

**Issues Involving Child Witnesses, Statements of Children and Confrontation**

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**Lecture 10: Hearsay**

**11) Constitutional challenges to hearsay:**

- a) **Confrontation Clause: “Testimonial in Nature” v. “Firmly Rooted”.** If declarant produced, testifies, and subject to cross-examination, no violation. *California v. Green* 399 U.S. 149 (1970). See also, *United States v. Owens*, 484 U.S. 554 (1988) (intervening lack of memory but still able to cross and no 6<sup>th</sup> Amendment violation). Major Confrontation Clause cases:
- i) *Ohio v. Roberts*, 448 U.S. 56 (1980) (former testimony)
  - ii) *United States v. Inadi*, 475 U.S. 387 (1986) (co-conspirator statement and no need for “unavailability” as required under *Roberts, supra*)
  - iii) *Bourjaily v. United States*, 483 U.S. 171 (1987) (co-conspirator's statement)
  - iv) *Idaho v. Wright*, 497 U.S. 805 (1990) (residual clause)
  - v) *White v. Illinois*, 502 U.S. 346 (1992) (excited utterance, statement made for purposes of medical diagnosis or treatment)
  - vi) *United States v. Ismoila*, 100 F3rd 380 (5<sup>th</sup> Cir. 1996) cert. den. 520 U.S. 1219, 1247 (1997) (business records, residual exception)
  - vii) *Lilly v. Virginia*, 527 U.S. 116 (1999) (constitutional privilege/statement)

against penal interest).

viii) ***Crawford v. Washington***, 541 U.S. 36 (2004) (marital privilege/statement against penal interest) Two competing independent concepts: hearsay and right to confront under the Constitution. Overruled *Roberts, supra* as to testimonial statements only. “Testimony” is defined as “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford, supra* at 51.

- (1) Examples of testimonial statements cited in *Crawford, supra* opinion
  - (a) Prior testimony at a preliminary exam, before a grand jury, or at a former trial
  - (b) Plea allocation showing existence of conspiracy (and presumptively plea allocutions in general)
  - (c) Police interrogation
- (2) Potential exceptions/non-testimonial examples referenced *Crawford, supra* in opinion:
  - (a) If party had prior opportunity to cross examine and witness is unavailable at trial
  - (b) If declarant testifies at trial and subject to cross
  - (c) Forfeiture by wrongdoing
    - (i) *United States v. Thompson* 286 F3d 950, 965 (7<sup>th</sup> Cir. 2002)
    - (ii) *People v. Moreno*, 160 P3d 242 (Colo. 2007) (statutory exception permitting child sexual assault victim statements violates 6<sup>th</sup> amendment even though child witness medically unavailable.)
    - (iii) *State v. Byrd*, 923 A2d 242, 251 (NJ App. 2007)
    - (iv) *State v. Brooks*, 2006 WL 2523991 (Tenn. App. 2006)
    - (v) *State v. Mason*, 162 P3d 396 (Wash. 2007) (victim statements to p.o. the day before homicide that D choked him, gagged him, threatened with gun and drain cleaner, and forced to write check admissible. Applying forfeiture in homicide case even if no intent to silence the witness but requiring proof by evidence that is clear, cogent and convincing.)
  - (d) Off hand, overheard remark
  - (e) A person who makes a casual remark to an acquaintance
  - (f) Statements in business records or statements in furtherance of a conspiracy
    - (i) Conspiracy
      1. *United States v. Larson*, 460 F3d 1200, 1213 ( 9<sup>th</sup> Cir. 2006)
    - (ii) Business Records
      1. *Melendez-Diaz v. Massachusetts* 69 Mass. App. Ct 1114 (2007), rev. den. 449 Mass 1113 (2007), cert. granted 128 S. Ct. 1647 (2008) Defendant Luis Melendez-Diaz was convicted in the Massachusetts state trial court of trafficking in cocaine partly on the basis of a crime lab analysis that was admitted

and confirmed cocaine was in plastic bags found in the car in which he was riding. Rather than accept or stipulate to chain and chemist or the contents of the report, Melendez-Diaz objected and requested that he be allowed to question the person who prepared it about testing methods, how the evidence was preserved, and other issues. Massachusetts courts permitted the introduction of a crime lab report and rejected defendant's request to produce the forensic analysts who prepared the report. Defendant petitioned the U.S. Supreme Court claiming that his constitutional right under the 6<sup>th</sup> Amendment to confront witnesses against him extends to lab reports and the analysts who prepare them.

2. *United States v. Lamons*, 532 F3d 1251 (11<sup>th</sup> Cir. 2008) cert. den. 129 S.Ct. 524 (2008) Admission of electronically generated billing data did not violate defendant's confrontation rights because machine generated statements are exempt from Confrontation Clause analysis.
3. *United States v. Washington*, 498 F3d 225 (4<sup>th</sup> Cir 2007) (toxicology reports of defendants blood levels were not statements of lab technicians and did not constitute hearsay in violation of 6<sup>th</sup>)
4. *United States v. Ellis* 460 F3d 920, 925 (7<sup>th</sup> Cir. 2006)
5. *United States v. Gilbertson* 435 F3d 790, 795-6 (7<sup>th</sup> Cir. 2006)
6. *Hinojos-Mendoza v. People*, 2007 WL 2581700 (Colo. 2007 Drug lab analysis testimonial, statute permitting admissibility valid but D's counsel waived 6<sup>th</sup> amendment right by not complying w/ statutory requirements to produce technician.)
7. *Blevin v. State* 922 So2d 1046 (Fla. App. 2006)
8. *Rollins v. State* 897 A2d 821, 845-6 (Md. 2006)
9. *State v. Caulfield* 722 NW2d 304, 309 (Minn. 2006)
10. *State v. Wright*, 726 NW2d 464 (Minn. 2007)
11. *State v. Kent*, 918 A2d 626, 644 (NJ App. 2007) (Drunk driving case. State police lab sheets, worksheets, and blood test certification prepared by hospital EE's at p.o. request were testimonial in nature.)
12. *State v. Crager* 844 NE 2d 390 (Ohio App. 2005)
13. *Grant v. State* 218 SW3d 225 (Tex. App 2007 (aggravated robbery case. Error during penalty phase to admit testimonial portions of high school disciplinary record particularly when there was no showing of unavailability)
14. *State v. Doss*, 2007 WL 2238664 (Wisc. App. 2007) (retention by bailee or trustee of more than \$10,000 . Conviction reversed. Certification of authenticity of bank records is

testimonial.)

(g) Dying declaration

(i) *Giles v. California*, - U.S. -, 128 S. Ct. 2678 (2008) prior statement of wife to police in response to domestic violence call who was subsequently victim of a homicide several three weeks later was not admissible in the homicide trial under the California's "forfeiture by wrongdoing" provision and constituted a violation of the Confrontation Clause. Two forms of statements were admissible under the concept of forfeiture by wrongdoing at common law at the time the 6<sup>th</sup> Amendment was adopted: 1) dying declarations, or 2) statements of a witness who was "detained" or "kept away" by the "means or procurement" of the defendant. The exception applies only when the defendant engages in conduct designed to prevent the witness from testifying. Procurement requires more than defendant simply causing the witness' failure to appear. It requires causality and conduct that was designed to bring about the result procured. Unconfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant caused a person to be absent, but had not done so to prevent the person from testifying – as is the typical murder case involving accusatorial statements by the victim –the testimony was excluded unless confronted or the statement qualified as a dying declaration. The wife's statements three weeks before were not a dying declaration and there was no evidence introduced to show that the homicide was committed to prevent the wife from testifying. Reversed and remanded

(ii) *State v. Lewis*, 2007 WL 2332966 (Tenn. 2007) (statement by victim to detective he "knew" that "a lady with the vases" was involved was testimonial. However, "the admissibility of the dying declaration is so deeply entrenched in the legal history of this state, it is also our view that this single hearsay exception survives the mandate of Crawford regardless of its testimonial nature.")

(iii) *Harkins v. State*, 143 P3d 706 (Nev. 2006) (911 call indicating "D shot me and was paid to do it.")

(h) Certain personal admissions by defendant

(3) Major issues:

(a) Is statement testimonial? (Is a "subjective" or declarant focused test or objective" totality of circumstances" standard employed?)

(i) Declarant focused:

1. *United States v. Townley*, 472 F3d 1267, 1272-3 (10<sup>th</sup> Cir. 2007)

2. *United States v. Hinton*, 423 F3d 355, 360 (3<sup>rd</sup> Cir. 2005)

(ii) Totality approach:

1. *State v. Henderson* 160 P3d 776 (Kan 2007)(objective totality of circumstances standard as to testimonial. Statement to social

worker and detective testimonial. Forfeiture by wrongdoing not applicable. P argued D targeted young children who would not be able to testify.)

2. *State v. Stahl*, 855 NE2d 834 (Ohio 2006) (kidnap and rape victim's statement to nurse practitioner in emergency room examination were non-testimonial. Court employed "objective," i.e. expectation of declarant to be used at trial, standard)
- (b) Appearance of witness at trial ( *Green*, supra) and meaningful cross
- (c) Prior opportunity to cross unavailable witness
- (d) Does the *Davis*, supra at 2277 "emergency" exception apply, i.e. "statement made for the primary purpose of enabling police to meet an ongoing emergency"?
  - (i) *United States v. Clemmons*, 461 F3d 1057, 1061 (8<sup>th</sup> Cir. 2006)
  - (ii) *State v. Slater* 908 A2d 1097 (Conn. App. 2006)(rape victim's statements to bystanders admissible per 803(2) and statement to doctor admissible per 803(4). Case was originally closed but reopened and victim was unavailable 4 years later. Lists non-testimonial 803(2) and 803(4) cases from other jurisdictions.)
  - (iii)*State v. Warsame* 735 NW2d 684 (Minn. 2007) (victim's initial statements to p.o. about medical condition and assault by D were non-testimonial. Likewise her statements regarding D's flight and her sister's condition were part of ongoing emergency. Statements made after that point however may not qualify under "emergency" exception.)
  - (iv)*State v. Holdbrook* 2006 WL 3183706 (Ohio App. 2006) (voluntary excited utterances to p.o. by bystanders regarding a shooting and identifying D's car non-testimonial)
  - (v) *State v. Miles*, 145 P3d 242 (Or. App. 2006) (factually similar to *Hammond v. Indiana*. Admission of girlfriend's hearsay statements to p.o. about DV violated 6<sup>th</sup>.)
- (e) Forfeiture by wrongdoing/dying declarations
  - (i) *State v. Lewis*, 2007 WL 2332966 (Tenn. 2007) (statement by victim to detective he "knew" that "a lady with the vases" was involved was testimonial. However, "the admissibility of the dying declaration is so deeply entrenched in the legal history of this state, it is also our view that this single hearsay exception survives the mandate of Crawford regardless of its testimonial nature.")
  - (ii) *Harkins v. State*, 143 P3d 706 (Nev. 2006) (911 call indicating "D shot me and was paid to do it.")
- (f) *Crawford* and statements not offered for TMA
  - (i) *United States v. Trala*, 386 F3d 536 (3<sup>rd</sup> Cir. 2004)
  - (ii) *United States v. Price*, 458 F3d 2002 (3<sup>rd</sup> Cir. 2006)
  - (iii)*State v. Araujo* 144 P3d 66 (Kan. App. 2006) ( P.O.'s testimony re: 911 caller's statements that D threatened him and was carrying weapons introduced to explain why D was target of investigation

and not for TMA.)

- (g) Interviews with or of victims of sexual assault, DV, the mentally disabled or children by the police or in police presence
  - (i) *State v. Hosty*, 944 So2d 255 (Fla. 2006) (statutory exception to hearsay rule admitting statements of mentally disabled adult victim's violates 6<sup>th</sup> in that it permits testimonial statements. Mentally disabled adults statement about sexual battery to p.o. was testimonial in nature.)
  - (ii) *State v. Hernandez*, 946 So2d 1270 ( Fla. App. 2007) (victim's statement to nurse was testimonial and violated 6<sup>th</sup>)
  - (iii) *State v. Henderson* 160 P3d 776 (Kan 2007)(objective totality of circumstances standard as to testimonial. Statement to social worker and detective testimonial. Forfeiture by wrongdoing not applicable. P argued D targeted young children who would not be able to testify.)
  - (iv) *State v. Krasky*, 736 NW2d 636 (Minn. 2007) (6 counts of second degree criminal sexual conduct. Child's statements to nurse employed by children's resource center were non-testimonial. No governmental actor involved in procuring statement. Court noted that competency of child and reliability of statement are separate considerations from hearsay exclusion and 6<sup>th</sup> amendment concerns.)
  - (v) *State v. Stahl*, 855 NE2d 834 (Ohio 2006) (kidnap and rape victim's statement to nurse practitioner in emergency room examination were non-testimonial. Court employed "objective," i.e. expectation of declarant to be used at trial, standard)
- (h) Is this a statement to or between civilians?
  - (i) *Porterfield v. State* 145 P3d 613 (Alaska App. 2006) (arson/homicide case in which D's wife made incriminating statements to a purported friend who had agreed to serve as a police informant were non-testimonial)
  - (ii) *State v. Thomas*, 909 A2d 57 (Conn. App. 2006) cert. den. 916 A2d 47 (Conn. 2007)(homicide case. Witnesses opened bag which they thought contained drugs but which contained murder weapon covered in blood and said "He ain't going to get away with this" admissible as non-testimonial spontaneous excited utterance.)

- ix) *Davis v. Washington*, 126 S. Ct. 2266 (2006) 911 call identifying Defendant as perpetrator non-testimonial, however in companion case *Hammon v. Indiana* a battery affidavit given to responding police officer was testimonial and its admission violated the Confrontation Clause. Remanded to Indiana Supreme Court to determine whether forfeiture by wrongdoing resulted in a forfeiture of defendant's right to confrontation.)
- x) *Whorton v. Bockting*, 127 S. Ct. 1173 (2007) held that under the rules set forth in *Teague v. Lane* 489 U.S. 288 (1989) that *Crawford*, which had overruled prior Supreme Court cases governing the admission of hearsay

statement in criminal trials did not announce a “watershed rule” of criminal procedure, such as could be applied retroactively on collateral review to cases already final on direct review through a writ of habeas corpus. The 9<sup>th</sup> Circuit was reversed and the defendant’s state conviction for sexual assault with a minor in which the unavailable minor’s statements to a detective and mother were permitted under then existing precedent was affirmed.

- xi) ***Giles v. California***, - U.S. -, 128 S. Ct. 2678 (2008) prior statement of wife to police in response to domestic violence call who was subsequently victim of a homicide several three weeks later was not admissible in the homicide trial under the California’s “forfeiture by wrongdoing” provision and constituted a violation of the Confrontation Clause. Two forms of statements were admissible under the concept of forfeiture by wrongdoing at common law at the time the 6<sup>th</sup> Amendment was adopted: 1) dying declarations, or 2) statements of a witness who was “detained” or “kept away” by the “means or procurement” of the defendant. The exception applies only when the defendant engages in conduct designed to prevent the witness from testifying. Procurement requires more than defendant simply causing the witness’ failure to appear. It requires causality and conduct that was designed to bring about the result procured. Unconfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant caused a person to be absent, but had not done so to prevent the person from testifying – as is the typical murder case involving accusatorial statements by the victim –the testimony was excluded unless confronted or the statement qualified as a dying declaration. The wife’s statements three weeks before were not a dying declaration and there was no evidence introduced to show that the homicide was committed to prevent the wife from testifying. Reversed and remanded.
- xii) ***Melendez-Diaz v. Massachusetts*** 69 Mass. App. Ct 1114 (2007), rev. den. 449 Mass 1113 (2007), cert. granted 128 S. Ct. 1647 (2008) Defendant Luis Melendez-Diaz was convicted in the Massachusetts state trial court of trafficking in cocaine partly on the basis of a crime lab analysis that was admitted and confirmed cocaine was in plastic bags found in the car in which he was riding. Rather than accept or stipulate to chain and chemist or the contents of the report, Melendez-Diaz objected and requested that he be allowed to question the person who prepared it about testing methods, how the evidence was preserved, and other issues. Massachusetts courts permitted the introduction of a crime lab report and rejected defendant’s request to produce

the forensic analysts who prepared the report. Defendant petitioned the U.S. Supreme Court claiming that his constitutional right under the 6<sup>th</sup> Amendment to confront witnesses against him extends to lab reports and the analysts who prepare them.

**b) Due Process Clause:**

- i) *Chambers v. Mississippi*, 410 U.S. 284 (1973) A due process violation was found where accused was prohibited from cross-examining the confessing person under Mississippi's "voucher rule" and the trial court had excluded several "reliable" confessions exculpating the accused.

**2) History of the Hearsay Rule and developing trends**

- a) History: Product of the adversarial jury system
- b) Developing trends in England
  - i) Civil: Hearsay rule virtually eliminated by English Evidence Act of 1938, as amended in 1968 and supplement by Civil Evidence Act of 1995.
  - ii) Criminal
- c) Developing trends in United States
  - i) Civil
  - ii) Criminal
  - iii) Proponents for change like English rule: Weinstein and Park
  - iv) Cautious of change: Lempert, Saltzburg, Mueller

**Lecture 11:**  
**Issues Involving Child Witnesses,**  
**Statements by Children, and the Confrontation Clause**

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**I. Primary Issues:**

- a) FRE 404/ FRE 413-5: Character
- b) FRE 702: Use of Experts
- c) FRE 801-7: Use of Hearsay
- d) FRE 601/ FRE 603: Competency and Oath

**II. CL to FRE 404(b) to FRE 413-5: The use of other uncharged acts in child criminal sexual conduct cases and civil cases involving child molestation:**

- a) Three potential methods:
  - i) **CL: Part of “principle transaction” with victim.** See, *People v. DerMartzex*, 390 Mich 410, 213 NW 2d 97 (1973)
  - ii) **FRE 404(b):** See, *People v. Starr*, 457 Mich. 490, 557 NW2d 673 (1998)
  - iii) **FRE 413-15:** For a sample FRE 414 case, see *United State v. McHorse*, 179 F3d 889 (NM 10<sup>th</sup> Cir. 1999)
- b) **FRE 404 (b):** Propensity for “unusual” or “abnormal” sexual relations: FRE 404(b); FRE 413 and FRE 414 (criminal); and FRE 415(civil). May be demonstrated under traditional FRE 404(b) analysis or, under new rules, defendant’s prior commission of child molestation may be shown to prove propensity in criminal (FRE 414) or by plaintiff in a civil case (FRE 415).
- c) **CL Principle Transaction Rule:** Similar to CL res gestae. Other act evidence permitted to show that there existed similar sexual familiarity between the defendant and the child complainant to help the jury in judging the credibility of the child only and not to prove conformity. See, *People v. DerMartzex*, 390 Mich 410, 213 NW 2d 97 (1973). See also *People v. Wright*, 161 Mich. App. 682, 687 (1987) (acts occurred five years before); *People v. Jones*, 417 Mich 285 (1983) limited *Dermartzex, supra*, to defendant and victim only under the CL “principle transaction” rule, not the defendant and other members of household, because Defendant’s acts with others were not part of the “principle transaction” with the victim. However, the more modern approach permits “other acts” with other

members of the household, see *People v. Starr*, 457 Mich. 490, 557 NW2d 673 (1998) permitted “other act” evidence involving victim’s half sister and “other act” evidence involving a stepdaughter was permitted in *People v. Sabin*, 463 Mich. 43, 614 NW 2d 888 (2000)

**d) Under CL Principle Transaction rule: not offered to show propensity but to show “credibility” or “corroboration.”** See Michigan Standard Jury Instruction CJI2d 20.28, Uncharged Acts in Child Criminal Sexual Conduct Cases, provides: “(1) You have heard evidence that was introduced to show that the defendant has engaged in improper sexual conduct for which the defendant is not on trial. (2) If you believe this evidence, you must be very careful to consider it for only one, limited purpose, that is to help you judge the believability of testimony regarding the act(s) for which the defendant is now on trial. (3) You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the defendant is a bad person or that the defendant is likely to commit crimes. You must not convict the defendant here because you think [he/she] is guilty of other bad conduct.”

**e) FRE 404(b), FRE 403 (“unfair prejudice”) and “remoteness” (“difficulty to defend”):**

- i) *State v. Schlak*, 111 NW 2d 289 (Iowa 1961) ( five year too remote, similar offense three month prior not too remote) However see, *State v. Maestas*, 224 NW2d 248 (Iowa 1974) which permitted other act evidence with victim’s two older sisters which had been committed 6 and 10 years prior to alleged incident)
- ii) *United State v. McHorse*, 179 F3d 889 (NM 10<sup>th</sup> Cir. 1999)( six years for victim and three years for cousin not too remote for other acts in child sexual abuse case)
- iii) *Staggers v. State* 172 SE2d 462 (Ga. App. 1969) (other act evidence that defendant had abused two of the victim’s sisters 7 and 14 years previous to trial not too remote)
- iv) *State v. Martin*, 796 P2d 1007 (Idaho 1990) (sex offenses occurring 10 to 12 years before the charged offense were not too remote. Also noted that issue of “remoteness” generally goes to the weight of the evidence, not its admissibility.
- v) *People v. Sabin*, 614 NW 2d 888 (Mich. 2000) (child sexual abuse case other acts involving stepdaughter of defendant extending from 17 years to 9 years prior to present allegations was not too remote). See also, *People v. Starr*, 457

Mich. 490, 557 NW2d 673 (1998) which list the proper purposes for which “other act” evidence may be introduced.

- vi) *Cooper v. State*, 325 SE2d 9877 (Ga. App. 1985) (admitted testimony of the defendant’s adult daughters regarding acts committed by the defendant 19 years prior to prosecution of defendant for incest involving granddaughters.)
- vii) *State v. McIntosh*, 534 SE2d 757 (WVa 2000) prior acts between teacher and other students (ranging from 3 years to 21 years prior) and victim (7-8 years prior) not too remote. Issue of “remoteness” generally goes to the weight of the evidence, not its admissibility.
- viii) *State v. Jackson*, 625 So 2d 146 (La 1993) (permitted other act evidence occurring 15 to 24 years prior to current allegation noting that they would be prejudicial but that their admissibility was not unduly prejudicial)

**f) FRE 404(b) and standard of proof:**

- i) Varies from as low as “preponderance” to as high as “beyond reasonable doubt”
- ii) *People v. Sabin*, 463 Mich. 43, 614 NW 2d 888 (2000) (“preponderance” consistent with *Huddleston v. United States*, 485 U.S. 681 (1988)) (charged for acts committed in 1994 but court permitted prior acts involving step daughter shown by a “preponderance of evidence” which began as early as kindergarten in 1977 (17 years before) through 1985 when stepdaughter was in 7<sup>th</sup> grade. Court observed that to be admissible, other act evidence must be offered for a proper purpose (FRE 404(b)), it must be relevant (FRE 402), and its probative value must not be substantially outweighed by the danger of unfair prejudice (FRE 403).
- iii) *State v. Tutton*, 580 SE 2d 186 (SC Ct. App. 2003) (“clear and convincing”) (although common scheme and plan is possible method to introduce such evidence, the court precluded prior acts with neighbor girls which had been offered under common scheme or plan exception because it did not meet criteria required for this particular exception.)
- iv) In light of *Huddleston, supra*, few states still require either “clear or convincing” or “beyond a reasonable doubt”

- g) FRE 414:** Permits other acts to show conformity contrary to FRE 404(a). *United State v. McHorse*, 179 F3d 889 (NM 10<sup>th</sup> Cir. 1999). See, Michigan Compiled Law (MCL) 768.27a: “In a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be

considered for its bearing on any matter to which it is relevant.” (Effective 1/1/2006)

- h)** Michigan’s equivalent to FRE 414. Standard Jury Instruction CJI 2<sup>nd</sup> 5.8(b) Evidence of Other Acts of Child Sexual Abuse: (1) The prosecution has introduced evidence of claimed acts of sexual misconduct by the defendant with a [minor/minors] for which [he/she] is not on trial. (2) Before you may consider such alleged acts as evidence against the defendant, you must first find that the defendant actually committed those acts. (3) If you find that the defendant did commit those acts, you may consider them in deciding if the defendant committed the [offenses/offenses] for which [he/she] is now on trial. **Potential current conflict between CJI 2<sup>nd</sup> 5.8(b) which permits propensity evidence to show conformity and CJI 2<sup>nd</sup> 20.28 which permits use only for limited purpose of child witness credibility.**
- i)** Many cases have upheld constitutionality of FRE 414 including *United States v. Castillo*, 140 F3d 874 (10<sup>th</sup> Cir. 1998), *United State v. McHorse*, 179 F3d 889 (NM 10<sup>th</sup> Cir. 1999)
- j)** Historical precedent for evidence of sex crimes prior to FRE 413, FRE 414 and FRE 415: FRE 404(b) and other common law (such as “principle transaction”) exceptions:

  - i) *State v. Williams*, 103 P. 250 (Utah 1909)(statutory rape/same parties)
  - ii) *State v. Start*, 132 P.51 (Or. 1913)(statutory rape/same parties)
  - iii) *State v. Cupit* 179 So. 837 (La.1938)(Permitted other act evidence to show “lustful desire” and “unnatural tendencies” toward nieces)
  - iv) *State v Searle*, 239 P.2d 995 (Mont. 1952)(sodomy/same parties)
  - v) *State v. Schlak*, 111 NW 2d 289 (Iowa 1961) (other attacks on other victims permitted to show “motive,” “identity” and “lustful desires” to attack young girls) See also, *State v. Maestas*, 224 NW 2d 248 (Iowa 1974)
  - vi) *State v. Jenson*, 455 P.2d 631 (Mont. 1969) (expanded scope to permit evidence involving 12 other women over three year period that chiropractor had common scheme or plan re: rape of 15 year old);

vii) *Commonwealth v. King* 441 NE 2d 248 (Mass 1982) (Permitted other act evidence involving victim's brother and use of dog under "common pattern or course of conduct" exception. The Massachusetts Supreme court cited and relied on a significant number of cases from other jurisdictions that permitted defendant's sexual conduct with child not named in indictment in an action charging a sexual offense against the named child See, e.g., *State v. Dowell*, 47 Idaho 457, 276 P. 39 (1929) (charge of statutory rape; admitted evidence of intercourse or attempted intercourse with other girls under fifteen in the victim's presence in the same room at other times); *People v. Crocker*, 25 Ill.2d 52, 183 N.E.2d 161 (1962) (charge of statutory rape; evidence of sexual assault on another child admissible as part of "res gestae"); *State v. Schlak*, 253 Iowa 113, 116, 111 N.W.2d 289 (1961) (charge of committing lewd act on child; evidence of similar acts with three other children admissible to show motive, the desire to gratify desire by molesting young girls); *State v. Whiting*, 173 Kan. 711, 713, 252 P.2d 884 (1953) (charge of lascivious behavior with one child; evidence of similar offenses with two other children admissible to show lustful disposition of defendant); *State v. Shtemme*, 133 Minn. 184, 158 N.W. 48 (1916) (charge of statutory rape of thirteen year old girl; evidence of similar conduct with another young girl in the victim's presence was admissible); *State v. Simerly*, 463 S.W.2d 846 (Mo.1971) (charge of incest with fifteen year old daughter; evidence of intercourse with another daughter beginning at age five could properly be considered as corroboration); *State v. Jackson*, 82 Ohio App. 318, 322, 81 N.E.2d 546 (1948) (charge of incest with daughter; separate acts of incest with other daughters are "so related to the offense for which the defendant is on trial that they have a logical connection therewith and may reasonably disclose a motive"); *State v. Putney*, 110 Or. 634, 224 P. 279 (1924) (charge of statutory rape of twelve year old girl; admitted defendant's statement to victim around the time of offense that he had been sexually familiar at an earlier time with another young girl); *McKinney v. State*, 505 S.W.2d 536, 541-542 (Tex.Cr.App.1974) (charge of statutory rape on defendant's adopted daughter; fondling and sodomy with other adopted daughters admissible); *Proper v. State*, 85 Wis. 615, 55 N.W. 1035 (1893) (charge of intercourse with a ten year old girl; later intercourse with another girl in the same house admissible).

- viii) *People v. Jones*, 417 Mich. 285, 335 NW 2d 465 (1983) limited prior acts under “principle transaction” rule to those between defendant and victim only and not other members of victim’s family
- ix) *State v. Howard*, 520 So2d 1150 (LA. Ct. App 1987) ( in case involving 11 year old victim permitted other act testimony of a 20 year old daughter (step-sister of victim) to prove “motive” or “system, pattern, or intent” The *Howard* court relied on a factually similar case, *Elliott v. State*, 600 P.2d 1044 (Wyo.1979), and similar cases from other jurisdictions which permit the admissibility of the testimony of third persons as to prior or subsequent similar crimes, wrongs or acts in cases involving sexual offenses to show motive or to show plan, *State v. Thomas*, 110 Ariz. 106, 515 P.2d 851 (1973); *Fields v. State*, 255 Ark. 540, 502 S.W.2d 480 (1973); *People v. Fritts*, 72 Cal.App.3d 319, 140 Cal.Rptr. 94 (1977); *People v. Covert*, 249 Cal.App.2d 81, 57 Cal.Rptr. 220 (1967); *State v. Hauck*, 172 Conn. 140, 374 A.2d 150 (1976); *Hunt v. State*, 233 Ga. 329, 211 S.E.2d 288 (1974); *Staggers v. State*, 120 Ga.App. 875, 172 S.E.2d 462 (1969); *Thornton v. State*, Ind., [268 Ind. 456] 376 N.E.2d 492 (1978); *Merry v. State*, [166 Ind.App. 199] 335 N.E.2d 249 (1975); *Thompson v. State*, 162 Ind.App. 381, 319 N.E.2d 670 (1974); *People v. Gonzales*, 60 Ill.App.3d 980, 17 Ill. Dec. 901, 377 N.E.2d 91 (1978); *People v. Middleton*, 38 Ill.App.3d 984, 350 N.E.2d 223 (1976); *State v. Drake*, 219 N.W.2d 492 ( Iowa 1974); *State v. Hampton*, 215 Kan. 907, 529 P.2d 127 (1974); *People v. Burton*, 28 Mich. App. 253, 184 N.W.2d 336 (1970); *State v. Jensen*, 153 Mont. 233, 455 P.2d 631 (1969); *State v. Hoffmeyer*, 187 Neb. 701, 193 N.W.2d 760 (1972); *Simpson v. State*, [94 Nev. 760] 587 P.2d 1319 (Nev. 1978); *Jett v. State*, 525 P.2d 1247 (Okl. Cr. 1974); *State v. Jackson*, 82 Ohio App. 318, 81 N.E.2d 546 (1948); *McKinney v. State*, Tex.Cr.App., 505 S.W.2d 536 (TX 1974); *Hendrickson v. State*, 61 Wis.2d 275, 212 N.W.2d 481 (Wis. 1973); *State v. Tarrell*, 74 Wis.2d 647, 247 N.W.2d 696 (Wis. 1976). The *Howard* court also observed that in sexual assaults cases involving incest, and statutory rape with family members as the victims, the courts almost uniformly admitted such testimony. See for example, *People v. Fritts*, supra; *People v. Covert*, supra; *Staggers v. State*, supra; *Merry v. State*, supra; *Simpson v. State*, supra; *Jett v. State*, supra; *State v. Jackson*, supra; *Hendrickson v. State*, supra.

- x) *State v. Moore* 819 P2d 1143 (Idaho 1991) (in sexual assault case involving granddaughter also permitted to show grandfather had “plan” and “motive” to exploit young female in family including daughter and step daughter)
- xi) *State v. McIntosh*, 534 SE2d 757 (WVa 2000) prior acts between teacher and other students (ranging from 3 years to 21 years prior) and victim (7-8 years prior) not too remote. Issue of “remoteness” generally goes to the weight of the evidence, not its admissibility.
- xii) *State v. Tutton*, 580 SE 2d 186 (SC Ct. App. 2003) (although common scheme and plan is possible method to introduce such evidence, the court precluded prior acts with neighbor girls which had been offered under common scheme or plan exception because it did not meet criteria required for this particular exception.) See also, *State v. Hubner*, 608 SE 2d 464 (SC Ct. App. 2005)( similarities insufficient for common scheme or plan for other acts involving church minister and victim going back several decades); *State v. Wallace*, 611 Se2d 332 (SC App. 2005) (similarities insufficient to admit other act evidence testimony under common scheme or plan exception involving sister of victim. *State v. Fletcher* 609 SE2d 572 ( SC App. 2005) (homicide by child abuse case in which witnesses testimony regarding evidence of other act evidence of abuse of victim in defendant’s home was admissible to establish common scheme or plan, intent, absence of mistake or accident, and identity. It was also admissible under SC’s “res gestae” exception.)
- k) More general information: *Admissibility, in prosecution for sexual offense, of evidence of other similar offenses*, 77 ALR 2d 841 (1961) (Regularly updated but not limited to child victims)

**III. FRE 702: The use of expert witness testimony in child criminal sexual conduct cases:**

- a) FRE 702 and *Daubert v. Merrell Dow*, 509 U.S. 579 (1993) require: Qualification + (relevance + reliability) = admissibility. Must first be qualified. Once that analysis has been completed, must examine relevance and reliability of opinion testimony.

- b) Opinions generally offered: post traumatic stress disorder, rape trauma syndrome, child sexual abuse accommodation syndrome, medical testimony from treating physician or rape trauma or child abuse expert.
- c) An expert may testify on direct regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior and an expert may also testify in rebuttal to consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility.
- d) Split in authority on whether expert can testify as to whether child was in fact raped or abused.
- e) Although experts may testify to opinions which are not based on personal knowledge (FRE 703), most civilian and military courts that have addressed issue have concluded that an expert may not expressly vouch for the victim's credibility, i.e. that the rape or sexual abuse actually occurred, or that defendant is guilty. See:
  - i) *United States v. Charley*, 176 F. 3d 1265 (10<sup>th</sup> Cir. 1999)
  - ii) *United States v Whitted*, 11 F3d 782 (8<sup>th</sup> Cir 1993); *United States v. Johns*, 15 F3d 740 (8<sup>th</sup> Cir 1994); *United States v. Wright* 119 F3d 630(8<sup>th</sup> Cir. 1997)
  - iii) *United States v. Birdsall*, 47 M.J. 404 (CAAF 1998)
  - iv) *Johnson v. State* 732 SW2d 817 (Ark. 1987)
  - v) *State v. Batangan* 799 P2d 48 (Haw. 1990)
  - vi) *State v. Bressman*, 689 P2d 901 (Kan. 1984)
  - vii) *State v. Black*, 537 A2d 1154 (Me. 1988)
  - viii) *Commonwealth v. Colin C.*, 643 NE2d 19 (Mass. 1994)
  - ix) *People v. Beckley*, 434 Mich 691, 456 NW2d 391 (1990) (*Beckley* also held that child sexual abuse accommodation syndrome evidence was "unreliable" as an indicator of abuse under "Frye" standard) and the consolidated cases of *People v. Peterson* and *People v. Smith*, 450 Mich. 349 (1995)
  - x) *Goodson v. State* 566 So2d 1142 (Miss. 1990)
  - xi) *State v. Lucero*, 863 P2d 1071 (NM 1993) but see earlier case of *State v. Alberico*, 861 P2d 192 (NM 1993) which addressed admissibility of PTSD as being "consistent" with rape.
  - xii) *State v. Kallin*, 877 P2d 138 (Utah 1994)
  - xiii) *State v. Gokey*, 574 A2d 766 (Vt. 1990)
  - xiv) *State v. Haseltine*, 352 NW2d 673 (WI Ct. App. 1984)

- f) Other courts have permitted such testimony, i.e. rape or child sexual assault occurred, but some of the following courts have not addressed whether such opinion testimony constitutes “vouching”:
  - i) *Broderick v. King’s Way Assembly of God*, 808 P2d. 1211 (Alaska 1991)
  - ii) *Glendenning v. State*, 536 So2d 212 (Fla. 1988)
  - iii) *State v. Hester*, 760 P2d 27 (Idaho 1988)
  - iv) *State v. Geyman*, 729 P2d 475 (Mont. 1986)
  - v) *Townsend v. State*, 734 P2d 705 (Nev. 1987)
  - vi) *State v. Figured*, 446 SE2d 838 ( NC Ct. App. 1994)
  - vii) *State v. Stowers*, 690 NE2d 881 (Ohio 1998)
  - viii) *State v. Wilson*, 855 P2d 657 (Or. Ct. App. 1993)
  - ix) *Johnson v. State*, 970 SW2d 716 ( Tex. App. 1998)
  
- g) Sample Expert Instruction: Michigan Standard Jury Instruction CJI2d 20.29 provides: “(1) You heard [name of expert]’s opinion about the behavior of sexually abused children. (2) You should consider that evidence only for the limited purpose of deciding whether [name of complainant]’s acts and words after the alleged crime were consistent with those of sexually abused children. (3) That evidence cannot be used to show that the crime charged here was committed or that the defendant committed it. Nor can it be considered an opinion by [name of expert] that [name of complainant] is telling the truth.”

#### IV. Hearsay and Confrontation

- a) **FRE 801: Hearsay**
  - i) **Non- Hearsay Purpose:** See, *Tennessee v. Street*, 471 U.S. 409 (1985)
  - ii) **To show knowledge:** For example in *Bridges v. State*, 19 NW 2d 529 (Wisc.1945). (In a prosecution for taking indecent liberties with a child, the child’s statement reporting the incident gave a description of the house, its surroundings, the room in which the attack occurred, and its furnishings. The statement was not intended to establish TMA but had independent value to establish child’s presence or to show that complaint was made. Other evidence demonstrated that the child’s description fit the house and the room where defendant lived.) By analogy, see also *State v. Peeler*, 614 P2d 335 (Ariz. Ct.

of App.1980)(officer's opinion testimony that elderly victim was mentally competent following sexual assault based on personal observation and what she said, not hearsay.)

iii) **Hearsay Exclusions: Statements that are definitionally not hearsay:**

**Prior statement by a witness:** FRE 801(d) (1).

(1) The test: The declarant must 1) *testify at trial*, 2) be subject to cross-examination, and 3) the statement must be either:

(a) Prior Inconsistent Statement. Made under oath at a prior proceeding may be admissible for impeachment purposes as well as for the truth of the prior matter. Compare to FRE 613 that is limited to impeachment only.

(b) Consistent: if offered to rebut a charge of recent fabrication, improper influence or motive. Prior consistent statement must be made prior to motivation to fabricate exists. *Tome v. United States*, 513 U.S. 150, 115 S. Ct. 696 (1995) (allegations of sexual molestation made after motive to fabricate existed).

(c) Statement of prior identification

(d) Confrontation Clause and FRE 801(d) (1) exclusions: Not going to be a 6<sup>th</sup> Amendment violation because all three statements require declarant to testify and be subject to cross examination. See, *California v. Green*, 399 U.S. 149 (1970).

(e) Scope of Cross: Not a violation in *United States v. Owens*, 484 U.S. 554 (1988)(prior statement of identification of defendant but loss of memory due to intervening injury, witness took stand, subject to cross regarding prior identification, not violation of 6<sup>th</sup> Amendment. Judicial restrictions on cross and claim of privilege would threaten meaningful inquiry but loss of memory does not.)

iv) **Statements that are definitionally not hearsay: Admissions by party opponent:** FRE 801(d) (2). Party admissions are substantive evidence and not hearsay if they are offered against a party and the statement is either:

(1) Party's own statement, i.e. defendant's statement to child witness, other individual or law enforcement regarding the allegations may be admissible. See, for example, *Commonwealth v. King* 441 NE 2d 248 (Mass 1982) where victim's aunt testified to what defendant told her about what he did to victim and other acts involving her younger brother.

(2) Other FRE 801(d)(2) "admissions" generally not common in cases of this

type:

- (a) Adopted statement
- (b) Authorized statement (Requires additional corroboration)
- (c) Agent's statement (Requires additional corroboration), or
- (d) Co-conspirator's statement (Requires additional corroboration):  
*Bourjaily v. United States*, 483 U.S. 171 (1987). In *Krulewitch v. United States* 336 U.S. 440 (1949) statements of a co-conspirator after arrest of all participants was held inadmissible. Admission of co-conspirator's statement not a violation of 6<sup>th</sup> Amendment Confrontation Clause. *United States v. Inadi* 475 U.S. 387 ( 1986)

**b) FRE 803: Availability "Immaterial"**

- i) If child declarant "available," testifies, and subject to cross examination: No Confrontation Clause problems under *Crawford v. Washington* 124 S. Ct. 1354 (2004). *Crawford* only applies to FRE 803 exceptions if declarant "unavailable" and statement is "testimonial" in nature. Consistent with *California v. Green*, 399 U.S. 149 (1970). See, *United States v. Kappell*, 418 F3d 550 (6<sup>th</sup> Cir. 2005) (There is no 6<sup>th</sup> amendment violation if witness available, testifies and subject to cross-examination but answers some questions with a nod of the head, a shrug of the shoulders and fails to answer some questions at all.) See also, *State v. Hopkins*, 2006 WL 2552814 (Wash. App. Div. 2 Aug. 11, 2006)
- ii) If "**unavailable**" for cross examination and statement is "testimonial in nature" Confrontation Clause issue under *Crawford v. Washington*, 124 S. Ct. 1354 (2004). "Unavailability" for purposes of FRE 803 may be :
  - (1) If child "unavailable" as defined in FRE 804(a) (privilege, refusal, lack of memory, death, mental illness or infirmity, or beyond process of the court)  
or

- (2) not available if determined to be “incompetent” by statute ( e.g. Kan. Stat. Ann §60-4599g)(2)(1989)), or
- (3) not “competent” in the discretion of the court. FRE 601. A child witness who is not competent is “unavailable.” *Gregory v. North Carolina*, 900 F2d 705 (4<sup>th</sup> Cir. 1990) cert. den. 498 U.S. 879 (1990)
- (4) if would result in severe emotional trauma by making child testify *State v. Robinson*, 735 P2d 801(Ariz. 1987); *State. v. Kuone*, 757 P2d 289 (Kan. 1988), or
- (5) due to lack of memory, *State v. Slider*, 688 P2d 538 (Wash App.1984)( for lack of memory and Confrontation in general, see *United States v. Owens*, 484 U.S. 554 (1988))

iii) **Common FRE 803 exceptions involving child witnesses:** CL Res Gestae Exception: Criticized for being too vague and amorphous as to scope. Replaced by FRE 801(1)-(3). Potential revival of CL res gestae under *Crawford v. Washington*, 541 U.S. 36, 58 n. 8 (2004) citing *Thompson v. Trevanion*, 90 Eng. Rep. 179 (KB 1694) observed that to the extent that a hearsay exception existed at the time of the framing of the Constitution and Bill of Rights “it required that the statements be made immediate[ely] upon the hurt received and before [declarant] had time to devise or contrive anything for her own advantage.” If opportunity to deliberate exists, then not spontaneous or res gestae under CL.

(1) FRE 803(1) Presence Sense Impression

(2) FRE 803(2) Excited Utterance

(a) *White v. Illinois*, 502 U.S. 346 (1992); *Morgan v. Foretich*, 846 F2d 941 (4<sup>th</sup> Cir. 1988) (custody/divorce case)

(b) *State v. Smith*, 337 SE 2d 833 (NC 1985)(liberally construed time period to permit description of event 2-3 days after occurrence) See Michigan Court of Appeals case holding that 17 day gap was permissible if foundational requirements met. See also, *Snellen v. State*, 923 SW2d 238 (Tx. Ct. of App. 1996)(12-13 hour gap

permissible)

- (3) FRE 803(3) Then Existing Mental, Emotional, Physical Condition, i.e., statement to family member, doctor, baby sitter or others, "I hurt here." See also, *Commonwealth v. Capone*, 659 NE2d 1196 (Mass App. Ct. 1996); *Fleener v. State*, 648 NE2d 652 (In. App. Ct. 1995)
- (4) FRE 803(4) Statements Made for Medical Diagnosis or Treatment
  - (a) *Child's statement: People v. Ignacio*, 10 F3d 608 (9<sup>th</sup> Cir. 1993); *State v. Maldonado*, 536 A2d 600 (Conn. App. 1988) (Child's statement to security officer who told child he was questioning her to aid in her treatment permitted.) See also, *Morgan v. Foretich*, 846 F2d 941 (4<sup>th</sup> Cir. 1988)
  - (b) *Family member's statement on behalf of child:*
    - (i) *State v. Smith*, 337 SE2d 833 (NC 1985) (statement by child to grandmother, repeated by grandmother)
    - (ii) *Mendez v. United States*, 732 F. Supp. 414 (SDNY 1990)(grandmother's statement regarding child's condition)
  - (c) *Identification by child of perpetrator:* issue is whether it is pertinent to appropriate medical treatment
    - (i) *Fleener v. State*, 648 NE2d 652 (In. App. Ct. 1995); *State v. Maldonado*, 536 A2d 600,603 (Conn. App. 1988)(permitted)
    - (ii) *State v. Robinson*, 735 P2d 801 (Ariz. 1987)(permitted)
    - (iii)*State v. Rucker*, 847 SW2d 51 (Tenn. Crim. App. 1992)(permitted)
    - (iv)*State v. Altigibers*, 786 P2d 680 (N. Mex. App. 1989)(permitted)
    - (v) *Ring v. Erickson*, 983 F2d 818 (8<sup>th</sup> Cir. 1992) and *People v.*

*Lalone*, 437 NW2d 611 (Mich. 1989)(contra). Michigan has subsequently permitted identification of the perpetrator by an adult for purposes of medical treatment in *People v. Meeboer* (after remand) 439 Mich. 310,322, 330, 484 NW2d 621 (1992). *Lalone, supra*, was distinguished in *In re Bellamy*, 2004 WL 1883211 (Mich. App. 8/24/04)

(vi) *People v. Veluzat*, 578 A 2d 93 (RI 1990) (contra)

**c) FRE 804: Declarant “Unavailable”**

(1) Definition of “Unavailable”: Unlike FRE 803, FRE 804(a) specifically defines “unavailability” as privilege, refusal, lack of memory, death, mental illness or infirmity, or beyond process of the court.

(2) FRE 804 exceptions:

(a) Former testimony: FRE 804(b)(1)

(b) Dying declaration: FRE 804(b)(2)

(c) Statement against interest: FRE 804(b)(3)

(d) Statement of personal or family history: FRE 804(b)(4)

(e) Forfeiture by wrongdoing: FRE 804(b)(6)

**d) Hearsay and Confrontation issue: *Crawford v. Washington*, 124 S. Ct. 1354 (2004)**

**i) In General:**

- (1) *Crawford v. Washington*, 124 S. Ct. 1354 (2004) (FRE 804(b)(3))
  - (2) *Davis v. Washington*, 126 S. Ct. 226 (2006) 911 call identifying Defendant as perpetrator non-testimonial creating an the “ongoing emergency exception”, however in companion case *Hammon v. Indiana* a battery affidavit given to responding police officer was testimonial and its admission violated the Confrontation Clause. Remanded to Indiana Supreme Court to determine whether forfeiture by wrongdoing resulted in a forfeiture of defendant’s right to confrontation.)
  - (3) *Whorton v. Bockting*, 127 S. Ct. 1173 (2007). (child statement to detective, rule not retroactive)
  - (4) *Giles v. California*, 128 S. Ct. 2678 (2008) (statement of spouse three weeks before homicide did not qualify as a statement admissible under forfeiture by wrongdoing exception)
  - (5) *Melendez-Diaz v. Massachusetts* 69 Mass. App. Ct 1114 (2007), rev. den. 449 Mass 1113 (2007), cert. granted 128 S. Ct. 1647 (2008) (forensic analyst)
- ii) Several courts have held that child statements even though arranged by the prosecution or given in the presence of the prosecutor or police are **non-testimonial** and do **not** violate the Confrontation Clause.
- (1) *People v. Geno* 683 NW2d 687 (Mich. App. 2004). A child’s hearsay statement made to the Executive Director of the Children’s Assessment Center, not to a government employee, did not violate the Confrontation Clause and was not “testimonial” per *Crawford*, supra even though Children’s Protective Services had arranged for the assessment and interview of the child at the Center. The defendant allegedly sexually assaulted his girlfriend's two-year-old daughter. The interviewer noticed blood in the child's pull-up underpants and asked the child if she 'had an owie?' The child answered, 'yes, Dale [defendant] hurts me here,' pointing to her vaginal area." In ruling the hearsay non-testimonial, the court stated: “The child's statement was made to the executive director of the Children's Assessment Center, not to a government employee, and the child's answer to the question whether she had an "owie" was not a statement in the nature of ex parte in-court testimony or its functional equivalent. See also:
  - (2) *People v. Gonzalez*, 2006 WL 2685084 (Mich. App. 9/19/2006) (**unpublished opinion**) which expanded *Geno* and held that a child’s statement in the presence of a police officer to an interviewer who is trained to interview juveniles and make them feel comfortable employed by a private children’s assessment center, “Care House,” and who was not a government employee was not “testimonial.”
  - (3) *People v. T.T. (In re T.T.)*, 825 NE2d 789 (Ill App. 2004) (child’s

statements to physician describing cause of symptoms or pain or general nature of the sexual assault (but not identification of perpetrator) were non-testimonial even though the child was referred by the Department of Children and Family Services and the physician was a member of the child protection unit at the hospital where the exam was conducted.)

- (4) *People v. Vigil*, 127 P3d 916 (Colo. 2006) the Colorado Supreme Court found a child's statement to father, father's friend, and physician were not "testimonial." The child's statements to the doctor were non-testimonial even though the doctor was a member of the child protection team and the police had arranged the physical exam and spoken to the doctor before the examination was conducted. However, the admission of a police videotape interview of the child was a violation of the Confrontation Clause but was harmless and not plain error in light of all the overwhelming evidence of Defendant's guilt in the case reversing the Colorado Court of Appeals which had previously set aside the defendant's conviction due to the Confrontation Clause violation. (See *Lilly v. Virginia*, 527 U.S. 116 (1999) for a similar approach). In *Vigil*, the defendant was convicted for sexually assaulting a seven-year-old boy. At trial, the State showed portions of a videotaped police interview of the child. The boy did not testify at trial. In *People v. Vigil* 104 P.3d 258 (Colo.Ct.App.2004), the Court of Appeals had found that the videotape was "testimonial," rejecting the People's argument that the statement was not testimonial because "it was not made during the course of a police interrogation and because a seven-year-old child would not reasonably expect his statements to be used prosecutorially." The court explained that "[a]lthough the interview in this case was conducted in a relaxed atmosphere, with open-ended, nonleading questions, and although no oath was administered at the outset, it nevertheless amounted to interrogation under Crawford." The interviewing officer "told [the child] he needed to tell the truth," and when the officer asked the child what should happen to the defendant, "the child replied that defendant should go to jail." While the Colorado Court of Appeals did not expressly utilize Crawford's objective witness test and consider the age of the actual witness, the court applied such a test under the facts before it.
- (5) *State v. Scacchetti* 711 NW2d 508 ( Minn. 2006) (child's statement describing sexual assault to pediatric nurse practitioner employed by children's resource center during examinations at hospital and at the center's office did not violate the Confrontation Clause)
- (6) *State v. Stahl*, 855 NE2d 834 (Ohio 2006) (even though the investigating officer arranged and attended examination, sexual assault victim's statements to nurse practitioner at specialized facility for victims of violent sexual assault were non-testimonial even though facility gathered evidence for potential criminal investigation because primary purpose of facility

was to render care to its patients.)

(7) *State v. Krasky*, 736 NW2d 636 (Minn. 2007) (6 counts of second degree criminal sexual conduct. Child's statements to nurse employed by children's resource center were non-testimonial. No governmental actor involved in procuring statement. Court noted that competency of child and reliability of statement are separate considerations from hearsay exclusion and 6<sup>th</sup> amendment concerns.)

iii) Other courts have found that **child victim interviews and statements** obtained by law enforcement, in the presence of law enforcement, or at the direction of law enforcement are "**testimonial**" and a Confrontation Clause violation.

(1) Child's statement to detective is testimonial. *Bockting v. Bayer*, 399 F3d 1010 (9<sup>th</sup> Cir.2005) reversed on other grounds in *Whorton v. Bockting*, 127 S. Ct. 1173 (2007). Under the rules set forth in *Teague v. Lane*, 489 U.S. 288 (1989) the Supreme Court held that *Crawford*, which had overruled prior Supreme Court cases governing the admission of hearsay statement in criminal trials did not announce a "watershed rule" of criminal procedure, such as could be applied retroactively on collateral review to cases already final on direct review through a writ of habeas corpus. The 9<sup>th</sup> Circuit was reversed and the defendant's state conviction for sexual assault with a minor in which the unavailable minor's statements to a detective and mother were permitted under then existing precedent was affirmed.

(2) *Hernandez v. State* 946 So2d 1270 (Fla. 2<sup>nd</sup> DCA 2007) (admission of unavailable child's and unavailable child's parents statements in a child sexual assault case per 803(4) to Child Protection Team nurse at an examination arranged by sheriff was a violation of Confrontation Clause. See also, *Contreras v. State* 910 So2d 901 (Fla. 4<sup>th</sup> DCA 2005) rev. granted 924 So.2d 810 (Fla. 2006) (child's **videotaped** statement to CPT coordinator was testimonial.)

(3) *T. P. v. State*, 911 So2d 1117 (Ala. Crim. App. 2004) (child's statements about sexual abuse to interviewer employed by Dept. of Human Resources at interview that was attended by sheriff's investigator violated Confrontation Clause.)

(4) *Anderson v. State*, 833 NE2d 119 (In. Ct. App. 2005)(child's statements about sexual assault made to social worker during interviews coordinated and directed by state police violated Confrontation Clause.)

(5) *State v. Justus* 205 SW3d 872 ( Mo. 2006) (child's statements describing sexual abuse during interviews conducted by Family Services child abuse investigator and by licensed social worker employed at a child's advocacy center violated confrontation Clause)

(6) *State v. Flores*, 120 P3d 1170 (Nev. 2005)(child's statements to police

child abuse investigator and child protective services investigator concerning her mother's attack on sibling violated the Confrontation Clause)

- (7) *State v. Henderson*, 160 P3d 776 (Kansas 2007) (objective totality of the circumstances standard as to "testimonial." Statement to social worker and detective testimonial. Forfeiture by wrongdoing also inapplicable. Prosecutor argued that D targeted young children who would not be able to testify. )
- (8) Non child case: *State v. Romero*, 133 P3d 842 ( NM Ct. App. 2006) (woman's statement describing a sexual assault to sexual assault nurse examiner during interview and physical examination arranged by police detective were a Confrontation Clause violation.

iv) Similarly, several cases holding that **videotaped interviews** of unavailable child victims conducted by law enforcement, in the presence of law enforcement, or at law enforcement request are "**testimonial**" and violate the Confrontation Clause.

- (1) In *People v. Sisavath*, 118 Cal.App.4th 1396, 13 Cal.Rptr.3d 753 (2004), Sisavath was accused of sexually abusing two children referred to as Victim 1 and Victim 2. The evidence at trial included two hearsay statements of Victim 2: the first a statement to a police officer and the second a videotaped interview with a "trained interviewer at Fresno County's Multidisciplinary Interview Center (MDIC)." The trial court admitted **both** statements, but the California Court of Appeal reversed. As to the first statement, it was "clear that Victim 2's statement to Officer Vincent was testimonial under Crawford." The statement was 'knowingly given in response to structured police questioning.' The People concede this." The second statement contained in the videotaped interview took place after the original complaint had been filed and a preliminary hearing had been held. Although the interview may have had some therapeutic value or may have also been related to a removal proceeding, it was conducted by a "forensic interview specialist" and the deputy district attorney who prosecuted the case and an investigator from the district attorney's office were also present. The court concluded: "Under these circumstances, there is no serious question but that Victim 2's statement was made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." The *Sisavath* court concluded that the Supreme Court's reference to "objective witness" meant an "objective observer," not "an objective witness in the same category of persons as the actual witness-- here, an objective four-year-old." Similar cases involving a child's videotaped interview are:

- (2) *United States v. Bordeaux*, 400 F3d. 548 (8<sup>th</sup> Cir. 2005) (child's videotaped statements describing sexual assault made to a forensic examiner at an interview arranged by law enforcement violated

Confrontation Clause even though such multipurpose statements may also have a medical purpose)

- (3) *People ex rel. R.A.S.*, 111 P.3d 487, 2004 WL 1351383 (Colo.Ct.App.2004), the defendant, a juvenile, allegedly "touched the genitals of a four-year-old boy (the victim) and persuaded the victim to perform oral sex upon him." The victim did not testify. A police investigator, who conducted a videotaped forensic interview of the victim, testified and the videotaped interview was introduced as well. The court noted that "the statement was taken by an investigating officer in a question and answer format appropriate to a child." The court held: "The statement was 'testimonial' within even the narrowest formulation of the Court's definition of that term. We thus conclude that the statement was not admissible at trial.
- (4) *State v. Hooper*, - P3d -, 2006 WL 2328233 (Idaho Ct. App. 2006)(child's video statement about assault to nurse at Sexual Trauma Abuse Response Center was "testimonial" where police arranged interview, officer watched from next room, and police suggested additional questions to nurse)
- (5) *State v. Henderson*, 129 P3d 646( Kan 2006)( child's videotaped statements to detective and social worker who were both members of Exploited and Missing Child Unit about assault were testimonial)
- (6) *State v. Mack*, 101 P3d 349 (Or. (2004)( child's videotaped statements about defendant killing child's brother violated the Confrontation Clause because it was conducted by Department of Human Services worker at direction of police)
- (7) *State v. Blue*, 717 NW2d 558 ( ND 2006) ( child's videotaped statements describing sexual assault to forensic examiner made while police officer watched from separate room violated Confrontation Clause)
- (8) *Rangel v. State*, 199 SW3d 523 (Tex App. 2006)(child's statement describing sexual assault during video taped interview conducted by Child Protective Services investigator violated the Confrontation Clause.)
- (9) *Contreras v. State* 910 So2d 901 (Fla. 4<sup>th</sup> DCA 2005) rev. granted 924 So.2d 810 (Fla. 2006) (child's videotaped statement to CPT coordinator was testimonial.)
- (10) *State v. Courtney*, 692 NW 2d 73 (Minn. 2005) the Minnesota Supreme Court found a violation of the Confrontation Clause harmless with exception of child's reference to seeing defendant with a gun in light of all the overwhelming evidence of Defendant's guilt in the case reversing the Minnesota Court of Appeals which had set aside the defendant's conviction due to the Confrontation Clause violation. (See *Lilly v. Virginia*, 527 U.S. 116 (1999) for a similar approach). *State v.*

*Courtney* involved a child who was not sexually abused, but was a witness in a domestic assault action. Courtney was tried and convicted for assaulting the mother of the child declarant. The child made statements during a videotaped interview which was admitted at trial that on the night in question that she heard things breaking, heard her mother crying, and witnessed Courtney threatening her mother with two guns. In *State v. Courtney*, 682 NW2d 185 (Minn.Ct.App.2004), the Court of Appeals had held: [The child's] statement is testimonial. A child-protection worker, along with a law enforcement officer, interviewed [the child] for the purpose of developing a case against Courtney.... At one point, the interview was stopped by the police officer when he directed the child-protection worker to ask [the child] to draw the guns she saw Courtney allegedly use to threaten [the victim]. The circumstances under which the interview was conducted show it was made in preparation for the case against Courtney.”

- v) Several jurisdictions have held that child’s statements to medical personnel in sexual assault or abuse cases are admissible where statements are **solely made for 803(3)** medical purposes and diagnosis and law enforcement involvement is either limited or nonexistent and there is no indication that the purpose is to gather information for potential criminal prosecution.

- (1) Child’s statements to nurse per TRE 803(4) that “Daddy did it” “Daddy hit me” were not testimonial *McDonald v. State*, 2006 WL 2417177 (Tex. App. San Antonio 8/23/2006)(*unpublished opinion*) In finding it illogical for a two year to conclude that her statements to the nurse would be “testimonial,” the court relied on several factors: 1) spontaneity of the statement, 2) to whom it was made ( police, friend, acquaintance), 3) age or maturity of declarant and whether declarant would reasonably know statement made to police would reach prosecutors and be used against accused, and 4) nature of law enforcement involvement. The *McDonald* court obtained this 4 prong test from two prior Texas sources *Wilson v. State* 2006 WL 228630 (Tex. App. San Antonio 2/1/2006) and *Lagunas v. State* 187 SW3d 503 (Tex. App. Austin 2005, pet. ref’d)
- (2) *State v. Vaught*, 682 NW2d 284 ( Neb. 2004) (child’s statements to emergency room physician about details of assault and identification of perpetrator admissible because only purpose was to obtain medical treatment);
- (3) *Commonwealth v. DeOliveira* 849 NE2d 218 ( Mass. 2006) (child’s statement to emergency room physician about sexual assault were non-testimonial);
- (4) *Foley v. State* 914 So2d 677 (Miss. 2005) (child’s statements about sexual abuse to various therapists and medical professionals were non-testimonial

where defendant failed to argue or show in any way that the therapists or medical professionals had been contacted by the police or were “acting in concert” with the police to interrogate the child, to gather information for potential criminal prosecution, or to investigate her claims.)

- (5) For similar non-child cases, see *State v. Kirby* 908 A2d 506 (Conn. 2006) (kidnap victim’s statements to volunteer medical technician) and *State v. Moses*, 119 P3d 906 ( Wash App. 2005 (wife’s statements about husband’s assault to emergency room physician)

vi) Confrontation and state “Tender Years” exceptions:

- (1) In *Snowden v. State*, 867 A2d 314 (Md. 2005)156 Md. App. 139, 846 A.2d 36 (Spec.App.2004) (Children’s statements to social worker who was required by statute to take statement for use in sexual abuse case was testimonial and excluded). Snowden was convicted of seven counts of child abuse and related offenses arising out of alleged sexual contact with three different minor females, two of whom were ten years old and one of whom was eight. The children did not testify at trial. Instead, a social worker was allowed to relate their testimony pursuant to Maryland’s “Tender Years” statute. Md.Code Ann., Crim. Proc. § 11- 304 (2002)). The social worker had conducted one unrecorded interview with each of the children which was non-leading and general but intended to elicit details of the abuse. The therapeutic motive or effect was secondary and the Snowden court was persuaded the children's statements, testified to by the social worker, were testimonial since the children were interviewed for the expressed purpose of developing their testimony by the social worker, under the relevant Maryland statute that provides for the testimony of certain persons in lieu of a child, in a child sexual abuse case.
- (2) *People v. Moreno*, 160 P3d 242 (Colo. 2007) (Statutory exception permitting child sexual assault victim statements violates 6<sup>th</sup> amendment even though child witness medically unavailable.)
- (3) *See also, State v. Hosty*, 944 So2d 255 (Fla. 2006) (statutory exception to hearsay rule admitting statements of mentally disabled adult victim’s violates 6<sup>th</sup> in that it permits testimonial statements. Mentally disabled adults statement about sexual battery to p.o. was testimonial in nature.)

vii) Child’s statement to parents non-testimonial:

- (a) *Herrera-Vega v. State*, 888 So.2d 66 (Fla.Dist.Ct.App.2004) (a child's statement to a parent is non-testimonial). The court observed testimonial evidence "does not appear to include the spontaneous statements made by D.H. to her mother while being dressed, nor does it include D.H.'s statements to her father."
- (b) *Somervell v. State*, 883 So.2d 836 (Fla.Dist.Ct.App.2004) (a child's statement to a parent is non-testimonial) The court noted: "It seems to

us that statements that a mother hears from her autistic child does not fit within the umbra or penumbra of" any of the categories of testimonial set forth by the Crawford Court.”

(c) *People v. Vigil*, 127 P3d 916 (Colo. 2006) (child’s statement to father and father’s friend non-testimonial)

e) **FRE 807 Residual Exception**

i) Used frequently despite actual language of the rule

ii) Primary focus upon:

(1) Spontaneity and consistency of statement (if not, then excluded),

(2) Unusualness of explicit sexual knowledge by child (if has source of information outside offense, then excluded)

(3) Young children generally don’t fabricate or create such allegations

(4) Cases:

(a) *Oldson v. People*, 732 P2d 1132 (Colo. 1986)

(b) *State v. Robinson*, 735 P2d 801 (Ariz. 1987)

(c) *State v. Sorenson*, 421 NW2d 77 (Wis. 1988)

(d) *People v. Katt*, 662 NW2d 12 (Mich. 2003)

(5) Residual Exception and the Confrontation Clause:

(a) *Idaho v. Wright*, 497 U.S. 805 (1990). Under current analysis, child

statement to police psychologist probably still excluded in that it was “testimonial in nature” in addition to not being “firmly rooted”.

- (b) See *People v. Geno* 683 NW2d 687 (Mich. App. 2004) in which a child’s hearsay statement admitted under residual clause MRE 803(24). The statement had been made to the Executive Director of the Children’s Assessment Center, not to a government employee, did not violate the Confrontation Clause, and was not “testimonial” per *Crawford, supra. People v. Geno* 683 NW2d 687 (Mich. App. 2004).

**f) Miscellaneous Hearsay Exceptions:**

- i) **Recorded Statements Exception:** Rev. Unif. R. Evid. 807 (1986) permits audio visually recorded statement of child or witness describing act of sexual abuse if:

- (1) Minor will suffer trauma,
- (2) Circumstantial guarantees of trustworthiness present,
- (3) Recording requirements followed.

- ii) **States with statutes providing alternative testimonial procedures (i.e audiotape, videotape or closed circuit T.V.) for child witnesses:**

- (1) Alabama (§15-25-2) , Alaska, Arizona, Arkansas (§ 16-44-203), California, Connecticut, Florida, Georgia, Hawaii (H.R.E 616), Idaho (§19-3024A), Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts,

Minnesota, Mississippi (M.R.E. 617), New Jersey (NJSA 2A:84A-32.4), New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Vermont (Vt. R. E 807), Virginia

- (2) Testimony by videotape or closed circuit TV permitted. *Maryland v. Craig*, 497 U.S. 836 (1990) (No 6<sup>th</sup> Amendment violation if individualized finding of serious emotional distress to child.) See also, *Danner v. Motley*, 448 F3d 372 (6<sup>th</sup> Cir. 2006) If not enumerated finding of fact, then procedure precluded. See, *Coy v. Iowa*, 487 US 1012 (1988) where victim was permitted to testify behind a screen and there was not a particularized finding or showing of necessity. In *Coy*, procedure found to violate 6<sup>th</sup> Amendment right to confrontation.). Particularized procedures also permitted in most states including California, Maine, New Mexico etc....
- (3) **Potential area of change:** Justice Scalia wrote majority opinion in *Coy v. Iowa*, 487 US 1012 (1988) reversing because no particularized findings made but also noted that 6<sup>th</sup> amendment requires face to face confrontation. Justice Scalia and 3 others dissented in *Maryland v. Craig*, 497 U.S. 836 (1990) indicating that any statute which does not permit face to face confrontation should be invalidated.

iii) **State Tender Years Hearsay Exception:** Although there is no FRE “Tender Years” exception, some state rules of evidence create special hearsay exceptions for child’s statements in sexual abuse cases.

- (1) States with codified “Tender Years” Exception: Alabama (§15-25-31), Arizona (§13-1416, ARE 803(25)), Arkansas (ARE 804(b)(6)(7)), California (West’s Ann. Cal. Evid. Code §1360), Colorado (§13-25-129), Delaware (11 Del. C. §3513), Florida (§90.803(23)), Georgia §24-3-16, Idaho (§19-3024), Illinois (735 §5/8-2601), Indiana (§35-37-4-6), Iowa (§910A.14), Kansas § 60-460(dd), Maryland (§ 11- 304), Michigan (MRE

803a), Minnesota (MSA§595.02 subd.3), Missouri (§491.075) Mississippi (MSRE 803(25)), Nevada (NRS§51.385), New Jersey (NJRE 803(c)(27)), North Dakota (NDRE 803(24)), Ohio (ORE 807), Oklahoma (12 O.S. Supp. 1984 §2803.1), Oregon (ORE 803(24)), Pennsylvania (42 PACSA §5985.1), South Dakota (SDCL §19-16-38), Tennessee (TRE 803(25)), Texas (Ann. Texas CCP Article 38.072), Utah (76-5-411), Vermont (VRE 804a), Washington (RCW 9A.44.120)

(2) Washington. Wash. Ann. 9A.44-120 permits child's statements if 1) available, 2) subject to cross, and 3) has sufficient indicia of reliability. Statute generally tracks Rev. Unif. R. Evid. 807 (1986). If child unavailable to testify, statute requires "corroboration" to demonstrate trustworthiness as required by *Ohio v. Roberts, supra*.

(3) This "unavailable" and "corroboration" provision of the Washington statute and other rules and statutes like it in other states may violate *Crawford v. Washington, supra* in criminal cases where child's statement is "testimonial" and child is "unavailable." Corroborated non-testimonial would still be permitted.

(4) ***Michigan Rule 803A. Hearsay Exception; Child's Statement about***

***Sexual Act.*** "A statement describing an incident that included a sexual act performed with or on the declarant by defendant or an accomplice is admissible to the extent that it corroborates **testimony given by the declarant during the same proceeding (emphasis added)**, provided:

(a) The declarant was under the age of 10 ( nota bene: if over 10 need an exclusion or some other traditional exception) when the statement was

made;

- (b) The statement is shown to have been spontaneous and without indication of manufacture;
- (c) Either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance;
- (d) The statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule. A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement. This rule applies in criminal and delinquency proceeding only.” See, *People v. Baker*, 251 Mich. 322 (1930) Cf. *People v. Kreiner*, 415 Mich. 372 (1982)

- (5) Potential problem if State Tender Years rule or statute permits statements and children do not testify: Crawford and Confrontation Clause. See In *Snowden v. State*, 867 A2d 314 (Md. 2005) (Children’s statements to social worker who was required by statute to take statement for use in sexual abuse case was testimonial and excluded). Snowden was convicted of seven counts of child abuse and related offenses arising out of alleged sexual contact with three different minor females, two of whom were ten years old and one of whom was eight. The children did not testify at trial. Instead, a social worker was allowed to relate their testimony pursuant to a

Maryland's "Tender Years" statute. Md.Code Ann., Crim. Proc. § 11- 304 (2002)). The social worker had conducted one unrecorded interview with each of the children which was non-leading and general but intended to elicit details of the abuse. The therapeutic motive or effect was secondary and the Snowden court was persuaded the children's statements, testified to by the social worker, were testimonial since the children were interviewed for the expressed purpose of developing their testimony by the social worker, under the relevant Maryland statute that provides for the testimony of certain persons in lieu of a child, in a child sexual abuse case. See also, *People v. Moreno*, 160 P3d 242 (Colo. 2007) (Statutory exception permitting child sexual assault victim statements violates 6<sup>th</sup> amendment even though child witness medically unavailable.) Likewise see, *State v. Hosty* 944 So2d 255 (Fla. 2006) (statutory exception to hearsay rule admitting statements of mentally disabled adult victims violates 6<sup>th</sup> in that it permits testimonial statements. Mentally disabled adult's statements to p.o. about sexual battery were testimonial in nature.)

## V. Competency and Oath

- a) All witnesses, including children, are competent: FRE 601
- b) All witnesses, including children, must take an oath, affirm or acknowledge the difference between telling the truth and a lie and promise to tell the truth. FRE 603
- c) In general, FRE 301 or equivalent State rule governs presumptions. Be careful not to confuse a "rule of law" with a "presumption". As to child in some state jurisdictions:
  - i) Over 7, presumed competent (Rebuttable presumption for child of any age *Litzkuhn v. Clark*, 35 Ariz. 355 (1959); *Artesani v. Gritton*, 252 NC 463 (1960)
  - ii) Under 7, many states presume "incompetent" and "unavailable" under common law but see, *People v. District Court*, 791 P2d 682 (Colo. 1990)(4 year old competent) and *Ricketts v. Delaware* 488 A2d 856 (Del. S. Ct. 1985)

( 6 year old competent)

- d) Where no presumption exists, judge resolves FRE 104(a) preliminary question of fact by observing whether the child has:
  - i) Capacity to observe
  - ii) Capacity to remember
  - iii) Capacity to relate
  - iv) Ability to satisfy the oath requirement, i.e. the ability to differentiate between telling the truth and telling a lie. FRE 603. FRE 603 is designed to be flexible when dealing with children. *United States v. Thai*, 29 F3d 785 (2<sup>nd</sup> Cir. 1984). In *Wheeler v. United States*, 159 U.S. 523 (1895) (3 factors: child's capacity and intelligence, whether child understands difference between telling the truth and falsity, and whether child appreciates duty to tell the truth.)
- e) The judge must also determine whether the child has personal knowledge of events under FRE 602. This analysis is performed under FRE 104(b). The standard is set forth in *United States v. Hickey*, 917 F2d 901 (6th Cir. 1990) which holds that personal knowledge is determined when there is enough evidence that a reasonable juror could find that it is more likely than not that a child's testimony is based on personal knowledge.
- f) The competency hearing:
  - i) Outside presence of the jury, in camera, recorded
  - ii) Parties need not be present at competency hearing, however, if defendant represented by counsel at hearing, defendant has no constitutional right to be present. *Kentucky v. Stincer* 482 U.S. 730 (1987)
  - iii) Although attorneys may question if judge permits, questioning may be limited to the judge only. Questions may be leading FRE 611.
  - iv) Relevancy threshold: Minimum credibility. If reasonable juror would find testimony trustworthy and relevant, it is admissible.
  - v) Evidentiary threshold: "preponderance of the evidence"
  - vi) Typical questions asked:
    - (1) Name

- (2) Address
- (3) Age
- (4) Birthday
- (5) Family members
- (6) School
- (7) Teachers
- (8) Toys
- (9) Activities
- (10) Understand telling the truth or telling a lie with examples

- vii) If a federal case and the child is the victim of child abuse exploitation, or a witness to a crime committed against another, federal statute sets forth special procedures for determining competency of a child witness. 18 U.S.C.A. § 3509(c) requires a written motion and an offer of proof before the hearing is conducted. A hearing will only be conducted if there are “compelling reasons.”
- viii) Even if child determined to be “incompetent,” child’s hearsay statement to others may still be admissible under hearsay exception. Examples, *Morgan v. Foretich*, 846 F2d 941 (4<sup>th</sup> Cir. 1988); *United States v. Nick*, 604 F2d 1199 (9<sup>th</sup> Cir. 1979); *Jones v. United States*, 231 F2d 244 ( DC Cir. 1956) (Now subject to *Crawford* if “unavailable” due to lack of competence and statement is “testimonial)

## **VI. Miscellaneous Trial Issues Involving Child Witnesses**

- a) *Fields v. Murray* 49 F3d 1024(4<sup>th</sup> Cir 1995) where defendant allegedly representing himself, state court did not permit the defendant to personally cross examine victim in sex crime prosecution but permitted the defendant to write out questions and give them to his appointed lawyer
- b) FRE 611. Leading questions permitted with child witness. For example, *State v. Kallin* 877 P2d 138 (Utah 1994) (11 year old had difficult time testifying, required numerous breaks to regain composure, and was crying during direct and cross.)