrase "bad manners" to describe the sexual abuse they suffered at the hands of Mr. Durham, a missionary who was staying at Upendo.[11] After more than a month of staying there, the manager of Upendo, Ms. Wambugo, walked into one of the rooms and saw that Durham was in bed with one of the girls.[12] The girls told Wambugo that they had "been doing bad manners" with Durham.[13]

After this discovery, several of the volunteers confronted Durham.[14] At first, he claimed that he did not remember, but once alone with Wambugo, he admitted to the sexual acts.[15] After returning to the group, he again said he could not remember.[16] Within a few weeks, he flew back to the United States, but before he left, Durham consented to a recording of his statement confessing what he had done.[17] Durham also wrote down a detailed account of how he abused the children at Upendo.[18]

At trial, five of the eight alleged victims testified, "including the victims associated with each of the four convictions."[19] A medical expert testified for

11. United States v. Durham, 902 F.3d 1180, 1189–90 (10th Cir. 2018).
12. *Id.* at 1190.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Durham*, 902 F.3d at 1190.
18. *Id.*
19. *Id.* at 1191.

the prosecution, and the court admitted Durham's recorded and written statements into evidence.[20] The jury convicted Durham of four counts of "traveling in foreign commerce and engaging in illicit sexual conduct with a minor in violation of 18 U.S.C. § 2423(c)."[21] The Tenth Circuit affirmed the convictions, along with the sentence of 480 months in prison.[22]

United States v. Durham demonstrates the utility of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act).[23] The purpose of the PROTECT Act, as noted in *Durham*, is to "combat the multibillion dollar international sex trafficking market."[24] The PROTECT Act amended the statute under which Durham was convicted, 18 U.S.C. § 2423(c), in 2003.[25]

Under 18 U.S.C. § 2423(c): "Any United States citizen . . . who travels in foreign commerce, or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both."[26] As defined under 18 U.S.C. § 2423(f), "illicit sexual conduct" is "a sexual act" with a minor that violates chapter 109A if it happened in the "special maritime and territorial jurisdiction of the United States," "any commercial sex act . . . with a person under 18 years of age," or "production of child pornography."[27]

In *Durham*, under the PROTECT Act and § 2423, the Federal Government had the authority to prosecute Durham's crimes.[28] The girls at Upendo will

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20. *Id.*

21. *Id.* The jury also convicted Durham of three more counts of violating § 2423(c), which the district court acquitted Durham of "because the Government had not shown Mr. Durham engaged in 'sexual conduct' as defined by the statute . . . ." *Id.* at 1192.

22. *Id.* at 1240, 1192.

23. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (2003).

24. *Durham*, 902 F.3d. at 1197.

25. *Id.* at 1196.

26. 18 U.S.C. § 2423(c) (2018).

27. 18 U.S.C. § 2423(f) (2018).

28. *Durham*, 902 F.3d. at 1192. Durham contested the constitutionality of the statute, alleging "noncommercial illicit sexual activity abroad has no relation to foreign commerce." *Id.* However, after surveying what the lower courts had stated on the matter, the court held that the PROTECT Act still gave Congress jurisdiction over noncommercial sex acts, such as the ones Durham engaged in. *Id.* at 1216. More specifically, the court stated that when Congress passed § 2423(c), it "had a rational basis to conclude it was regulating activity that substantially affects foreign commerce. In particular, it could reasonably decide that foreign travel followed by noncommercial sex with minors—in the aggregate—substantially affects

suffer from the effects of Durham's abuse for years to come. While a 480-month sentence does not undo the abuse Durham committed, it provides some accountability for his actions and it, hopefully, sends a message that sex crimes are to be taken seriously, whether they occur domestically or internationally.

Despite the United States having jurisdiction to prosecute both commercial and noncommercial international sex crimes, there are evidentiary and constitutional issues that arise when considering prosecuting these crimes. In *Durham*, several of the victims testified at trial.[29] Incredibly, not only did five of the eight alleged victims testify, but these five included "the victims associated with each of the four convictions."[30] Thus, in regard to the victims' testimony, no Confrontation Clause or hearsay issues arose.[31]

However, many times, when perpetrators travel overseas and commit abuse, it may be nearly impossible to find the victim, or, if found, transport them to the United States to testify.[32] Without the victim, prosecutors may hesitate to further investigate or prosecute the crime. If the government still prosecutes without the victim's presence, the prosecution must navigate both Confrontation Clause concerns and hearsay rules in order to admit their statements into evidence.

The PROTECT Act and 18 U.S.C. § 2423 provide prosecutors with an avenue by which to prosecute international sex crimes. Indeed, between the passage of the PROTECT Act and 2008, "there have been 65 convictions of

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the international market for sex tourism." *Id.* Thus, whether the sexual act is commercial or noncommercial in nature, under § 2423 and the PROTECT Act, prosecutors can hold defendants accountable for abuse they commit overseas. *Id.*

29. *Id.* at 1191.

30. *Id.*

31. At least in regard to the appeal, the defendant did not raise any hearsay or Confrontation Clause issues regarding the victims' testimony. *Id.* at 1192, 1217, 1222, 1225, 1230, 1233, 1236, 1239 (noting the issues on appeal included the constitutionality of 18 U.S.C. § 2423(c), a *Brady* Claim, some of the Defendant's statements, alleged prosecutorial misconduct, authentication of cell phone videos, medical records of victims, sentencing, and cumulative error regarding the alleged prosecutorial misconduct and the *Brady* claim).

32. Giordanella, *supra* note 9, at 152–53 n.157 (1998) ("Since the United States would encounter *difficulty in flying child witnesses to the United States to testify at trial*, the government may depose the children or introduce tes-timony via satellite. The Confrontation Clause, however, prohibits the use of foreign depositions unless the deposed is unavailable and the testimony appears reliable. . . . In addition, testimony via satellite in the United States may present a Confrontation Clause objection if the defendant is unable to question his accuser." (emphasis added) (referencing Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction,* 17 YALE J. INT'L L. 41, 55 (1992)).

child sex tourists."[33] Prosecuting these crimes "to the fullest extent possible" is a key way that the Government can combat sex crimes against children.[34] However, a victim's failure to testify presents incredible difficulties for prosecutors. While current hearsay exceptions provide some solutions for admitting critical statements, they may not always prove sufficient. In order to ensure the policies the legislature relied upon in promulgating the Federal Rules of Evidence, Congress should pass a new exception for these cases. In so doing, Confrontation Clause concerns must also be analyzed and answered.

III. WHO SAID SO, ANYWAY?: UTILIZING CURRENT HEARSAY EXCEPTIONS WHEN THE VICTIM OF AN INTERNATIONAL SEX CRIME DOES NOT TESTIFY

Before considering a new exception to the rules of hearsay, it is important to consider the utility of those currently in place. There are a number of ways that current hearsay exceptions may be used to admit out-of-court statements. The following analysis presents those exceptions that seem most applicable to international sex crime scenarios.

A. *Federal Rule of Evidence 801: Definitions and Exclusions*

Under Federal Rule of Evidence 801, if the statement is not being offered for the truth of the matter asserted, it is not hearsay.[35] While this hearsay rule seems rather elementary, there are several instances in which a prosecutor may creatively use this exception to admit a statement that would assist in proving the defendant's guilt. *United States v. Al-Maliki* provides just such an example.[36]

In *Al-Maliki*, a jury found the defendant guilty of sexually abusing two of his children in Syria, violating 18 U.S.C. §§ 2423(c) and (e).[37] At trial, the defendant argued that the statement of Mark Goldrup, the vice-consul at the U.S. Embassy in Damascus, Syria, was inadmissible hearsay.[38] Goldrup said that the defendant's wife "stated that she had been abused by [al-]Maliki."[39] The court found that the statement did not constitute inadmissible hearsay because the government did not offer it to prove the truth of the matter

33. *The Facts About Child Sex Tourism*, U.S. DEP'T OF STATE (Feb. 29, 2008), https://2001-2009.state.gov/g/tip/rls/fs/08/112090.htm.

34. *Id.* (specifically addressing child sex tourism).

35. FED. R. EVID. 801.

36. United States v. Al-Maliki, 787 F.3d 784 (6th Cir. 2015).

37. *Id.* at 789–90.

38. *Id.* at 789, 794.

39. *Id.* at 794.

asserted, but instead "for the limited purpose of explaining why [Goldrup's] government[al] investigation began."[40] Since it was not offered for the truth of the matter asserted, the wife's statement was admissible.[41] Thus, prosecutors should always consider whether the statement is offered for some other purpose besides proving the truth of the matter asserted. If so, then it does not constitute hearsay in the first place and may help to prove that the crime occurred.

Another notable hearsay exception under 801 is 801(d)(2)(E), or the co-conspirator exception.[42] The exception is for statements "offered against an opposing party and . . . made by the party's coconspirator during and in furtherance of the conspiracy."[43] In *United States v. Bianchi*, the defendant "repeatedly traveled around the world to meet and engage in sexual conduct with young boys."[44] The court noted that the defendant had a co-conspirator who translated and facilitated the sexual encounters between the defendant and the young boys.[45]

While the court in *Bianchi* did not rely upon the co-conspirator exception to hearsay, the case provides an example of when a prosecutor could use the co-conspirator exception to prove that abuse occurred. Per *Giles v. California*, "[C]ourts may make preliminary findings of this kind. For example, where the government charges a defendant with conspiracy, the judge is permitted to make an initial finding that the conspiracy existed so as to determine whether a statement can be admitted under the co-conspirator exception to the hearsay rule."[46] The defendant in *Bianchi* was charged with one count of conspiracy to engage in illicit sexual conduct in foreign placeces under 18 U.S.C. § 2423(e).[47] Thus, a judge could have made an initial finding that a conspiracy existed based on the charge, and the prosecution could have used that to introduce statements the defendant's co-conspirator made.

Prosecutors should keep the co-conspirator exception in mind when issuing charges against defendants in international sex crime cases. If the elements for conspiracy are met, the prosecutor should charge the defendant with conspiracy and request that the court make a preliminary finding that

40. *Id.* at 794–95 (internal quotations omitted) (quoting United States v. Martin, 897 F.2d 1368, 1371 (6th Cir. 1990)).

41. *Id.* at 794–95.

42. FED. R. EVID. 801(d)(2)(E).

43. *Id.*

44. United States v. Bianchi, 386 F. App'x 156, 157 (3d Cir. 2010).

45. *Id.*

46. Giles v. California, 554 U.S. 353, 403 (2008).

47. *Bianchi*, 386 Fed. App'x at 157.

the conspiracy existed. The prosecutor could then use that finding to rely upon the co-conspirator exception to admit the victim's statements, or another's statements that would support the allegations.

B. *Federal Rule of Evidence 803: Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness*

Federal Rule of Evidence 803, which lists the exceptions that apply regardless of the availability of the declarant, provides several key ways to admit out-of-court statements. *White v. Illinois* and *United States v. Iron Shell* provide helpful examples of how prosecutors may rely upon Federal Rule of Evidence 803 to admit vital out-of-court statements into evidence. Both opinions discuss the excited utterance exception and the medical treatment exception.

In *White v. Illinois*, the Court found that the prosecution did not have to first prove the availability of the victim to admit the victim's statement, at least in regard to the excited utterance and medical treatment and diagnosis exceptions.[48] The defendant was charged with aggravated criminal sexual assault of a four-year-old.[49] The babysitter heard the victim scream and went to her room.[50] The babysitter found S.G.—the victim—and the defendant in S.G.'s room, and the defendant then left the house.[51] S.G. then told her babysitter what had occurred and, thirty minutes later, her mother.[52] About forty-five minutes after the scream, she told a police officer.[53] Four hours after the scream, she told medical personnel at the hospital.[54]

At trial, the victim did not testify, but the babysitter, mother, police officer, emergency room nurse, and doctor testified.[55] While the defense objected to the testimony of each of the witnesses, claiming their testimony was inadmissible hearsay, the trial court found that the statements were

48. White v. Illinois, 502 U.S. 346, 348–49 (1992). The Supreme Court discussed the "spontaneous declaration" and "medical examination" exceptions, both exceptions under the Illinois Rules of Evidence. *Id.* at 348, 350 n.1, 351 n.2. The court noted that the spontaneous declaration exception is recognized under Federal Rule of Evidence 803(2), otherwise known as the excited utterance exception, and the medical treatment and diagnosis exception is recognized under 803(4). *Id.* at 355 n.8.

49. *Id.* at 349.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *White*, 502 U.S. at 350.

55. *Id.*

admissible under the Illinois hearsay exception for spontaneous declarations.[56] In regard to medical personnel, both the spontaneous declaration exception and medical treatment exception applied.[57]

The Court discussed whether the prosecution was required to "produce the declarant at trial or [whether] the trial court must find the declarant unavailable" before the court admitted statements that fell under a hearsay exception.[58] Ultimately, the Court held that these procedures were not "constitutionally required," and affirmed the appellate court's ruling that the statements were admissible.[59] Thus, the court did not have to first find that the victim was unavailable before the statements were admissible under the spontaneous declaration and medical examination exceptions.[60]

In the case of *United States v. Iron Shell* the Eighth Circuit was predominantly concerned with the medical diagnosis or treatment hearsay exception.[61] The case involved the sexual assault of a nine-year-old girl, who testified at trial, but "was unable to detail what happened after she was assaulted by the defendant."[62] The doctor also testified at trial.[63] In determining the admissibility of the victim's statements to the doctor, the court discussed the history of Federal Rule of Evidence 803(4), known as the medical diagnosis or treatment exception.[64] According to the court, the modern rule changed the old rule in two ways:

> First, the rule adopted an expansive approach by allowing statements concerning past symptoms and those which related to the cause of the injury. Second, the rule abolished the distinction between the doctor who is consulted for the purpose of treatment and an examination for the purpose of diagnosis only; the latter usually refers to a doctor who is consulted only in order to testify as a witness.[65]

The court noted that the victim's statements fell within the third category of 803(4), the "inception or general cause of the disease or injury" category, and

56. *Id.*
57. *Id.* at 350–51.
58. *Id.* at 348–49.
59. *Id.* at 348–49, 358.
60. *White*, 502 U.S. at 348–49.
61. United States v. Iron Shell, 633 F.2d 77, 82–85 (8th Cir. 1980).
62. *Id.* at 82.
63. *Id.* at 82–83.
64. *Id.* at 83.
65. *Id.*

that the key issue then became whether the statements made were "reasonably pertinent to diagnosis or treatment."[66]

In determining whether the statements were reasonably pertinent, the court discussed two key rationales behind the rule.[67] First, "[i]t focuses upon the patient and relies upon the patient's strong motive to tell the truth because diagnosis or treatment will depend in part upon what the patient says. It is thought that the declarant's motive guarantees trustworthiness sufficiently to allow an exception to the hearsay rule."[68] Second, the court noted Judge Weinstein's reasoning: "'a fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape proscription.' . . . [L]ife and death decisions are made by physicians in reliance on such facts and as such should have sufficient trustworthiness to be admissible in a court of law."[69] From these rationales, the court established a two-part test to ensure that the reasoning behind the exception was upheld: "[F]irst, is the declarant's motive consistent with the purpose of the rule; and second, is it reasonable for the physician to rely on the information in diagnosis or treatment."[70]

The court first analyzed the victim's motive, finding that "[t]here [was] nothing in the content of the statements to suggest that [the victim] was responding to the doctor's questions for any reason other than promoting treatment."[71] The court emphasized that the victim's statements primarily concerned "what happened rather than who assaulted her," and that while "[t]he former in most cases is pertinent to diagnosis and treatment . . . the latter would seldom, if ever, be sufficiently related."[72] Finally, the court noted that the age of the patient was relevant in determining the admissibility of the statements as it "mitigates against a finding that [the victim's] statements were not within the traditional rationale of the rule."[73] Ultimately, every one of the victim's statements was admissible under the test because "they were related to her physical condition and were consistent with a motive to promote treatment."[74]

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66. *Id.*

67. *Iron Shell*, 633 F.2d. at 83–84.

68. *Id.* (citing Meaney v. United States, 112 F.2d 538 (2d Cir. 1940)).

69. *Id.* at 84 (quoting 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* § 803.125 (Mark S. Brodin, ed., Matthew Bender ed. 1979)).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Iron Shell*, 633 F.2d at 84.

74. *Id.*

The court then discussed the reasonability of the physician relying on the information, finding that the doctor's motive was to "treat [the victim] and to preserve any evidence that was available."[75] The court stated:

> It is not dispositive that Dr. Hopkins' examination would have been identical to the one he performed if [the victim] had been unable to utter a word. . . . It is enough that the information eliminated potential physical problems from the doctor's examination in order to meet the test of 803(4). . . . Dr. Hopkins also testified, in response to specific questions from the court, that most doctors would have sought such a history and that he relied upon [the victim's] statements in deciding upon a course of treatment.[76]

Ultimately, both the victim's and the physician's statements were admissible as a statement "made for . . . medical diagnosis or treatment . . . ."[77]

White and *Iron Shell* illustrate how the excited utterance exception and medical treatment exception may be used in cases in which child sexual abuse has occurred. The holdings of the cases should assist prosecutors in admitting out-of-court statements because (a) they will not have to first prove unavailability for excited utterance and medical treatment statements,[78] and (b) they will be able to admit statements to physicians "concerning past symptoms and those which related to the cause of the injury," including doctors "consulted only in order to testify as a witness."[79] Prosecutors of international sex crimes should especially consider these exceptions.[80]

While the specific exceptions discussed in *Iron Shell* and *White* will not apply in every case, the court's reasoning sheds light on how prosecutors should argue admissibility. Prosecutors should take note of the courts' tendency to reflect upon constitutional requirements,[81] the purpose of the

75. *Id.*

76. *Id.* at 84–85 (footnote omitted).

77. FED. R. EVID. 803(4); *see Iron Shell.* 633 F.2d at 84–85.

78. While Federal Rule of Evidence 803 clearly states that such a finding is not mandatory, *White v. Illinois* provides case law support to the rule as well as an example of its usefulness in court. FED. R. EVID. 803; *White*, 502 U.S. at 348–49, 58.

79. *Iron Shell*, 633 F.2d. at 83; *see White*, 502 U.S. at 348–49, 358 (1992).

80. *See* discussion *infra* Section V.

81. *White*, 502 U.S. at 348–49, 358.

rule,[82] and the motive of the speaker.[83] Prosecutors who integrate these considerations into their arguments to the court will be far more persuasive.

C. *Federal Rule of Evidence 804: Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness*

Federal Rule of Evidence 804 provides exceptions for instances when the declarant is unavailable. In order for the hearsay exceptions under 804 to apply, the prosecution must first establish that the declarant is unavailable. From there, the prosecution argues the specific exceptions under 804 to admit the statements.

Generally speaking, child victims of sexual abuse may be unavailable for several reasons. For instance, an inability to remember and a refusal to testify "despite a court order" are reasons that the victim could be unavailable under 804.[84] Moreover, an individual who is a non-citizen of the United States may be found unavailable because of the inability to "procure" the witness through process.[85] According to Federal Rule of Criminal Procedure 17, "If the witness is in a foreign country, 28 U.S.C. § 1783 governs the subpoena's service."[86] However, 28 U.S.C. § 1783 speaks to serving a subpoena on a United States citizen, but does not provide process for non-citizens.[87] Thus, if a non-citizen victim does not come volitionally, prosecutors would be unable to "procure" them, and the victim would qualify as an unavailable witness under 804(5).[88] Once the prosecution establishes that the declarant is unavailable, the prosecution must show that one of the hearsay exceptions under 804 applies.

Perhaps one of the most relevant hearsay exceptions for international sex crime cases under 804 is 804(b)(6), commonly called the forfeiture exception.[89] The rule provides that a witness is considered unavailable if the witness's prior statement is "offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result."[90]

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82. *Iron Shell*, 633 F.2d at 83–84.
83. *Id.*
84. FED. R. EVID. 804(a).
85. FED. R. EVID. 804(a)(5).
86. FED. R. CRIM. P. 17(e)(2).
87. 28 U.S.C.S. § 1783 (LexisNexis 2020).
88. FED. R. EVID. 804(a)(5).
89. FED. R. EVID. 804(b)(6).
90. *Id.*

United States v. Gurrola provides an example of how the forfeiture doctrine may be used successfully in a case involving sexual assault.[91] At trial, the victim's statements came in through her brother.[92] In *Gurrola*, the defendant argued that the lower court erred in admitting the victim's statements under the forfeiture doctrine.[93] More specifically, the defendant argued that the Government failed to prove that the defendant in fact caused the victim's unavailability.[94] However, the court found that the defendant possessed the requisite intent in 804(b)(6), as evidenced in a pre-trial hearing conducted on the admissibility of the victim's statements.[95]

In that pre-trial hearing, the case agent testified that two individuals had told him that "Gurrola ordered [the victim] murdered specifically to prevent her from testifying."[96] Thus, the court found that because the agent's testimony was "highly probative of [the defendant's] motive for having [the victim] killed" that was "later confirmed by [a witness] at trial," the district court did not err in admitting the victim's statements through her brother.[97] The defendant's direct threats against the victim were sufficient to establish his intent to make her unavailable to testify.[98]

The policy behind the forfeiture by wrongdoing exception, which may apply both to hearsay and the Confrontation Clause, is equity.[99] In other words: "a man shall not profit from his wrongdoing."[100] A perpetrator may be found to have caused the witness's unavailability if the abuse made it impossible for the victim to testify. Perpetrators of international sex crimes should not benefit from their wrongdoing, nor from the fact that they committed the crime overseas, making prosecution more challenging. The policy underlying this hearsay exception should assist with the argument that if a perpetrator commits a heinous crime against a victim, and that interferes with the victim's ability to be present for trial, their statements should be admissible. The prosecutor should seriously consider the forfeiture exception

91. United States v. Gurrola, 898 F.3d 524 (5th Cir. 2018).

92. *Id.* at 534.

93. *Id.*

94. *Id.*

95. *Id.* at 534–35.

96. *Id.* at 534.

97. *Gurrola*, 898 F.3d at 534–35.

98. *Id.* at 535.

99. *See* Katie M. McDonough, Comment, *Combating Gang-Perpetrated Witness Intimidation with Forfeiture by Wrongdoing*, 43 SETON HALL L. REV. 1283, 1301-04 (2013).

100. *Id.* at 1303.

in arguing the admissibility of victims' statements, despite potential difficulty proving that the perpetrator intentionally caused the victim's unavailability.

D. *Federal Rule of Evidence 807: Residual Exception*

Federal Rule of Evidence 807, the residual exception,[101] is a seldom used exception to the bar against hearsay.[102] However, there have been instances where the courts have admitted statements relying on this exception. The exception holds two basic requirements: (1) "the statement is supported by sufficient guarantees of trustworthiness . . . ."; and (2) "it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts."[103] In determining whether a statement is admissible under the residual exception, courts heavily rely on the policies the Federal Rules of Evidence were written to achieve.

For example, in *Doe v. Darien Board of Education*, the court found that certain statements were admissible under the residual exception.[104] In *Darien Board of Education*, the plaintiffs, the victim and his parents, alleged that the victim's paraprofessional aide sexually abused him.[105] The plaintiffs offered the victim's parents' statements, the victim's psychiatrist's statements, and a Sexual Assault Response Team interview transcript into evidence.[106] The court discussed the residual exception in its discussion of the admissibility of the parents' statements and the interview transcript.[107] In regards to the first element of the residual exception, the trustworthiness of the statement, the court noted that the United States Supreme Court listed several factors for

101. FED. R. EVID. 807.

102. *See* Huff v. White Motor Corp., 609 F.2d 286, 291 (7th Cir. 1979) (commenting on the rule's legislative history and cautioning against the over-use of this exception).

103. FED. R. EVID. 807.

104. Doe v. Darien Bd. of Educ., 110 F. Supp. 3d 386, 402 (D. Conn. 2015).

105. *Id.* at 393.

106. *Id.* at 395–96.

107. *Id.* at 398. For the policies behind the residual exception, see *In re* Archdiocese of Milwaukee, No. 11-20059-svk, 2015 Bankr. LEXIS 922 (Bankr. E.D. Wis. Mar. 24, 2015). In that decision, the court stated:

> A residual exception was considered necessary in order (1) [t]o provide sufficient flexibility to permit the courts to deal with new and unanticipated situations, (2) [t]o preserve the integrity of the specifically enumerated exceptions, [and] (3) [t]o facilitate the basic purpose of the Federal Rules of Evidence: truth ascertainment and fair adjudication of controversies.

Id. at 22 (third alteration in original) (internal quotation marks omitted) (quoting United States v. Sposito, 106 F.3d 1042, 1048 (1st Cir. 1997)).

determining "whether hearsay statements made by a child witness in child sexual abuse cases are reliable."[108] Those factors include: "spontaneity and consistent repetition," "mental state of the declarant," "use of terminology unexpected of a child of similar age," and "lack of motive to fabricate."[109]

In the court's analysis in *Darien Board of Education*, the court noted the general consistency of the victim's testimony, despite small variations,[110] the statements' being made "spontaneously, without much prompting or questioning,"[111] the victim's ability to lie,[112] the victim's prior accusations of abuse,[113] and the victim's behavior after the alleged assault.[114] Ultimately, given these factors, the court found that the statement satisfied the first element of 807.[115]

Furthermore, the court found that the statements were "unquestionably material"[116] and "would be the most probative on what happened" to the victim.[117] The court also emphasized that the parents would testify as to what their son told them, and the jury could determine the credibility of their statements.[118] Finally, the court found that admitting the victim's statements would best serve the interests of justice and purpose behind the Federal Rules of Evidence:

> The propriety of requiring extremely young [or disabled] victims of abuse to take the stand as the only method for putting before the jury what is, in all probability, the only first-hand account of the circumstances of abuse other than that of the defendant is debatable. In a more relaxed environment, the child in this case was able to provide his

108. *Darien Bd. of Educ.*, 110 F. Supp. 3d at 398 (quoting Idaho v. Wright, 497 U.S. 805, 821 (1990)).

109. *Id.* (quoting *Wright*, 497 U.S. at 821–22).

110. *Id.* at 398–402.

111. *Id.* (citing Doe v. United States, 976 F.2d at 1080 (7th Cir. 1992)).

112. *Id.* at 400.

113. *Id.* The court noted that an allegation of sexual assault would have been "out of character" for the victim. *Id.*

114. *Darien Bd. of Educ.*, 110 F. Supp. 3d at 400.

115. *Id.* at 400–01.

116. *Id.* at 401 (quoting United States v. Nick, 604 F.2d 1199, 1204 (9th Cir. 1979).

117. *Id.* (quoting Brookover v. Mary Hitchcock Mem'l Hosp., 893 F.2d 411, 420 (1st Cir. 1990)).

118. *Id.*

> version of the relevant events and yet avoid a potentially traumatic courtroom encounter.[119]

Therefore, the court found that the victim's statements would "likely be admissible at trial under the residual exception."[120]

In determining whether the residual exception will allow for the admittance of a hearsay statement, the court will analyze the elements listed in Federal Rule of Evidence 807.[121] Perhaps the most compelling argument, however, is how the admittance of a statement can achieve the purposes behind the rules. According to *United States v. Sposito*, these purposes include "truth ascertainment and fair adjudication of controversies."[122] Ultimately, the court in *Darien Board of Education* largely relied upon those purposes in its decision.[123]

Even if the other, more commonly used hearsay exceptions do not allow the statement of a victim into evidence, prosecutors may attempt to use the residual exception. While prosecutors may hesitate to argue the admissibility under the residual exception because of the uncertainty of its success, without a change in the Federal Rules of Evidence, this may be the only option to effectively prosecute certain international sex crimes.[124]

IV. JUSTICE FOR BOTH SIDES: THE SIXTH AMENDMENT, *CRAWFORD V. WASHINGTON*, AND EXCEPTIONS TO THE RIGHT TO CONFRONT WITNESSES

A. *The Confrontation Clause and Its Underlying Policies*

When a victim is unable, unwilling, or unavailable to testify, a key issue that arises is the defendant's right to confront the witness. The Sixth Amendment ensures the defendant's right "to be confronted with the witnesses against him" in criminal cases.[125] Several courts have commented on the intent behind and policies supporting the Confrontation Clause.[126] Understanding courts' concerns and reasoning regarding the Confrontation Clause will help prosecutors know when and how to argue the admissibility of statements from victims that do not testify.

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119. *Id.* (quoting United States v. Cree, 778 F.2d 474, 478 (8th Cir. 1985)).

120. *Darien Bd. of Educ.*, 110 F. Supp. 3d at 401.

121. *See* FED. R. EVID. 807.

122. United States v. Sposito, 106 F.3d 1042, 1048 (1st Cir. 1997).

123. *Darien Bd. of Educ.*, 110 F. Supp. 3d at 398.

124. *See, e.g.*, State v. D.R., 537 A.2d 667, 674 (N.J. 1988).

125. U.S. CONST. amend. VI.

126. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 49–55 (2004) (and cases cited therein).

In the seminal case of *Crawford v. Washington*, the Supreme Court invalidated the *Ohio v. Roberts* test and held that the testimonial statements were inadmissible under the Confrontation Clause.[127] In *Crawford*, the defendant stabbed a man who allegedly attempted to rape his wife.[128] The defendant's wife spoke to the police about the stabbing, and at trial, the prosecution presented the recording to the jury.[129] The defendant had no previous opportunity to cross-examine; thus, the issue on appeal was whether the admitted evidence violated his constitutional right to confront the witness.[130]

In determining whether the statement was admissible, the Supreme Court analyzed the test in *Roberts*, which held that a statement may be admissible if it "bears 'adequate indicia of reliability.'"[131] In order to determine the validity of the test, the Court in *Crawford* looked to the original intent of the Sixth Amendment.[132] After surveying the history and policies behind the Confrontation Clause, the Court stated that the "principal evil" the Confrontation Clause was intended to prevent was "use of *ex parte* examinations as evidence against the accused."[133] The Court stated that the text of the Confrontation Clause references the right to confront at common law, thus limiting its scope to those exceptions present at the time of the nation's inception.[134]

The Court in *Crawford* held that the test in *Roberts* was invalid and noted that a reliability test was insufficient because the Confrontation Clause's goal "is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[135] The Court stated that the main "vice" of the *Roberts*

127. *Id.* at 61, 68.

128. *Id.* at 38.

129. *Id.*

130. *Id.*

131. *Id.* at 40 (internal quotation marks omitted) (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

132. *Crawford*, 541 U.S. at 43.

133. *Id.* at 50.

134. *Id.* at 54. The exception present at the time of the nation's inception was that the statements were admissible only if the declarant was unavailable and there was a "prior opportunity to cross-examine." *Id.* While the Court noted that other exceptions were present by 1791, there was little, if any, evidence to support a contention that there was an exception to "admit testimonial statements against the accused in a criminal case." *Id.* at 56 (emphasis removed).

135. *Id.* at 61.

test was that it would "admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[136]

Ultimately, the Court held that the recording was inadmissible and that the lower court erred in relying on the *Roberts* test.[137] The statements clearly constituted testimonial, as the declarant made them to the police.[138] In order for a court to admit testimonial statements, the court would have to find the witness unavailable and ensure there had been a prior opportunity to cross-examine.[139] Since that was not the case in *Crawford*, there was a clear bar against the statements' admissibility.[140]

If the Court had found that the statements were nontestimonial, they would have been admissible.[141] The Court did not go into detail about how to determine whether or not a statement is testimonial; however, it did state that, at a bare minimum, testimonial statements include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[142] After *Crawford*, the key issue became determining what constitutes a testimonial statement.

B. *Determining Testimonial Statements*

While the Court in *Crawford* did not provide a clear definition of testimonial, it did state that it is "typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[143] Thus, a statement that is not offered to establish or prove some fact would not constitute a testimonial statement. The Court in *Crawford* listed several items of evidence that would constitute testimonial statements: "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[144] This list seems to align well with the previous definition provided by *Crawford,* since those items listed would be expected to be "made *for the purpose of establishing or proving some fact*."[145]

136. *Id.* at 63.
137. *Id.* at 68–69.
138. *Crawford*, 541 U.S. at 40, 68.
139. *Id.* at 68.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 51.
144. *Crawford*, 541 U.S. at 51.
145. *Id.* (emphasis added).

According to the Court in *Crawford*, statements made during police interrogations fit squarely within the realm of testimonial statements.[146] In *Davis v. Washington*, the Court further dissected this seemingly clear category.[147] The Court held that because the interrogation's "primary purpose was to enable police assistance to meet an ongoing emergency," the statements at issue were not testimonial.[148] The Court differentiated between the primary purpose of testimonial and nontestimonial statements made in police interrogations: whereas testimonial statements were made to prove "past events potentially relevant to later criminal prosecution," nontestimonial statements were made to "end a threatening situation."[149]

Michigan v. Bryant provides more guidance in determining the primary purpose of an interrogation.[150] In *Bryant*, the Supreme Court stated that, in determining the primary purpose, one should "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties."[151] Some of the factors to consider include where the encounter occurred (police station or where the crime occurred), when the encounter occurred (during the emergency or after), the formality of the interrogation (the more formal, the more like testimonial), the victim's motives behind his or her statements, the interrogator's motives behind his or her statements, and the victim's medical condition.[152]

Determining whether an ongoing emergency exists depends on "the type and scope of danger posed to the victim, the police, and the public."[153] The Court emphasized that the standard for determining the primary purpose is objective, or "the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and circumstances in which the encounter occurred."[154] *Bryant* also stated that "the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers."[155] While the Court noted that while an ongoing emergency occurring is not dispositive,[156] it is

146. *Id.* at 68.
147. Davis v. Washington, 547 U.S. 813, 828 (2006).
148. *Id.*
149. *Id.* at 822, 832.
150. Michigan v. Bryant, 562 U.S. 344, 359 (2011).
151. *Id.*
152. *Id.* at 360, 364–66, 368.
153. *Id.* at 370–71.
154. *Id.* at 360.
155. *Id.* at 367–68.
156. *Bryant*, 562 U.S. at 366.

"among the most important circumstances informing the 'primary purpose' of an interrogation."[157]

Another part of determining whether a statement is testimonial is the defendant's conduct. In *Giles v. California*, the Court discussed the common law forfeiture doctrine by wrongdoing.[158] This doctrine permits admission of statements of "a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant."[159] The majority held that "[t]he terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying."[160] In other words, the defendant had to cause the witness's unavailability with the purpose of "prevent[ing] the person from testifying."[161] The Court vacated and remanded the case to determine the defendant's intent.[162]

Thomas D. Lyon contributed to an amicus brief in support of the respondent in *Giles*.[163] In an article written by Lyon and Julia A. Dente, they observe that "[a] majority of the Court expressed the view that repeated acts of domestic violence against the declarant should suffice to prove that her murder was motivated by a desire to control the declarant and render her unavailable."[164] As Lyon and Dente argue, "The *Giles* opinion provides an opportunity to apply the forfeiture doctrine to the special challenges facing the prosecution in child-witness cases."[165] More specifically, they argue in their article that "forfeiture should apply if the defendant exploited a child's vulnerabilities such that he could reasonably anticipate that the child would be unavailable to testify."[166] While mere commentary on the case, perhaps prosecutors could adopt and apply this reasoning to certain international sex crime cases, where it would be reasonably foreseeable that due to the defendant's abuse of the child, the child would be unavailable to testify.

Collectively, these cases help frame an analysis for determining whether a statement is testimonial. By using the factors outlined in *Michigan v. Bryant*,

157. *Id.* at 361.

158. Giles v. California, 554 U.S. 353, 359 (2008).

159. *Id.*

160. *Id.* at 359.

161. *Id.* at 361.

162. *Id.* at 377.

163. Thomas D. Lyon & Julia A. Dente, *Child Witnesses and the Confrontation Clause*, 102 J. CRIM. L. & CRIMINOLOGY 1181, 1181 (2012).

164. *Id.* at 1184 (citing *Giles*, 554 U.S. at 377).

165. *Id.* at 1184–85.

166. *Id.* at 1185.

one will be able to determine what the primary purpose is behind a statement.[167] Ultimately, if the primary purpose is to help with an "on-going emergency," then the statement will not constitute a testimonial statement.[168] Moreover, under the forfeiture exception, if defendants act to cause the victim's unavailability, they forfeit their right to confront. Thus, prosecutors addressing Confrontation Clause issues must first address whether the statement is in fact testimonial, and if so, whether or not the doctrine of forfeiture applies.

C. *How* Ohio v. Clark *Changed the Confrontation Clause Analysis*

The Court in *Ohio v. Clark* focused on the first step of analysis: Whether a statement constitutes testimonial.[169] More specifically, the Court in *Clark* addressed the issue: "[W]hether statements to persons other than law enforcement officers are subject to the Confrontation Clause."[170] The victim, a three-year-old, was unavailable because of her age.[171] The teacher to whom the three-year-old made statements to testified in his stead, and despite the defendant's objections, the Court held that the statements were not testimonial and thus did not violate the Confrontation Clause because "neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution."[172]

In determining the primary purpose of the statements, the Court noted that the statements were made "in the context of an ongoing emergency" and the teachers' primary concern was to ensure the child's safety.[173] The Court also pointed out that the conversation between the victim and his teachers were "informal and spontaneous," as the teachers asked him about the injuries "immediately upon discovering them" in the lunchroom and classroom.[174] Thus, the Court used some of the factors outlined in *Michigan v. Bryant*, such as the formality of the conversation, where the conversation occurred, when the conversation occurred, and the interrogator's motives

167. *Bryant*, 562 U.S. at 360, 364–68, 371.

168. *Davis*, 547 U.S. at 828.

169. Ohio v. Clark, 135 S. Ct. 2173, 2177 (2015).

170. *Id.* at 2181.

171. *Id.* at 2177–78.

172. *Id.* at 2177.

173. *Id.* at 2176.

174. *Id.* at 2181.

behind their statements.[175] Moreover, the Court mentioned the victim's medical condition, the marks of abuse, in its analysis.[176]

The Court in *Clark* noted that it was "extremely unlikely that a 3-year-old child in L.P.'s position would intend his statements to be a substitute for trial testimony," but rather, "a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all."[177] The Court held: "Statements by very young children will rarely, if ever, implicate the Confrontation Clause."[178] The Court also stated: "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers."[179]

Finally, the Court stated that it was "irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in [the defendant's] prosecution."[180] Thus, the Court in *Clark* focused on the primary purpose of the statements when the declarant made them.[181] The primary purpose did not change simply because prosecutors offered them into evidence later.[182] *Clark*'s holding proves instrumental for prosecutors of international sex crimes because it applies the *Bryant* factors to an instance of child sex abuse, while clarifying that the ultimate use of the statement does not alter its primary purpose.

175. *Clark*, 135 S. Ct. at 2181.

176. *Id.*

177. *Id.* at 2182.

178. *Id.*

179. *Id.*

180. *Id.* The defendant also argued that since the teachers were mandated reporters, the court should find that their statements were testimonial. at 2182–83. However, the Court found that "the teachers' pressing concern was to protect [the victim] and remove him from harm's way" and that "they undoubtedly would have acted with the same purpose" regardless of whether they had been mandated to report by state-law. *Id.* at 2183. The court noted that "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution." *Id.*

181. *Clark*, 135 S. Ct. at 2183.

182. *Id.*

V. BUT WHAT IF THEY WEREN'T THERE?: APPLICATION OF HEARSAY AND CONFRONTATION CLAUSE PRECEDENT TO A SITUATION WHERE THE VICTIM DOES NOT TESTIFY

In *United States v. Durham*, the victims were able to testify.[183] However, in hypothesizing that they were not, the case provides a helpful example to analyze hearsay and Confrontation Clause issues in an international sex crime case. The below analysis considers what the author believes are relevant hearsay exceptions and notable Confrontation Clause arguments to an instance of international sex abuse perpetrated against a minor.

The victims' statements to Wambugo likely would have been admissible at trial, even if the victims chose not to testify, or were unavailable.[184] After Wambugo walked into the girls' bedroom and saw Durham lying on a bed with one of the girls, Durham left and Wambugo immediately spoke with the girls.[185] This conversation, where the girls told Wambugo they had been "doing bad manners" with Durham, would most likely have been admissible under the "present sense impression" exception. A present sense impression is "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it."[186] The girls made the statements immediately after they perceived Durham's actions. The "excited utterance" exception could also apply since the abuse had happened recently and the girls were still "under the stress of excitement that it caused."[187]

The utility of these exceptions is limited, especially in instances in which the abuse has been occurring over a substantial length of time. In regard to the present sense impression, the defense may argue that any statement that refers to abuse that did not occur while or immediately after it was perceived is inadmissible under the present sense impression exception. Moreover, in terms of the excited utterance exception, prosecutors must prepare themselves for the argument that because a sufficient amount of time has passed, the declarant cannot claim they are still under the stress of the

183. United States v. Durham, 902 F.3d 1180, 1191 (10th Cir. 2018).

184. First of all, regarding Federal Rule of Evidence 801, the prosecution would offer the statements that the girls made directly after the abuse for the truth of the matter asserted. FED. R. EVID. 801. More specifically, the prosecutor would want the statement "doing bad manners" to be entered for the truth, since the issue at trial was whether or not there was abuse. *Durham*, 902 F.3d at 1190. However, this first step is always important to consider, because if the statement is not offered for the truth of the matter asserted, it does not constitute hearsay and is admissible. FED. R. EVID. 801.

185. *Id.*

186. FED. R. EVID. 803(1).

187. FED. R. EVID. 803(2).

excitement the incident caused. Prosecutors should look to evidence relating to the effect of abuse on victims, which could potentially support an argument that even though the referenced abuse occurred a while ago the victim was still under the "stress of excitement that it caused" when he or she made the statement.[188]

Other hearsay exceptions could come into play in this hypothetical. For instance, the medical treatment exception could apply. Indeed, in *Durham*, a doctor testified as to the victims' physical state.[189] The girls were examined six days after Wambugo discovered the abuse.[190] However, it is unclear from the case what exactly occurred on the date Wambugo found Durham laying with one of the girls. The acts he confessed to, namely, molesting and raping the girls, occurred on several occasions.[191] While the doctor in *Durham* did not share any of the statements of the victims, this exception could prove very helpful in international sex crime cases in which the victim does share information with the doctor. Of course, as articulated in *Iron Shell*, the court will examine the motives of the victim and the doctor to determine whether to allow the doctor to share these statements.[192] However, prosecutors should utilize this exception if possible. Even if a medical exam has not been done,

188. *Id.*; *see, e.g.*, Susanne Babbel, *Trauma: Childhood Sexual Abuse*, PSYCHOL. TODAY (Mar. 12, 2013), https://www.psychologytoday.com/us/blog/somatic-psychology/201303/trauma-childhood-sexual-abuse ("With childhood sexual abuse, victims are often too young to know how to express what is happening and seek out help. When not properly treated, this can result in a lifetime of PTSD, depression, and anxiety."); *see also* Melissa Hamilton, *The Reliability of Assault Victims' Immediate Accounts: Evidence from Trauma Studies*, 26 STAN. L. & POL'Y REV. 269, 277 (2015). Hamilton explains:

> Courts have accepted excited utterances delivered quite some time after a trauma. In one case, the court admitted as an excited utterance the victim's statements made to a neighbor two hours after the final assault, as the beatings were repeated overnight and the victim was crying and hysterical at the time of the utterance. In another case, the victim's story asserted ten hours after her sexual assault was admitted as the victim's unusual behavior between the assault and the statement indicated a continued state of stress. A variation has arisen though it remains controversial; it is nicknamed the "re-excited" utterance exemption and applies when the declarant makes a statement upon being reminded of the earlier startling event, such as from watching a movie or reading a news article with related themes.

Id. (footnotes omitted).

189. *Durham*, 902 F.3d at 1219.

190. *Id.* at 1191.

191. *Id.* at 1190–91.

192. United States v. Iron Shell, 633 F.2d. 77, 83–84 (8th Cir. 1980).

the prosecutor should consider having a doctor examine the victim (if possible). After *Iron Shell*, even if the doctor is examining the witness for the purposes of testifying at trial, they may still fall under the exception to the bar against hearsay.[193]

Federal Rule of Evidence 804 may also prove helpful in an international sex crime case. Perhaps most significant of the exceptions under 804 is the exception for former testimony.[194] If a prosecutor is unable to convince a child to testify in court, they may be able to hold a deposition, or other hearing specified in the rule, and present that at trial. In the case of *Durham*, if the victims were unavailable, the prosecutor could have arranged for depositions of the girls, or, if only a few could make the trip, retain depositions of the others.

While typically not often relied upon, the residual exception has unique applicability for child sex abuse cases. In *Doe v. Darien Board of Education*, allowing children to share what happened to them in a more "relaxed environment," thus avoiding a "potentially traumatic courtroom encounter," was a compelling reason to hold that allowing the victim's statements into evidence without them testifying best served the interests of justice.[195] Of course, prosecutors must consider other elements, including whether the statement is trustworthy, whether it is "offered as evidence of a material fact," and whether it is "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts."[196] The prosecutor should not have much trouble proving the materiality and probativeness of the statement, in most instances, as the victim's testimony is often the key element of evidence in the case.[197]

The largest hurdle for the admissibility of a statement under the residual statement, then, seems to be the statement's trustworthiness.[198] This analysis will differ in each case and will involve a variety of factors, including consistency and spontaneity.[199] The prosecutor must undergo a fact-intensive inquiry, which may prove difficult, but, given the residual exception's success

193. *Id.* at 84.

194. FED. R. EVID. 804(b)(1). Note, however, that the Confrontation Clause will still be implicated.

195. Doe v. Darien Bd. of Educ., 110 F. Supp. 3d 386, 401 (D. Conn. 2015) (quoting United States v. Cree, 778 F.2d 474, 478 (8th Cir. 1985)).

196. *Id.* at 398 (internal quotation marks omitted) (quoting FED. R. EVID. 807).

197. State v. D.R., 537 A.2d 667, 672–73 (N.J. 1988).

198. *Darien Bd. of Educ.*, 110 F. Supp. 3d at 398 (internal quotation marks omitted) (quoting FED. R. EVID. 807).

199. *Id.*

in *Darien Board of Education*, the prosecutor should at least consider making the argument.[200]

In regard to Confrontation Clause concerns, the prosecutor must first determine whether the statement is testimonial. In the *Durham* hypothetical, the prosecutor could have made a strong argument that the declarant did not make the statement for prosecution, but to preserve the safety of the young girls at Upendo Children's Home. The court would have considered the factors outlined in *Michigan v. Bryant* and applied in *Ohio v. Clark*.[201] First, an on-going emergency concerning child abuse existed, as in *Clark*.[202] Wambugo found Durham in the girls' room and lying on one of their beds.[203] The conversation in which the girls confessed that "bad manners" had occurred happened directly after this discovery.[204] Similar to the teacher's primary purpose of safety in *Clark*, in *Durham*, Wambugo needed to discover whether the girls staying in the Children's Home were safe.[205] Finally, the conversation was "informal and spontaneous," as in *Clark*, as it occurred in the girls' room in the Children's Home and immediately after Wambugo saw Durham on one of the girls' beds.[206] Thus, regarding the girls' statements, admitting them at trial, even without the girls taking the stand, should not have violated the Confrontation Clause.[207]

If, for some reason, the statements were determined to be testimonial, the prosecutor should consider the forfeiture exception. As Lyon and Dente propose: "forfeiture should apply if the defendant exploited a child's vulnerabilities such that he could reasonably anticipate that the child would be unavailable to testify."[208] While the success of this argument is uncertain, the Supreme Court's commentary on domestic violence and the forfeiture doctrine in *Giles* provides some insight that in the future, arguing the

200. *Id.* at 401.

201. For the list of factors, see *Michigan v. Bryant*, 562 U.S. 344, 358–68 (2011), as applied in *Ohio v. Clark*, 135 S. Ct. 2177, 2181 (2015).

202. *Clark*, 135 S. Ct. at 2181.

203. United States v. Durham, 902 F.3d 1180, 1190 (10th Cir. 2018).

204. *Id.*

205. *Clark*, 135 S. Ct. at 2181; *Durham*, 902 F.3d at 1190.

206. *Clark*, 135 S. Ct. at 2181; *Durham*, 902 F.3d at 1190.

207. While this article focuses on the statements of the victim, the statements of Durham, including the statements that were recorded and written down, would likely have been admissible under the opposing part statement exception. *See* FED. R. EVID. 801(d)(2)(A). Since Durham was present at trial, the Confrontation Clause would be satisfied. United States v. Durham, 902 F.3d 1180, 1191 (10th Cir. 2018); U.S. CONST. amend. VI.

208. Thomas D. Lyon & Julia A. Dente, *Child Witnesses and the Confrontation Clause*, 102 J. CRIM. L. & CRIMINOLOGY 1181, 1185 (2012).

forfeiture exception in an international sex crime case involving a child may prove beneficial.[209]

Ultimately, simply because a victim does not testify does not hand the defendant a "Get Out of Jail Free" card. The current Confrontation Clause case law provides avenues for prosecutors to offer statements into evidence without violating the defendant's Constitutional rights. By looking at the history and purpose behind the defendant's Constitutional rights protected by the Sixth Amendment, prosecutors can understand how to effectively argue the admissibility of statements, while respecting the defendant's Constitutional rights.

Every case poses distinct challenges, and in some cases, the victim may make no statement whatsoever. However, the analysis above demonstrates that prosecutors should not veer away from cases in which the victim is unable to testify. Rather, they should consider every avenue available to admit evidence in order to prosecute these heinous crimes. However, there are sure to be instances in which the victim does not testify and the hearsay exceptions, other than perhaps the residual exception, do not apply. For those instances, the legislature should consider creating a new hearsay exception specifically for cases involving international sex crimes perpetrated against children.

VI. GETTING CREATIVE: A NEW HEARSAY EXCEPTION

A. *The Tender Years Exception*

If the purpose behind the hearsay rules is to achieve justice and truth, as has been claimed,[210] then prosecutors should use the exceptions to further those goals. When the hearsay exceptions, including the residual exception, prove insufficient to admit critical statements, the legislature should consider another means to ensure that justice and truth prevail.

In *State v. D.R.*, the Supreme Court of New Jersey adopted one such hearsay exception.[211] The victim in the case was the two-and-one-half-year-old granddaughter of the defendant.[212] The New Jersey Division of Youth and Family Services questioned the victim and recorded her responses, which the jury heard at trial.[213] While the trial court found that the victim was unavailable to testify, a clinical psychologist, who had interviewed the victim

209. *Id.* at 1184 (citing *Giles*, 554 U.S. at 377).

210. United States v. Sposito, 106 F.3d 1042, 1048 (1st Cir. 1997).

211. State v. D.R., 537 A.2d 667, 682–83 app. A (N.J. 1988).

212. *Id.* at 668.

213. *Id.* at 669.

three times, testified.[214] He stated that the sexual assault caused the victim's post-traumatic stress disorder.[215] Moreover, the psychologist testified that the victim expressed anxiety and fear as she used dolls to act out a sexual assault.[216]

The defendant was convicted of aggravated sexual assault, sexual assault, and endangering the welfare of a child.[217] The appellate court found that the psychologist's expert testimony was "sufficient, even without the victim's incriminatory statements, to constitute independent corroborative proof adequate to sustain defendant's conviction."[218] However, the court found that the statements the victim made to the psychologist were hearsay and not admissible under any recognized hearsay exception.[219] In recognition of the limitation this posed, the appellate court "acknowledged the need for an exception that would allow into evidence, under certain conditions, testimony of out-of-court statements made by a young child relating acts of sexual abuse."[220]

The court noted that "[c]ourts, legislatures, and commentators that have focused on the problems of proof in child sex abuse prosecutions appear to agree that testimony by the victim is often the indispensable element of the prosecution's case."[221] Reasons for this recognition include the fact that oftentimes the perpetrator is someone the victim or the family knows and trusts. Usually, there are no witnesses, and "[f]requently, there is no visible physical evidence that acts of sexual molestation have occurred."[222] Thus, "[a]bsent a confession, the victim's account of the sexual abuse may be the best and sometimes the only evidence that a sexual assault has taken place."[223] Moreover, the court recognized that in-court testimony of child victims may be less reliable than out-of-court statements because of "the stress of the courtroom experience, the presence of the defendant, and the prosecutor's

214. *Id.*
215. *Id.*
216. *Id.* at 670–71.
217. State v. D.R., 537 A.2d at 671.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 672 (citing State v. R.W., 514 A.2d 1287, 1287–88 (N.J. 1986).
222. *Id.*
223. State v. D.R., 537 A.2d at 672.

need to resort to leading questions."[224] The court also noted that the passage of time may impede the child's memory and since many perpetrators are trusted family or friends, "the victim may be urged or coerced to recant."[225]

The court referenced a study conducted by the American Bar Association's National Legal Resource Center for Child Advocacy and Protection, noting the study's recommendations support the admissibility of child victims' out-of-court statements of sexual abuse:

> [W]here it does not qualify under an existing hearsay exception, as long as: (1) the child testifies; or (2) in the event the child does not testify, there is other corroborative evidence of the abuse. In support of its proposal, the Recommendations rely on the general trustworthiness of children's complaints concerning sexual abuse, the pressing need for such evidence, inadequacy of existing hearsay exceptions to permit admission of such statements, and the tendency of courts to invoke tortured interpretations of the "excited utterance" exception in order to sustain admissibility of a child's out-of-court statement.[226]

In the ABA study, the commission noted that in the states of Kansas and Washington, "legislation has been pro-posed or enacted creating a special exception specifically for the admission of children's statements of sexual abuse."[227] Indeed, Washington was the first state to adopt a statute allowing these statements,[228] and other states modeled their statutes after

224. *Id.* at 673. Victor I. Vieth has commented on this difficult experience and advocated for having individuals present to support the victim. Victor I. Vieth, *Keeping Faith: The Potential Role of a Chaplain to Address the Spiritual Needs of Maltreated Children and Advise Child Abuse Multi-Disciplinary Teams*, 14 LIBERTY UNIV. L. REV. 351, 364–65 (2020). Specifically, in cases of child abuse in the church, Vieth comments that having a theologian or chaplain present could be of immense help to the victim in navigating the process. *Id.*

225. State v. D.R., 537 A.2d at 672.

226. *Id.* at 673–74 (citations omitted) (quoting NAT'L LEGAL RES. CTR. FOR CHILD ADVOCACY AND PROTECTION ET AL., RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD ABUSE CASES 34–36 (J. Bulkley ed. 1982), https://www.ncjrs.gov/pdffiles1/Digitization/87385NCJRS.pdf.).

227. NAT'L LEGAL RES. CTR. FOR CHILD ADVOCACY AND PROTECTION ET AL., RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD ABUSE CAS ES 35 (J. Bulkley ed. 1982), https://www.ncjrs.gov/pdffiles1/Digitization/87385NCJRS.pdf. [hereinafter RECOMMENDATIONS]).

228. State v. D.R., 537 A.2d at 674.

Washington's.[229] Even in circumstances without a legislative exception, the court noted how other courts had admitted similar statements under the residual hearsay exception.[230]

Based on this analysis, the court found that such a hearsay exception was "necessary and appropriate."[231] The court reasoned that the exception would "enable the judicial system to deal more sensibly and effectively with the difficult problems of proof inherent in child sex abuse prosecutions."[232] The adopted hearsay exception reads:

> A statement by a child under the age of 12 relating to a sexual offense under the Code of Criminal Justice committed on, with, or against that child is admissible in a criminal proceeding brought against a defendant for the commission of such offense if (a) the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement at such time as to provide him with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 8(1), that on the basis of the time, content, and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of paragraph (b) of Rule 17.[233]

The exception only applied to those under the age of twelve[234] and only applied to criminal cases. The court's reference to Rule 8(1) would translate

229. *Id.* (noting Florida, Indiana, Minnesota, South Dakota, Utah, Colorado, and Georgia as examples modeling their hearsay exceptions on Washington's statute).

230. *Id.*

231. *Id.* at 675.

232. *Id.*

233. *Id.* at 683; *see also* R.S. v. Knighton, 592 A.2d 1157, 1163–64 (N.J. 1991). The author of this Note cound not find a direct comparison between N.J. Evid. R. 17(b) and the Federal Rules of Evidence. If the federal courts adopted this exception, the qualifications for the witness would be determined by Article VI of the Federal Rules of Evidence.

234. State v. D.R., 537 A.2d at 683. In contrast, Washington's statute applies to children under ten, but also includes an exception for individuals under 16 years old who make a

to Federal Rule of Evidence 104, Preliminary Questions.[235] The exception itself provides parameters for when these statements may be admissible. As outlined below, the court considered both the policies behind the hearsay exceptions as well as the Constitutional concerns behind the Confrontation Clause in adopting the Tender Years Exception.

B. *The Tender Years Exception and Hearsay Policies*

Essentially, the Tender Years Exception is a glorified residual exception that applies to child victims of sexual abuse. Just as the residual exception does, it requires notice and that the statement have a probability of trustworthiness.[236] Given the nature of cases to which the Tender Years Exception applies, where typically the victim's statements are the key pieces of evidence in the case, the probative value of the statement should not prove difficult to establish.[237] Moreover, the Tender Years Exception's requirement of a "probability" of trustworthiness echoes the residual exception's requirement of "sufficient guarantees of trustworthiness."[238]

Currently, the statute reads that the court must find that "on the basis of the time, content, and circumstances of the statement there is a probability that the statement is trustworthy . . . ."[239] As with other hearsay exceptions, the closer that the statement is made to the occurrence of abuse, the more reliable it is. While the statement may not be close in time enough to constitute a present sense impression or an excited utterance, if the statement is made relatively close to the abuse, and the other factors are indicative of reliability, then the court could find the statement trustworthy.

In terms of content, the court in *State v. D.R.* claimed that "[y]oung children, having no sexual orientation, do not necessarily regard a sexual encounter as shocking or unpleasant, and frequently relate such incidents to

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statement "describing any of the following acts or attempted acts performed with or on the child: Trafficking under RCW 9A.40.100; commercial sexual abuse of a minor under RCW 9.68A.100; promoting commercial sexual abuse of a minor under RCW 9.68A.101; or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102 . . . ." WASH. REV. CODE ANN. § 9A.44.120 (LexisNexis 2019).

235. *See* N.J. R. EVID. 104 cmt. (commenting that "[t]he subject matter covered by paragraph (a) of Fed. R. Evid. 104 is substantially the same as that covered by N.J. Evid. R. 8(1).").

236. FED. R. EVID. 807.

237. State v. D.R., 537 A.2d 667, 672–73 (N.J. 1988).

238. *Compare* State v. D.R., 537 A.2d 667, 682–83 app. A (N.J. 1988), *with* FED. R. EVID. 807.

239. State v. D.R., 537 A.2d 667, 683 (N.J. 1988).

a parent or relative in a matter-of-fact manner."[240] The actual words that the children use could also support a finding of trustworthiness. For instance, in *Durham*, the children's use of the words "bad manners," rather than a specific description of a sex act, lends to the reliability of their statement as their choice of words shows that they were simply trying to describe what had occurred, which lends to the statement's trustworthiness.[241]

The circumstances of the statement also lend to determining its reliability, as circumstances can indicate the speaker's motive for making the statement. As discussed above, in *Durham* the circumstances made it clear that Ms. Wambugo's motive was to protect the girls.[242] Moreover, the circumstances of the statement—Ms. Wambugo walking in on Durham lying with the girls, Ms. Wambugo asking the girls what had occurred, and the girls responding immediately—indicate that the motive of the speakers was simply to answer the questions of Ms. Wambugo.[243] Their choice of words ("bad manners") also indicates that they assumed some of the fault.[244] These circumstances indicate that the motive of the speakers was not for future prosecution, but to simply respond to questions of Ms. Wambugo. These facts support the statement's trustworthiness.

Not all situations are as clear as the case of *Durham*, however, and it will not always prove easy to determine the motive of the speaker and listener. The Tender Years Exception must provide more than a glorified residual exception if it is going to help prosecutors try these cases. While the residual exception provides an option to prosecutors, it has proven less than helpful because it is too broad. In order for the Tender Years Exception to prove effective, it must have stricter requirements beyond mandating the court to consider the content, time, and circumstances of the statement. The court in *Doe v. Darien Board of Education* used multiple factors to determine the trustworthiness of the statement under the residual exception.[245] Adding these factors to the Tender Years Exception will assist courts in their determination of whether or not a statement is trustworthy. As the Tender Years Exception is a type of specialized residual exception, the application of the factors to this exception makes pragmatic and logical sense.

240. *Id.* at 673.

241. United States v. Durham, 902 F.3d 1180, 1190 (10th Cir. 2018).

242. *See* discussion *supra* Section V.

243. *Durham*, 902 F.3d at 1190.

244. *Id.*

245. *Darien Bd. of Educ.*, 110 F. Supp. 3d at 398–402.

C. *The Tender Years Exception and Confrontation Clause Concerns*

Adopting the Tender Years Exception poses significant Confrontation Clause concerns, and rightfully so. Advocacy for one individual's access to justice should not inhibit another's access. With that in mind, and as noted above, courts will look to the primary purpose of a statement to determine whether it is testimonial. If the statements are not testimonial then the statements do not implicate the Confrontation Clause.

The New Jersey legislature drafted the Tender Years Exception before the Supreme Court's decision in *Crawford v. Washington*.[246] After *Crawford*, mere reliability was not sufficient to admit out-of-court statements without the defendant being able to confront.[247] However, even with this alteration in case law, *Ohio v. Clark* provides an example in which a court may still admit statements by a victim because they are not testimonial.[248] Courts with similar exceptions to New Jersey's have responded in various ways, and demonstrated that the exception may still be adopted and used, as long as the statement is not testimonial.[249] Moreover, if the forfeiture exception applies, the court may admit the statement without violating the Confrontation Clause.[250]

While the change in case law regarding the Confrontation Clause affects the application of the Tender Years Exception, the exception still provides a valuable tool in allowing child victim's statements into evidence. If the statement does not constitute testimonial, or fits under the forfeiture exception, than the exception could apply. Because the Confrontation Clause would have the ability to bar the utility of the exception in certain cases, prosecutors should first and foremost address Confrontation Clause concerns before addressing the applicability of the Tender Years Exception.

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246. The court decided *State v. D.R.* in 1988, but the Supreme Court did not issue its opinion in *Crawford v. Washington* until 2004. State v. D.R., 537 A.2d 667 (1988); Crawford v. Washington, 541 U.S. 36 (2004).

247. *Crawford*, 541 U.S. at 60, 67–69 (2004).

248. Ohio v. Clark, 135 S. Ct. 2173, 2177 (2015).

249. *See, e.g.*, Herrera-Vega v. State, 888 So. 2d 66, 68–69 (Fla. Dist. Ct. App. 2004). In *Herrera-Vega*, a statute similar to the Tender Years Exception was involved. *Id.* at 67; FLA. STAT. ANN. § 90.803(23) (LexisNexis 2019). The Supreme Court of Florida had relied on *Ohio v. Roberts*, rather than *Crawford v. Washington*, in its holding that the Florida statute satisfied Confrontation Clause requirements. *Id.* at 68. However, because the statements were not testimonial, *Crawford* did "not entitle [the defendant] to any relief." *Id.* at 68–69.

250. Giles v. California, 554 U.S. 353, 359 (2008).

D. *Expanding the Tender Years Exception to International Sex Crimes*

The key reason behind adopting a hearsay exception for child victims of abuse applies to victims of international sex crimes. Even if physical evidence exists, it may be extremely difficult to obtain. Thus, similar to the court's reasoning in *State v. D.R.*, "[a]bsent a confession, the victim's account of the sexual abuse may be the best and sometimes the only evidence that a sexual assault has taken place."[251]

Congress would have to make changes to the Tender Years Exception in order to effectively promote justice for all child victims of international sex crimes. For instance, Congress would broaden the scope of applicability to crimes under 18 U.S.C. § 2423. Moreover, the age requirement should be increased to include all minors. Currently, the exception applies to children under twelve.[252] Notably, Washington's comparable statute has a provision for children under sixteen.[253] While some may posit that older children's statements are less reliable than younger children's statements, the exception's requirement for corroborating evidence helps protect against unreliable statements.[254]

As explained above, the exception would include a list of factors in order to provide parameters for the court in determining the reliability of the statement. One of the factors would be the relationship between the declarant and the listener. When the listener has a responsibility for the child's safety and wellbeing, similar rationales underlying the medical treatment would support the admission of the statement. Statements under the medical treatment exception are excepted from the hearsay ban because of the assumption that medical professionsals are merely trying to gain information to ultimately treat and protect the child.[255] Individuals who are in charge of a child's wellbeing, such as teachers, counselors, supervisors, and caregivers, typically have similar motives in asking children questions.[256] Of course, this is only one additional factor to consider in light of the others listed.

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251. State v. D.R., 537 A.2d at 672.

252. *Id.* at 683 app. A.

253. WASH. REV. CODE ANN. § 9A.44.120 (LexisNexis 2019).

254. State v. D.R., 537 A.2d at 683 app. A.

255. *Iron Shell*, 633 F.2d at 84 (noting that the doctor's motive was to "treat [the victim] and to preserve any evidence that was available.").

256. For example, the teacher's motive in *Ohio v. Clark* was to ensure the child's safety. Ohio v. Clark, 135 S. Ct. 2173, 2183 (2015). Similarly, the supervisor of the home in *Durham* simply wanted to discover what had occurred and protect the girls. United States v. Durham, 902 F.3d 1180, 1190 (10th Cir. 2018); *see* discussion *supra* Section V.

With these edits, and a few other minor ones, the exception would read as follows:

> A statement by a child under the age of 18 relating to a sexual offense under 18 U.S.C. § 2423 committed on, with, or against that child is admissible in a criminal proceeding brought against a defendant for the commission of such offense if the following three requirements are met. First, the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement at such time as to provide him with a fair opportunity to prepare to meet it. Second, the court finds, in a hearing conducted pursuant to Federal Rule of Evidence 104, that on the basis of the time, content, and circumstances of the statement there is a probability that the statement is trustworthy. Third, either (a) the child testifies at the proceeding, or (b) the child is unavailable as a witness under Federal Rule of Evidence 804, the statement is non-testimonial [or the forfeiture exception applies], and there is offered admissible evidence corroborating the act of sexual abuse. This exception is based on the contingency that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of the Federal Rules of Evidence.
>
> In determining the trustworthiness of the statement, the court shall consider the following factors: the spontaneity of the statement, the consistency of the statement(s), the mental state of the declarant, the use of terminology unexpected of a child of similar age, the declarant's ability to lie, the declarant's prior accusations of abuse, the declarant's behavior after the alleged assault, whether or not the declarant had a motive to fabricate, and the declarant's relationship to the listener. The statement has greater indicia of reliability when it is made to an individual who has a responsibility for the child's safety and wellbeing, such as a medical professional, counselor, teacher, supervisor, or caregiver, rather than a family member or peer.

VII. CONCLUSION

While the hurdles of prosecuting international sex crimes seem daunting, they should not cause prosecutors to hesitate to the point where they fail to

prosecute the crime at all. As this Note has demonstrated, current hearsay exceptions and Confrontation Clause case law provide various avenues through which prosecutors can admit vital statements made by victims. However, they may prove insufficient to prosecute international sex crimes effectively. When current hearsay exceptions run into a dead end, the legislature should consider a new avenue by which to promote the goals of justice and truth the exceptions were founded upon.

By adopting a new hearsay exception based on the New Jersey Tender Years Exception, the legislature would ensure the implementation of the policies behind the Federal Rules of Evidence and the Constitution. But the adoption of this hearsay exception would do more than that. It would send a message to perpetrators that leaving the borders of the United States does not hand them a "Get Out of Jail Free" card.