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California Evidence Code 1228: A Constitutional Analysis

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California Evidence Code 1228: A Constitutional Analysis

Concern over the sexual abuse of children has increased dramatically in recent years.[1] Distressed by the serious nature of this crime, legal commentators and the public have called for more effective means of prosecuting those accused of sexual abuse of children.[2] Accordingly, several state legislatures have enacted statutory exceptions to traditional procedural safeguards in order to assist the prosecution in proving the guilt of defendants in child sexual abuse cases.[3] The proponents of this legislation justify these exceptions by arguing that the sexual abuse of children is a unique crime, the nature of which dictates the need for special laws in order to convict the perpetrators.[4] Opponents of the legislation fear that due to the present state of hysteria about child sexual abuse, defendants are being systematically denied their procedural due process protections.[5]

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1. *"Some Day, I'll Cry My Eyes Out,"* Time, April 23, 1984, at 72-73 (extent of problem is only now beginning to dawn on many authorities); *see, e.g.*, Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations,* 98 HARV. L. REV. 806, 806 (1985).

2. *See* Yun, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases,* 83 COLUM. L. REV. 1745, 1766 (1983) (existing hearsay exceptions inadequate to deal with unique problems associated with child sexual abuse); Wilson, *The Sexually Abused Infant Hearsay Exception: A Constitutional Analysis,* 8 J. JUV. L. 59, 73 (1984) (special hearsay exceptions needed to stop near epidemic sexual abuse of children); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System,* 15 WAYNE L. REV. 977, 1014 (1969) (proposes special child courtrooms); *see also* L.A. Times, Sept. 23, 1982, §V, at 9, col. 1 (Concerned Citizens for Stronger Legislation Against Child Molesters (S.L.A.M.) seeks tougher child molestation laws); L.A. Times, April 6, 1984, §II, at 2, col. 1 (public support sought for tougher California law on child molestations).

3. *See* CAL. PENAL CODE §1377 (allows alleged victims of sexual abuse, who are 10 years or younger, to testify by means of two-way closed-circuit television); WASH. CRIM. CODE §9A.44.120 (permits admission of a hearsay statement about sexual abuse by a child under the age of ten, upon a finding by the court that the circumstances and content of the statement indicate that the evidence is sufficiently reliable to be admitted into evidence).

4. "A new approach is needed, one which is sensitive to the special circumstances of child sex abuse and its victims." Yun, *supra* note 2, at 1766; "Because sexual abuse of children has become epidemic or nearly so . . . a special hearsay exception is needed to make admissible what is often the only direct evidence of the act or its perpetrator's identity: the out-of-court statements of the child victim." Wilson, *supra* note 2, at 73.

5. *See* Frank, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception,* 7 U. PUGET SOUND L. REV. 387, 403-04 (1984); *see also The Other Victims of Child Abuse,* U.S. NEWS & WORLD REPORT, April 1, 1985, at 66 (flurry of arrests and new laws aimed at stopping child abuse misfire and end up creating a "child abuse hysteria"); *The Youngest Witnesses, Is there a "witch hunt" mentality in sex-abuse cases?,*

Prosecutors frequently have a very difficult task proving the guilt of defendants accused of sexually abusing young children.[6] There are rarely any witnesses or corroborative physical evidence of the alleged abuse.[7] In many instances, the prosecutor's only direct evidence is an out-of-court statement made by the child.[8] Unless the child takes the stand or the statement falls within a hearsay exception, the hearsay rule of evidence[9] bars the prosecution from introducing the out-of-court statement of the child.[10] Consequently, several state legislatures have created special exceptions to the hearsay rule to cover this situation.[11] These exceptions allow the prosecution to introduce, under certain circumstances, the out-of-court statements of the allegedly sexually abused child.[12]

Following the trend of establishing special child hearsay exceptions, the California legislature, in January 1985, added section 1228 to the California Evidence Code.[13] The bill enacting section 1228 was in-

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NEWSWEEK, February 18, 1985, at 72-73 (as reports of child abuse increase, the number of false accusations increase, ruining the reputations of many innocent people); Note, *supra* note 1, at 809 (current hearsay and videotaping statutes fail to meet constitutional standards). *Cf.* Armstrong, *The Criminal Videotape Trial: Serious Constitutional Questions,* 55 OREG. L. REV. 567 (1976) (any type of video testimony may deny the defendant the right to confrontation).

6. Yun, *supra* note 2, at 1745-46; Wilson, *supra* note 2, at 59-60; Skolar, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse,* 18 J. MARSH. L. REV. 1, 5-6 (1984).

7. Yun, *supra* note 2, at 1745-46; Wilson, *supra* note 2, at 59-60; Skolar, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse,* 18 J. MARSH. L. REV. 1, 5-6 (1984).

8. Wilson, *supra* note 2, at 73; Note, *supra* note 1, at 806-07; Yun, *supra* note 2, at 1749.

9. Hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Cal. Evid. Code §1200. In California, unless the hearsay falls within a statutory exception, the hearsay is inadmissible. *Id.*

10. Yun, *supra* note 2, at 1747.

11. At least seven states have enacted child hearsay exception statutes since 1982. These are: Colorado, Indiana, Kansas, Minnesota, South Dakota, Utah, and Washington. Note, *supra* note 1 at 811 n.38.

12. Frank, *supra* note 5, at 387-88. The Washington statute provides in part:"A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings . . . if: (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content and circumstances of the statement provide sufficient indicia of reliability; and (2) The child either: (a) Testifies at the proceedings; or (b) Is unavailable as a witness: Provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act." WASH. CRIM. CODE §9A.44.120. The Washington statute has been the model for all but one of the child hearsay statutes in the other states. Note, *supra* note 1, at 811. The Kansas statute differs in that it applies only if the child victim is not available to testify at trial, and it applies to any crime in which the victim is a child. Note, *supra* note 1, at 811 n.39. A California assembly bill, 34 (Mojonnier), which would have established a hearsay exception very similar to that of Washington, failed to pass the Assembly Public Safety Committee on May 20, 1985.

13. CAL. EVID. CODE §1228 reads in full:

> Notwithstanding any other provision of law, for the purpose of establishing the elements of the crime in order to admit as evidence the confession of a person accused of

troduced in response to a highly publicized Solano County case in which the defendant was charged with sexually abusing his twelve-year-old stepdaughter.[14] The stepfather confessed to fondling his stepdaughter but the court still confined the stepdaughter to juvenile hall for eight days for refusing to testify.[15] Because the stepdaughter refused to testify, the corpus delicti of the alleged crime could not be established, and therefore, the stepfather's confession was inadmissible.[16] Without the confession, the prosecution's case collapsed and the charges were ultimately dismissed.[17] Section 1228 was enacted to avoid the same problem in similar future cases.[18]

Section 1228 is a hearsay exception which provides that a hearsay statement made by a child in a sexual abuse case may be used to satisfy the corpus delicti rule[19] in certain circumstances.[20] Existing law requires that the elements of a crime, "the corpus delicti," must be established by evidence other than the defendant's confession.[21] Unless

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violating Section 261, 264.1, 285, 286, 288, 288a, 289, or 647a of the Penal Code, a court, in its discretion, may determine that a statement of the complaining witness is not made inadmissible by the hearsay rule if it finds all of the following: (a) The statement was made by a minor child under the age of 12, and the contents of the statement were included in a written report of a law enforcement official or an employee of a county welfare department. (b) The statement describes the minor child as a victim of sexual abuse. (c) The statement was made prior to the defendant's confession. The court shall review with caution the testimony of a person recounting hearsay where there is evidence of personal bias or prejudice. (d) There are no circumstances, such as significant inconsistencies between the confession and the statement concerning material facts establishing any element of the crime or the identification of the defendant, that would render the statement unreliable. (e) The minor child is found to be unavailable pursuant to paragraph (3) of subdivision (a) of Section 240 or refuses to testify. (f) The confession was memorialized in a trustworthy fashion by a law enforcement official. If the prosecution intends to offer a statement of the complaining witness pursuant to this section, the prosecution shall serve a written notice upon the defendant at least 10 days prior to the hearing or trial at which the prosecution intends to offer the statement. If the statement is offered during trial, the court's determination shall be made out of the presence of the jury. If the statement is found to be admissible pursuant to this section, it shall be admitted out of the presence of the jury and solely for the purpose of determining the admissibility of the confession of the defendant.

CAL. EVID. CODE §1228 (added by Stats. 1984, c. 1421, p. ____, §1.).

14. Letter of intent from Senator Barry Keene to Governor George Deukmejian (August 30, 1984) (explaining the purpose of and reasons for Evidence Code section 1228). Copy on file at the *Pacific Law Journal.*

15. L.A. Times, Jan. 11, 1984, §I, at 13, col. 4.

16. *Id.*

17. L.A. Times, Jan. 10, 1984, §I, at 3, col. 6.

18. Letter of intent, *supra* note 14.

19. Corpus delicti means the body of a crime. BLACK'S LAW DICTIONARY, 181 (abridged 5th ed. 1983). The corpus delicti rule requires a showing of all elements of an alleged crime prior to admission of the defendant's confession.

20. CAL. EVID. CODE §1228.

21. People v. Cantrell, 8 Cal. 3d 672, 679-80, 504 P.2d 1256, 1260, 105 Cal. Rptr. 792, 796 (1973).

the corpus delicti can be established by independent evidence, a defendant's confession is inadmissible.[22] The purpose of section 1228 is to provide a mechanism by which the corpus delicti of the crime may be established when a child sexual abuse victim is unavailable, or refuses to testify.[23] The out-of-court statement of the child is heard by the judge out of the presence of the jury and solely for the purpose of determining the admissibility of the confession of the defendant.

First, this comment will briefly examine the history of the corpus delicti rule in order to establish the origin and purpose of the rule. Next, the rationale and policy reasons for the creation of the corpus delicti rule will be assessed to determine whether they continue to justify the use of the rule in California. After concluding that the corpus delicti rule is still necessary to protect defendants' rights in California, this comment proposes that the defendant's sixth amendment right to confrontation may be violated by the use of a hearsay statement under Evidence Code section 1228. Thus, the test enunciated in the United States Supreme Court case of *Ohio v. Roberts*[24] should be applied to the hearsay exception created by section 1228. This comment will conclude that because Evidence Code section 1228 fails to meet the strict standards set forth in *Roberts*, section 1228 should be ruled unconstitutional. As a preliminary matter, a review of the current state of the corpus delicti rule in California is necessary.

The Corpus Delicti Rule

The corpus delicti rule requires that a prima facie showing of the elements of the crime charged be made before a defendant's extrajudicial statements, admissions or confession may be received in evidence.[25] Before the defendant's out-of-court statements are admissible, evidence of the crime other than those statements must be presented.[26] A limited exploration of the history of the corpus delicti rule is necessary in order to analyze section 1228, because the code section attempts to mitigate the importance of this rule.

Locating the origin of the corpus delicti rule is difficult.[27] One legal scholar has suggested that the elements of the corpus delicti rule existed

22. *Id.*
23. Letter of intent, *supra* note 14.
24. 485 U.S. 56, 66 (1980).
25. *Cantrell*, 8 Cal. 3d at 679, 504 P.2d at 1260, 105 Cal. Rptr. at 796.
26. *Id.* at 679-80, 504 P.2d at 1260, 105 Cal. Rptr. at 796.
27. For more in-depth discussion of the historical background of the corpus delicti rule, see generally Note, *Proof of the Corpus Delicti Aliunde the Defendant's Confession,* 103 U.

in Roman law.[28] Others argue that the rule was a result of the general distrust of confessions by the English common law courts.[29] Originally in England the defendant's confession was sufficient by itself to support a conviction.[30] Following this precedent, an English court in the seventeenth century sustained a murder conviction solely upon the uncorroborated confession of the defendant.[31] Several years after the defendant was executed, the supposed victim returned with a bizarre story of having been captured and sold as a slave in Turkey.[32] Similar shocking cases, coupled with the writings of legal scholars, led the courts to a general distrust of confessions.[33] Currently, every jurisdiction in the United States, with the exception of Massachusetts, requires that extrajudicial confessions be corroborated by some independent evidence.[34]

Two main policy concerns underlie the development of the corpus delicti rule.[35] First, a confession may be unreliable if the confession was coerced or induced by abuse of authority.[36] Second, a confession may be unreliable because the defendant is not telling the truth.[37]

PA. L. REV. 638 (1955); C. MCCORMICK, MCCORMICK ON EVIDENCE §147 (E. Cleary 3d ed. 1984); 7 J. WIGMORE, EVIDENCE §§2070-72 (Chadbourn Rev. 1978); Ayling, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions,* 1984 WISCONSIN L. REV. 1121 (1984); Schwartz, *California's Corpus Delicti Rule: The Case for Review and Clarification,* 20 UCLA L. REV. 1055 (1973).

28. 1 S. GREENLEAF, EVIDENCE §217 at 279 (6th ed. 1852). For an interesting analysis of the Greenleaf theory, see Schwartz, *supra* note 27, at 1058 n.14.

29. Schwartz, *supra* note 27, at 1058 n.15; 7 J. WIGMORE, *supra* note 27, §2070, at 393 n.3.

30. Note, *supra* note 27 at 638; Ayling, *supra* note 27 at 1126.

31. *Perry's Case,* 14 HOW. ST. TR. 1312, 1315 (1660). The alleged "victim" had been kidnapped and taken as a slave in Turkey. The defendant, his servant, was questioned concerning his failure to return home after being sent to locate the "victim." For some unknown reason, the defendant confessed to murdering his master, implicating not only himself but his brother and mother as well. The three were subsequently convicted and executed on the basis of the "victim's" disappearance, a bloodied hat, and the defendant's confession. *Id. See* Note, *supra* note 27 at 638-39; *see also* Ayling, *supra* note 27 at 1126; Schwartz, *supra* note 27 at 1060-61.

32. Note, *supra* note 27 at 638-39; Ayling, *supra* note 27 at 1126; Schwartz, *supra* note 27 at 1060-61.

33. Note, *supra* note 27 at 639-40; Ayling, *supra* note 27 at 1126; Schwartz, *supra* note 27 at 1061-65. Blackstone went so far as to describe confessions as the "weakest and most suspicious of all testimony." 4 W. BLACKSTONE COMMENTARIES 357.

34. Ayling, *supra* note 27, at 1126 n.18 (list of jurisdictions and statutes pertaining to corpus delicti rule). The Massachusetts Supreme Court believes that the jury is competent to evaluate the probative value of an uncorroborated confession. *Id.* at 1126 n.17.

35. Ayling, *supra* note 28 at 1122-25; Note, *supra* note 27 at 676; *see* Schwartz, *supra* note 27 at 108791.

36. This concern stems not only from possible police use of "third degree" methods to obtain a confession, but also from fear that a confession may be obtained through more subtle types of coercion which may take place during questioning. Note, *supra* note 27 at 643; Ayling, *supra* note 27 at 1162-76.

37. A confession may be false for several reasons. First, the defendant may be mistaken as to the facts (e.g., accused confesses to killing a person by hitting the person on the head,

The assumption behind the first concern is that the corpus delicti rule functions to correct possible abusive police conduct in obtaining a confession.[38] The primary safeguard against the use of *uncoerced* false confessions, on the other hand, has been the corroboration requirement of the corpus delicti rule.[39] In contrast to the other rules excluding confessions, which are mainly concerned with the abuse of authority, the corroboration requirement of the corpus delicti rule directly tests the reliability of a confession.[40] Thus the primary purpose of the corpus delicti rule is to prevent "errors in conviction based upon untrue confessions alone."[41]

California Law

In California, the corpus delicti rule operates in two ways to assure the reliability of a confession. First, the corpus delicti rule specifies the findings that must be made by a judge before a confession may be admitted into evidence.[42] Second, the corpus delicti rule specifies the findings that must be made by a jury before a conviction is allowed.[43]

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when the person is not actually dead). Second, the person may be mistaken as to the law (e.g., accused who does not understand the differences between murder and noncriminal homicide confesses to murder). Finally, a confession may be false for purely psychological reasons. Certain psychological disorders may lead a person to confess to a crime that he has never committed. Note, *supra* note 27 at 643-44. In an extensive empirical study, Ayling examines whether false confessions occur frequently enough to justify following the ancient common law corpus delicti rule. Ayling examines psychological, sociopsychological, and sociological causes of false confessions. Ayling demonstrates that the danger of false confessions is not limited to pathological persons. Rather, even the most "normal" person may confess falsely. Additionally, the reliability problem includes more subtle behavior than full-blown fantastic false confessions. Subtle distortions of memory and self-perception can cause an innocent suspect to make incriminating statements unwittingly, without consciously acknowledging guilt. Similarly, a guilty person can be led to overstate the perceived degree of guilt. Finally, perhaps the most subtle manifestation of a false confession is the ability of an entirely innocent suspect to utter false inculpatory statements in moments of panic or confusion. Ayling concludes by contending that the corpus delicti rule is an insufficient safeguard against false confessions, that should be supplemented by additional procedures. Specifically, police should make a complete audio or video recording of the entire interrogation, defense counsel should be encouraged to secure expert witnesses to analyze the interrogation, and the order of proof should be changed to facilitate a more objective appraisal of the extent of corroboration. Ayling, *supra* note, 27 at 1203.

38. Ayling, *supra* note 27 at 1128; Note, *supra* note 27 at 643; *see also* Schwartz, *supra* note 27, at 1089 (Schwartz recognizes prevention of police misconduct in obtaining a confession as one of the reasons given for the corpus delicti rule, but argues that this function of the rule is now obsolete).

39. Ayling, *supra* note 27, at 1124.

40. *Id.* at 1127.

41. Warszower v. United States, 312 U.S. 342, 347 (1941).

42. The judge must be satisfied that a prima facie showing of the corpus delicti has been made before the confession is admitted into evidence. People v. Cantrell, 8 Cal. 3d at 679, 504 P.2d at 1260, 105 Cal. Rptr. at 796.

43. The second aspect of the corpus delicti rule is summarized in the current standard jury instruction given on the corpus delicti rule: "No person may be convicted of a criminal

When the prosecution offers an alleged confession by the defendant, a preliminary question is presented for the trial judge.[44] If the judge determines that the prosecution has presented sufficient evidence to constitute prima facie proof that a crime was committed, the corpus delicti is established and the trial judge will permit the confession to be introduced into evidence.[45] If the judge determines that the corpus delicti has not yet been established, the confession will be inadmissible.[46] Admission of the confession allows the jury to consider the confession in determining the guilt of the defendant. In California, however, the judge is required to instruct the jury that they must find that the confession has been corroborated before deciding the guilt or innocence of the defendant.[47] Thus, although the question of corroboration is resubmitted to the jury, the judge makes an initial ruling on whether the confession will be admitted into evidence.

If a confession is uncorroborated, the confession is excluded from evidence, not because it is irrelevant, but because policy reasons support exclusion.[48] The policy reasons for the exclusion of an uncorroborated confession are: (1) prevention of conviction of the innocent; (2) motivation for the police to undertake a thorough investigation of the crime; and (3) prevention of overreliance on the confession by the jury in making a determination of guilt.[49] In order to effectuate these policies, especially the concern over the jurors' view of confessions, the question of whether the confession has been sufficiently corroborated to be admissible is best left to the determination of the judge.[50]

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offense unless there is some proof of each element of the crime independent of any confession or admission made by him outside of this trial." California Jury Instructions, Criminal (CALJIC) No. 2.72, (3d ed. 1970). Whether or not requested to do so, the trial judge must give such an instruction to the jury in every criminal case in which the defendant's confession or admission is introduced in evidence. People v. Beagle, 6 Cal. 3d 441, 445, 99 Cal. Rptr. 313, 321 (1972). Failure to do so constitutes error. *Id.* The error may not be considered prejudicial, however, if the record contains sufficient evidence, other than the confession or admission, to establish the corpus delicti. *Id.*

44. *See* CAL. EVID. CODE §405 (provides in part that "[w]hen the existence of a preliminary fact is disputed . . . the court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises").

45. *See supra* note 42.

46. *See supra* notes 16-17 and accompanying text.

47. *See supra* note 43.

48. Ayling, *supra* note 27, at 1139.

49. *Id. See also* Note, *supra* note 27, at 642-49; Schwartz, *supra* note 27, at 1087-90.

50. Ayling, *supra* note 27, at 1139-40; *see also* Note, *supra* note 27, at 677 (recognizing that jury's thinking may be colored by introduction of a confession).

In California, the corpus delicti rule became part of the body of case law in 1867.[51] The California Supreme Court held that, absent proof of a crime other than the extrajudicial confession of the defendant, a conviction could not be sustained.[52] Gradual judicial refinement and acceptance of the rule followed. Today, the corpus delicti rule in California prohibits the introduction of the defendant's confession unless the prosecution has presented proof of the crime independent of the confession of the accused.[53] Although modern law does extend more protection to the defendant, the policies underlying the corpus delicti rule necessitate the continued use of the rule.[54] The California courts have consistently held that the corpus delicti rule is a well-established rule of law and that the continued use of the rule is necessary to protect the rights of defendants who have confessed to a crime.[55]

Evidence Code section 1228 allows a judge to hear, under certain

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51. People v. Jones, 31 Cal. 565 (1867).

52. *Jones*, 31 Cal. at 569. The trial court judge struggled with the issue of whether to admit the defendant's confession as evidence establishing the corpus delicti of the alleged crime. The California Supreme Court reasoned that no evidence of the crime, and therefore no proof of the corpus delicti had been presented. Thus insufficient evidence existed for conviction. *Id.* For an in-depth discussion of the intricacies of the *Jones* case, see Schwartz, *supra* note 27 at 1066 nn. 51-53. The Supreme Court later developed the corpus delicti doctrine into a test that determines the admissibility of the defendant's extrajudicial statement. *See* People v. Simonsen, 170 Cal. 345, 40 P. 440 (1895) and *infra* note 53.

53. People v. Cantrell, 8 Cal. 3d at 679, 504 P.2d at 1260, 105 Cal. Rptr. at 796; People v. Quarez, 196 Cal. 404, 409 (1925). While the court in *Jones* was concerned with the sufficiency of the defendant's statement for conviction, the *Simonsen* court held that the defendant's out-of-court statements would not be admissible at all, absent independent evidence of the corpus delicti. *Compare Jones*, 31 Cal. at 569 *with Simonsen*, 170 Cal. at 346, 40 P. at 440. In *Simonsen*, the California Supreme Court held that "[i]t is elementary that the corpus delicti must be established before the extra-judicial statements and admissions of a defendant are admissible in evidence, and can be considered as tending to establish the fact to which they relate." People v. Simonsen, 170 Cal. at 346, 40 P. at 440.

54. Ayling, *supra* note 27; Note, *supra* note 27.

55. A question arose as to the fate of the corpus delicti rule in California after passage of the 1967 California Evidence Code. Section 351 of that Code states: "Except as otherwise provided by statute, all relevant evidence is admissible." CAL. EVID. CODE §351. The corpus delecti rule had been based entirely on decisional law and had not yet been statutorily recognized in California. Therefore, the sweeping language of section 351 had arguably abolished the corpus delicti rule in California. Apparently, only one commentator has recognized this result. For his analysis, see Graham, *California's "Restatement" of Evidence: Some Reflections on Appellate Repair of the Codification Fiasco*, 4 LOY. U. OF L.A.L. REV. 279 (1971). In *People v. Starr*, the Court of Appeal for the Second District held that despite Evidence Code section 351, the corpus delicti was still required to be established prior to the admission of the defendant's out-of-court admissions. People v. Starr, 11 Cal. App. 3d 574, 583, 89 Cal. Rptr. 906, 912 (1970). The *Starr* court did not believe that "such a firmly established and fundamental rule of the criminal law of years' standing was overruled by any vague and indecisive provision in the Evidence Code." *Id.* Subsequently, in *People v. Cantrell*, the California Supreme Court again stated that a prima facie showing of the corpus delicti of the crime charged must be established before a defendant's extrajudicial statements, admissions or confession may be received in evidence. People v. Cantrell, 8 Cal. 3d at 679, 504 P.2d at 1260, 105 Cal. Rptr. at 796.

conditions, the out-of-court statement of an allegedly sexually abused child, solely for the purpose of establishing the elements of the crime, in order to admit as evidence the confession of the defendant.[56] Prior to hearing the child's out-of-court statement, the judge must find that: (1) the statement was made by a child under the age of twelve, and the contents were included in a written report; (2) the statement describes the child as a victim of sexual abuse; (3) the statement was made prior to the defendant's confession; (4) no significant inconsistencies exist between the confession and the statement that would render the statement unreliable; (5) the child is unavailable to testify pursuant to paragraph (3) of subdivision (a) of California Evidence Code section 240 or because of a refusal to testify; and (6) the confession was memorialized in a trustworthy fashion by a law enforcement official.[57] If the statement is found to be admissible pursuant to the above conditions, then the judge will hear the statement out of the presence of the jury.[58] Because section 1228 allows the prosecution to use the alleged victim's statement without producing the child as a witness, serious questions are raised regarding the defendant's right to confront accusing witnesses. This comment next will examine whether use of a child's hearsay statement to establish the corpus delicti violates the defendant's constitutional right to confrontation. The first step in this analysis is to determine to what California proceedings the right of confrontation applies.

Scope of the Confrontation Requirement

The confrontation clause of the sixth amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[59] In the landmark case of *Pointer v. Texas*,[60] the sixth amendment was made binding on the states.[61] Although the right of confrontation is basically a trial right,[62] California courts have extended the right to confrontation beyond the trial stages of a criminal proceeding.[63] In *Herbert v. Superior Court*,[64] the Third District Court of Appeal

56. Cal. Evid. Code §1228.
57. *Id.*
58. *Id.*
59. U.S. Const. amend. VI.
60. 380 U.S. 400 (1965).
61. *Id.* at 406.
62. Barber v. Page, 390 U.S. 719, 725 (1968); Snyder v. Massachusetts, 291 U.S. 97, 107 (1934).
63. *See infra* notes 64-66 and accompanying text.

held that the right of confrontation applies in preliminary hearings.[65] The court stated further that the right to confrontation is not limited to the trial stages of proceedings, but extends to any phase of the proceedings at which witnesses are called for questioning.[66]

Section 1228 provides for a hearing at which witnesses will testify.[67] The prosecution is allowed to bring in witnesses to recount the statements made by the child who was allegedly sexually abused.[68] The holding in *Herbert* would dictate that the defendant's right to confrontation is applicable, since a witness will testify at the hearing provided for under section 1228.

The fact that the right of confrontation applies to section 1228 hearings does not necessarily mean that the confrontation clause insures the defendant the right to cross-examine the child hearsay declarant. The child must also be found to be a "witness against" the accused within the meaning of the sixth amendment.[69] United States Supreme Court decisions have provided some clues for determining whether an out-of-court declarant should be considered a witness against the accused.[70] One factor to consider is the use to which an out-of-court statement is put.[71] For example, in determining whether the declarant is a "witness against" the accused, the Supreme Court has considered the importance of the evidence to the case of the prosecution.[72] If the evidence offered by the out-of-court declarant makes that declarant the principal witness[73] against the defendant, the witness is more likely to be a "witness against." Additionally, if the out-of-court statement of the declarant is the only direct evidence[74] against the accused, there is greater likelihood that the declarant will fall within the meaning

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64. 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981).

65. *Id.* at 666, 172 Cal. Rptr. at 852.

66. *Id.*

67. Section 1228 provides in pertinent part: "The court shall view with caution the testimony of a person recounting hearsay where there is evidence of personal bias or prejudice." CAL. EVID. CODE §1228(c). Inherent in this language is the fact that the prosecution will be allowed to bring a person in front of the judge to recount the statement that the child made to that person.

68. *See supra* note 67.

69. The sixth amendment provides in part that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

70. *See infra* notes 72-74 and accompanying text.

71. 4 D. LOUISELL AND C. MUELLER, FEDERAL EVIDENCE §418 (1980) at 151.

72. *Id.*

73. *Pointer*, 380 U.S. at 403.

74. Douglas v. Alabama, 380 U.S. 415 (1965). The confession of the co-offender implicating the defendant was the only direct evidence that he had fired the shotgun, and this taken with the other circumstances surrounding the shooting, amounted to a "crucial link in the proof of petitioner's act and of the requisite intent to murder." *Id.* at 419.

of the sixth amendment. On the other hand, if the statement of the declarant is neither crucial nor devastating to the defense, then the declarant will probably not be considered a "witness against" the accused.[75]

A second factor to consider in determining whether the declarant should be considered a "witness against" is the potency or persuasive force of the out-of-court statement.[76] The greater the possibility that a statement will influence the trier of fact, the greater the need to view the declarant as a "witness against" the defendant.[77] Taking the factors discussed above into consideration, the effect of admitting a hearsay statement of a child for the purpose of establishing the corpus delicti will be examined.

The Child As A Witness Against

In any case in which the prosecution must use the hearsay statement of the child to establish the corpus delicti, the child is probably not just the principal witness but the only witness against the accused.[78] Sexual abuse crimes against children generally lack any witnesses other than the victim and the perpetrator.[79] Although the statement of the child will never be heard by the trier of fact, the statement will be used to establish the admissibility of what is in most cases the only direct evidence against the accused, namely, the confession of the accused. Thus, the use of hearsay evidence is without doubt a crucial link in the prosecutor's case. Without the child's hearsay statement to establish the corpus delicti, the defendant's confession will most likely not be admitted.[80] If the confession of the defendant is not admitted, then the case of the prosecution will probably collapse.[81] This result may not occur in all child sexual abuse cases. If, however, the evidence of the prosecutor other than the child's statement is not

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75. Dutton v. Evans, 400 U.S. 74 (1970). "This case does not involve evidence in any sense 'crucial' or 'devastating' . . . ." *Id.* at 87. The Court emphasized that the statement of the most important state witness "was of peripheral significance at most." *Id.*

76. D. Louisell and C. Mueller, *supra* note 71, at 153.

77. *See* D. Louisell and C. Mueller, *supra* note 71, at 153.

78. *See supra* note 7 and accompanying text.

79. *Id.*

80. This was the situation in a Solano County case. The young girl would not testify and therefore the stepfather's confession was inadmissible. L.A. Times, Jan. 11, 1984, §I, at 13, col. 4. Of course, if the prosecution can produce enough corroborative evidence of the crime to make a prima facie showing of the corpus delicti of the crime, the defendant's confession would be admissible even without the testimony of the child.

81. This was the problem confronted by the prosecution in the Solano County case, which resulted in dismissal of the charges. L.A. Times, Jan. 10, 1984, §I, at 3, col. 6.

enough to establish a prima facie showing of the corpus delicti, the prosecutor is unlikely to have sufficient evidence to prove the guilt of the defendant without the confession. Finally, although the hearsay statement of the child will not be heard by the jury, the introduction of the confession, resulting from use of the statement, will have a tremendous impact and persuasive effect upon the trier of fact. Although cautionary instructions are required, consideration of a confession by a jury has a substantial impact upon the jury's determination of the guilt or innocence of the accused.[82]

The crucial nature of the child's hearsay statement under section 1228 dictates that the child should be considered a "witness against" the defendant. Therefore, the right to confrontation should apply to the hearing provided in section 1228. The next step in this comment will be an exploration of whether the hearsay exception created by section 1228 violates a defendant's right to confrontation.

HEARSAY EXCEPTIONS AND THE RIGHT TO CONFRONTATION

Resolving the relationship between the sixth amendment and the hearsay doctrine is a perplexing task.[83] If the language of the sixth amendment were taken literally, the confrontation clause would appear to require the exclusion of any statement made by a declarant not present at trial.[84] Nevertheless, the United States Supreme Court has rejected a complete bar as unintended and too extreme.[85] The Court did acknowledge, however, that the confrontation clause was intended to exclude some hearsay.[86]

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.[87] In California, Evidence Code section 1200 states the hearsay rule.[88] The hearsay rule defines hearsay evidence and provides that such evidence is inadmissible unless the evidence

82. *See* Note, *supra* note 27, at 677; *see* Ayling, *supra* note 27, at 1139.

83. Attempts to define and explain the relationship between the sixth amendment and the hearsay rule has fostered volumes of scholarly writing. *See generally* Seidelson, *Hearsay Exceptions and the Sixth Amendment,* 40 GEO. WASH. L. REV. 76 (1971); Westen, *The Future of Confrontation,* 77 MICH. L. REV. 1185 (1979); Graham, *The Right to Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One,* 8 CRIM. L. BULL. 99 (1972); Baker, *The Right to Confrontation, The Hearsay Rules and Due Process—A Proposal For Determining When Hearsay May Be Used in Criminal Trials,* 6 CONN. L. REV. 529.

84. *Roberts,* 448 U.S. at 63.

85. *Id.*

86. *Id.*

87. CAL. EVID. CODE §1200.

88. *Id.*

meets the conditions of an exception established by law.[89] The underlying reason for the hearsay rule is the assumption that the testimony of a witness relating to an out-of-court statement made by one other than the witness is less reliable than the first hand testimony of a person.[90]

The United States Supreme Court bases the preference for face-to-face firsthand testimony on an interpretation of the confrontation clause. The Court has held that the confrontation clause requires an opportunity for the accused to be present and cross-examine the witnesses who are testifying.[91] Cross-examination gives the jury the chance to observe the demeanor of witnesses, under oath, and subject to challenge by the defense.[92] Although the Supreme Court has demonstrated a preference for live, cross-examined testimony, the Court recognizes exceptions to the hearsay rule.[93] These exceptions are based upon the belief that certain out-of-court statements are likely to be extremely reliable.

The Supreme Court has developed some general guidelines to assist courts in determining whether the admission of a hearsay statement violates the confrontation clause.[94] When the declarant actually testifies at trial, the Court has consistently found hearsay evidence admissible, reasoning that the opportunity to cross-examine the declarant concerning the content of the out-of-court statement sufficiently tests the reliability of the statement.[95]

A different situation is presented, however, when the out-of-court declarant will not testify in court. In *Ohio v. Roberts*,[96] the United States Supreme Court enunciated a two-part test to determine the boundaries of admissible hearsay when the declarant is not present for

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89. *Id.*

90. 4 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE 800-09 (1982). The presence of a witness in court under oath solemnifies the occasion; the jury can observe the witness and the defendant can cross-examine. The three together result in an expectation that the witness will tell the truth. Without these three conditions present, testimony may be unreliable "because faults in perception, memory, and narration of the declarant will not be exposed." *Id.* at 800-11. *See* People v. Green, 3 Cal. 3d 981, 989, 479 P.2d 998, 1003, 92 Cal. Rptr. 494, 499 (1971).

91. *Roberts*, 448 U.S. at 63-64.

92. *Id.*

93. *See* Chambers v. Mississippi, 410 U.S. 284, 29899 (1973); *Roberts*, 448 U.S. at 62.

94. The common law hearsay exceptions are merely rules of evidence; they do not mark the boundary of the confrontation clause. *See* Dutton v. Evans, 400 U.S. 74, 82, 86 (1970). The Supreme Court has both upheld the admission of hearsay evidence not embraced by traditional exceptions, and held unconstitutional the admission of hearsay falling within arguably recognized exceptions. *See* California v. Green, 399 U.S. 149, 155-65 (1970).

95. *See* Chambers v. Mississippi, 410 U.S. at 301; Nelson v. O'Neil, 402 U.S. 622, 626-27 (1971); California v. Green, 399 U.S. at 158-61.

96. 448 U.S. 56 (1980).

cross-examination at trial.[97] First, the prosecution must demonstrate that the declarant is unavailable after a "good faith" effort has been made to produce the declarant.[98] Second, the hearsay evidence must have sufficient "indicia of reliability."[99] Reliability can be established by showing either that the evidence falls within a firmly-rooted[100] hearsay exception, or by demonstrating that the hearsay bears particularized guarantees of trustworthiness.[101]

Evidence Code section 1228 is an exception to the hearsay rule which allows a judge to hear the statement of a child when the child will not be present to testify at trial.[102] The child's statement will be conveyed to the judge through the testimony of a third party,[103] thus eliminating the opportunity for the defense to cross-examine the child declarant. Therefore, the two-part test set forth in *Ohio v. Roberts* should be applied to section 1228 to assess whether this hearsay exception denies the defendant's right to confront the witness against him.

THE UNAVAILABLE DECLARANT REQUIREMENT

The requirement of unavailability expressed in *Roberts* reflects a balancing of competing interests. The Court strives to ensure that the accused will have the opportunity to confront the declarant in court whenever possible.[104] In some circumstances when the declarant is unavailable to testify, however, the prosecution may be allowed to use the out-of-court statement of the declarant.[105] In this case, the state bears the burden of demonstrating the unavailability of the declarant whose out-of-court statement is in issue.[106]

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97. *Id.* at 65-66.
98. *Id.* at 66.
99. *Id.*
100. *Id.* Whether "firm rooting" is a function of either the longevity of an exception, the number of jurisdictions recognizing the exception, or both, is uncertain. The statements of children have been admitted into court using a variety of established hearsay exceptions. *See* Yun, *supra* note 2 at 1753-63; Skolar, *supra* note 6 at 7. The most widely used exception has been the excited utterance or *res gestae* exception. Yun, *supra* note 2, at 1753.
101. *Roberts*, 448 U.S. at 66.
102. CAL. EVID. CODE §1228.
103. *Id.*
104. *See* Ohio v. Roberts, 484 U.S. at 65. "The basic litmus of Sixth Amendment unavailability is established: '[A] witness is not 'unavailable' for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial.'" *Id.* at 74, citing Barber v. Page, 390 U.S. 719, 724-25 (1968).
105. *See* Mattox v. United States, 156 U.S. 237, 243 (1895).
106. *Roberts*, 448 U.S. at 74-75. In California, the burden of proof of unavailability is on the proponent of the evidence. People v. Enriquez, 19 Cal. 3d 221, 236, 561 P.2d 261, 270, 137 Cal. Rptr. 171, 180 (1977).

One of the preconditions to the admissibility of the child's hearsay statement under Evidence Code section 1228 is that the child be found unavailable. The child must be found unavailable either pursuant to paragraph (3) of subdivision (a) of Evidence Code section 240, or because of a refusal to testify.[107] Evidence Code section 1228 is unclear with respect to what is needed in order for a child's refusal to testify to establish unavailability. The wording of the statute indicates that mere refusal by the child to testify is sufficient to render the child unavailable.[108] This comment will propose that under current California case law, a recalcitrant witness may be found unavailable only upon (1) expert corroboration that the witness refuses to testify out of justifiable fear, or (2) a showing that the witness persists in refusing to testify even after the court has imposed coercive sanctions against the witness.

Prior to enactment of section 1228, California statutory law had not recognized mere refusal to testify as a ground constituting unavailability.[109] California case law, however, has recognized refusal to testify as sufficient to deem the witness unavailable in two circumstances. The first is when fear of testifying by the witness constitutes a mental infirmity within the meaning of paragraph (3) of subdivision (a) of California Evidence Code section 240.[110] The recognition of the fear of testifying by a witness as a basis for unavailability under Evidence Code section 240 was established by the California Supreme Court in the landmark case of *People v. Rojas.*[111]

Prior to the *Rojas* decision, the law was unclear whether the refusal by a witness to testify would fall within the bounds of section 240 so as to render the witness "unavailable."[112] In *Rojas*, the defendants were convicted of assault with a deadly weapon in two counts.[113] Navarette, an essential prosecution witness, was a co-passenger in the automobile driven by defendant Rojas.[114] Navarette testified at the

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107. CAL. EVID. CODE §1228(e). Under paragraph 3 subdivision (a) a witness is unavailable if dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity. CAL. EVID. CODE §240.

108. CAL. EVID. CODE §1228 subsection (e) states, "The minor child is found to be unavailable pursuant to paragraph (3) of subdivision (a) of Section 240 or refuses to testify." *Id.*

109. *See* CAL. EVID. CODE §240 (refusal to testify not listed as one of the factors establishing the unavailability of a witness.) *See also* People v. Rojas, 15 Cal. 3d 540, 550, 542 P.2d 229, 235, 125 Cal. Rptr. 357, 363 (1975) (court noting that California Evidence Code §240 does not mention a refusal to testify as grounds for unavailability). *Id.*

110. People v. Rojas, 15 Cal. 3d at 550, 542 P.2d at 235, 125 Cal. Rptr. at 363.

111. *Id.*

112. Uhl, *People v. Rojas: The Expanding Concept of Unavailability,* 3 PEPPERDINE L. REV. 394, 398 (1976).

113. *Id.*

114. *Id.*

preliminary hearing and at the first trial of the defendants.[115] The jury was unable to render a verdict, and a second trial was set.[116] At the second trial, Navarette refused to testify.[117] Navarette declared that he had been subjected to threats of bodily harm, and that his family had suffered from the vandalism of their property.[118] Navarette further stated that he feared greatly for the safety of his family, and therefore, intimidated by the possibility of future danger, Navarette felt compelled to refuse to testify.[119] Despite being threatened with contempt, Navarette remained silent; he was thereafter incarcerated.[120] The trial court allowed the prior testimony of Navarette to be read at the second trial, stating that Navarette's refusal to testify rendered him unavailable under section 240 of the Evidence Code.[121] Rojas was subsequently convicted; Rojas then appealed his conviction to the California Supreme Court.[122] The Court affirmed the conviction of Rojas, ruling that Navarette's fear for safety constituted a mental infirmity within the meaning of section 240(a)(3).[123] Therefore, the Court held, Navarette was properly characterized as unavailable, and thus his prior testimony could be admitted.[124]

In determining whether the fear of testifying by a witness constitutes a sufficient basis for unavailability under Evidence Code section 240, the California Supreme Court has held that either expert testimony on the sufficiency of the witness' fear, or the witness' own express refusal to testify made at trial, is needed.[125] In the case of *People v. Stritzinger*[126] the California Supreme Court was faced with an allegedly sexually abused child who refused to testify at trial. The trial court had held that the mother's testimony on the issue of her daughter's mental health was legally sufficient to support a finding of unavailability.[127] The trial court therefore allowed the preliminary hearing testimony of the child to be admitted into evidence at trial.[128]

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115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. Uhl, *supra* note 112, at 399.
122. *Id.*
123. Uhl, *supra* note 112, at 400.
124. *Id.*
125. People v. Stritzinger, 34 Cal. 3d 505, 516-17, 668 P.2d 738, 746, 194 Cal. Rptr. 431, 439 (1983).
126. 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983).
127. *Id.* at 510, 668 P.2d at 741, 194 Cal. Rptr. at 434.
128. *Id.*

The California Supreme Court reversed the trial court decision, stating that the mother's testimony was insufficient to establish that the child's fear constituted a mental infirmity within the meaning of section 240.[129] *Stritzinger* distinguished *People v. Rojas*[130] by noting that in *Rojas* the witness who had testified at the preliminary hearing appeared at the trial and stated he would refuse to testify out of fear.[131] The trial court was therefore able to observe the demeanor of the witness to determine whether his fear amounted to a mental infirmity that would render testimony relatively impossible.[132] The young witness in *Stritzinger*, however, did not testify at trial.[133] Thus, if under Evidence Code section 1228 the refusal of the child to testify is motivated by fear, the court must either have expert corroboration or have the child's testimony at trial in order to determine whether the fear is sufficient to constitute a mental infirmity within the meaning of paragraph (3) of subsection (a) of Evidence Code 240.

The second circumstance in which a recalcitrant witness may be deemed unavailable under California law is when the witness persists in refusing to testify after the court has used coercive measures to secure testimony.[134] In *People v. Sul*,[135] the California Court of Appeal for the Fifth District was confronted with the question of whether to uphold the admission of preliminary hearing testimony of a witness who had subsequently refused to testify at trial. The court in *Sul* distinguished *Rojas*, noting that nothing in the record indicated that the witness' refusal to testify was motivated by fear.[136] The trial court had heard no evidence of threats of violence against the witness.[137]

The *Sul* court decided to adopt a standard for unavailability that had been enunciated by the Tenth Circuit Court of Appeals.[138] That standard permits the court to make a finding of unavailability only after reasonable steps have been taken to induce the witness to testify, unless such steps would be unavailing.[139] The *Sul* court stated that "[s]uch action is required, else the defendant is denied his Sixth

129. *Id.* at 516, 668 P.2d at 746, 194 Cal. Rptr. at 439.
130. 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975).
131. *Stritzinger*, 34 Cal. 3d at 519, 668 P.2d at 748, 194 Cal. Rptr. at 441.
132. *Id.*
133. *Id.*
134. People v. Sul, 122 Cal. App. 3d 355, 365, 175 Cal. Rptr. 893, 899 (1981).
135. 122 Cal. App. 3d 355, 175 Cal. Rptr. 893 (1981).
136. *Id.* at 363, 175 Cal. Rptr. at 898.
137. *Id.*
138. Mason v. United States, 408 F.2d 903, *cert. denied* 400 U.S. 993, (1969). *Sul*, 122 Cal. App. 3d at 365, 175 Cal. Rptr. at 899.
139. *Sul*, 122 Cal. App. 3d at 365, 175 Cal. Rptr. at 899.

Amendment right to confrontation."[140] The court concluded that the efforts of the trial court in attempting to obtain the testimony of the witness (finding him in contempt and sending him to jail) were insufficient in view of the importance of the sixth amendment right of confrontation.[141] The court felt that the trial court had failed to make adequate use of other resources available to secure the testimony of the recalcitrant witness before deeming the witness unavailable.[142] Therefore, if under Evidence Code section 1228 a court is confronted with a recalcitrant child whose refusal to testify is not motivated by fear, the court must take coercive steps, in accordance with *Sul*, in an attempt to obtain the testimony of the child. A finding of unavailability should be made only if the child persists in refusing to testify despite efforts of the court to induce the testimony. This result is mandated by the *Sul* court's interpretation of the sixth amendment right of confrontation.

Once the prosecution demonstrates the witness is unavailable, *Roberts* dictates that the hearsay evidence must bear sufficient indicia of reliability.[143] The prosecution can demonstrate reliability by showing either that the evidence falls within a "firmly-rooted" hearsay exception or that the evidence bears "particularized guarantees of trustworthiness." The second part of the *Roberts* test will now be applied to Evidence Code section 1228 to determine whether this new exception to the hearsay rule provides adequate safeguards to ensure the reliability of the child's statement.

The Requirement of Particularized Guarantees of Trustworthiness

The second part of the *Roberts* test requires a showing that the out-of-court statement of the hearsay declarant possesses adequate "indicia of reliability."[144] Even if the presence of the declarant is excused, the hearsay offered by the state may violate the confrontation clause, absent a showing that the tendered evidence has sufficient "indicia of reliability." The *Roberts* case specifically noted that reliability can be assumed when the statement comes within a firmly-rooted exception to the hearsay rule.[145] If the statement does not fall within a

140. *Id.*
141. *Id.* at 367, 175 Cal. Rptr. at 900.
142. *Id.*
143. *Roberts*, 448 U.S. at 65.
144. *Id.* at 65-66.
145. *Id.*

firmly rooted hearsay exception, the statement must be excluded unless the state can demonstrate that the statement bears "particularized guarantees of trustworthiness."[146]

The language of the Washington statute,[147] which has been the model for statutes establishing child hearsay exceptions in other states,[148] reflects an obvious awareness and attentiveness to the test established in *Roberts*.[149] With one exception, all child hearsay statutes require a showing of unavailability if the child is not going to testify at trial.[150] Additionally, all but one of the statutes require corroboration of the alleged sexual abuse crime when the child will not testify at trial.[151] The corroboration requirement is an apparent attempt by the states to satisfy the *Roberts* requirement of "particularized guarantees of trustworthiness."[152] However, none of the statutes defines what constitutes corroboration sufficient to allow the hearsay statement of an absent declarant in evidence.[153]

Some proponents of child hearsay exceptions argue that because children do not lie about sexual abuse, their statements are inherently trustworthy and therefore would satisfy the reliability aspect of the *Roberts* test.[154] Whether children lie about sexual abuse is a continuing controversy,[155] and the issue will not be solved by this com-

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146. *Id.*

147. *See supra* note 12.

148. Note, *supra* note 1 at 811. Only the Kansas statute differs substantially from the Washington statute set forth *supra* note 12. The Kansas statute is not limited to cases of sexual abuse, but applies to any crime in which the victim is a child. *See* KAN. STAT. ANN. §60-460 (dd) (1983). *supra* note 1 at 811 n.39.

149. The Washington statute requires that when the child will not testify at trial, the child must be found unavailable and corroborative evidence of the act must be presented by the state, prior to admission of the out-of-court declarant. WASH. CRIM. CODE §9A.44.120.

150. Note, *supra* note 1 at 811. The only state that does not require a showing of unavailability is Utah. *See id.* at 812. *See* UTAH CODE ANN. §76-5-411 (Supp. 1983).

151. Note, *supra* note 1 at 812. The only state that does not require a showing of corroboration when a child will not be available to testify is Kansas. *See id.* at 812. *See* KAN. STAT. ANN. §60-460 (dd) (1983).

152. Note, *supra* note 1 at 812; *see*, Frank, *supra* note 5 at 402; Peterson, *Sexual Abuse of Children—Washington's New Hearsay Exception,* 58 WASH. L. REV. 813, 826-28 (1983); Yun, *supra* note 2 at 1763-66; Wilson, *supra* note 2 at 71-73.

153. Note, *supra* note 1 at 819.

154. *See* Skolar, *supra* note 6 at 43-46 (arguing that a brief review of relevant psychological literature suggests that a child's out of court statements of sexual abuse are inherently reliable); Wilson, *supra* note 2 at 67-73 (arguing that a child's statement is especially trustworthy because this type of sexual activity is beyond the realm of the child's experience).

155. Two experts on child sex abuse claim that "there is little or no evidence indicting that children's reports are unreliable, and none at all to support the fear that children often make false accusations of sexual assault or misunderstand innocent behavior by adults." Berlinger and Barbieri, *The Testimony of the Child Victim of Sexual Assault,* 40 J. Soc. Issue, No. 2, 125, 127 (1984). One study of sex abuse cases found that roughly 95 percent of children's accusations were accurate. *See Would a Kid Lie?,* A.B.A.J. Feb. 1985, 17. Another paper,

ment. The existence of a controversy, however, raises questions about the inherent reliability of a child's statement about sexual abuse. If states were to base their child hearsay exceptions upon the theory that children do not lie about sexual abuse, then a separate requirement of corroboration would be superfluous.[156] This reasoning would place the defendant in the hopeless position of having to refute, absent the benefit of cross-examination, the out-of-court statement of a child whose charge is only supported by a controversial theory that a child would not lie about such an occurrence.

Experience has demonstrated, however, that children do lie, at least in some instances, about sexual abuse.[157] The better approach, therefore, is to require some corroboration that sexual abuse did occur, prior to admitting the statement of a child declarant who will not be available for cross-examination. Since the bulk of the prosecution's case will typically be based upon the child's hearsay statement,[158] a requirement of independent corroboration is necessary to diminish the chances that an innocent defendant will be convicted.

Exactly what constitutes adequate corroboration prior to the admission of the child's statement is a difficult standard to construct.[159]

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based upon clinical work and the study of over 120 cases of child sexual abuse concludes that children almost never make up stories about sexual abuse. *See Is The Child Victim of Sexual Abuse Telling The Truth?,* 8 CHILD ABUSE & NEGLECT, 473-81 (1984). *But see, The Other Victims of Child Abuse,* U.S. NEWS & WORLD REPORT, April 1, 66 (1985) (Young children do make up false charges concerning sexual abuse for several reasons. Children may simply invent stories, others falsify on purpose to get revenge against a parent or teacher who disciplines them, and some erroneous accusations are inspired by the parents themselves to assist them in divorce or custody proceedings); *The Youngest Witnesses, Is there a "witch hunt" mentality in sex-abuse cases?* NEWSWEEK, Feb. 18, 1985 at 72-73, (children are extremely susceptible to suggestion which may lead them to make false claims based upon the unfounded suggestions of an investigator); Wilson v. United States, 271 F.2d 492, 493 (D.C. Cir. 1959) (citing M. GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW 374 (1952), for the proposition that children have no real understanding of the serious consequences of the charges they make); People v. Scholl, 225 Cal. App. 2d 558, 563, 37 Cal. Rptr. 475, 478 (1964) (stating that children may act out of malice or be the victims of sexual fantasies).

156. *See* Note, *supra* note 1, at 820.

157. *See supra* note 155.

158. *See* Yun, *supra* note 2, at 1749 (child's statements often constitute the only proof of the crime); *see* Wilson, *supra* note 2, at 73 (hearsay statement is often the only direct evidence of the act); *see* Note, *supra* note 1, at 806-07 (child is usually the only witness to the crime).

159. The vague language of the *Roberts* decision provides little assistance in constructing criteria to determine whether the statement of an absent declarant bears sufficient "particularized guarantees of trustworthiness." States therefore have struggled to determine what type or amount of corroboration is sufficient in order to admit the hearsay statement of a child who is unavailable to testify. The underlying policy for the limitations on admissible hearsay, however, emerges clearly from the *Roberts* decision. "Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *Roberts,* 448 U.S. at 65 (citing Snyder v. Massachusetts, 291 U.S. 97, 107).

Because the existing child hearsay exceptions do not list specific corroborative findings that must be made, the trial judge is left with broad discretion in determining the admissibility of the child's hearsay statement. Absence of some objective standards will certainly lead to endless appeals claiming that the state has failed to demonstrate that the child's statement bears "particularized guarantees of trustworthiness."

A better approach would be to avoid the problems of giving a trial judge complete discretion, by defining the standards for sufficient corroboration through legislative action or judicial decision.[160] Several suggestions have been made as to what standards would be appropriate. The statement must produce corroborative evidence of the actual sexual abuse, and not merely of the circumstances surrounding the act described by the child.[161] To corroborate the alleged sexual abuse, the state would be allowed to offer eyewitness testimony, physical evidence, or any clear evidence that the child has been the victim of sexual abuse, including psychiatric testimony that the child displays behavioral symptoms of having been sexually abused.[162]

Although these suggestions are meant to apply to situations in which the hearsay statement of the child is to be presented to the jury,[163] the same rationale and concerns are applicable to Evidence Code section 1228. Even though the statement of the child will not be heard by the jury, the statement will be used to secure the admittance of the prosecution's most crucial evidence, namely, the defendant's confession. In order to prevent conviction of a defendant based almost entirely upon the hearsay statement of a child, the requirement of some form of corroboration is necessary.

Section 1228 fails to require any form of corroboration of the alleged sexual abuse prior to admission of the child's hearsay statement to the judge. Section 1228 allows the uncorroborated hearsay statement alone to satisfy the corpus delicti requirement. This comment contends that because the reliability of a child's hearsay statement charging sexual abuse is questionable, the statement standing alone is insufficient to satisfy the reliability prong of the *Roberts* test for the constitutional use of hearsay statements. Therefore, section 1228 should be ruled unconstitutional unless rewritten to require independent cor-

160. Note, *supra* note 1, at 821.
161. *Id.*
162. *Id.*
163. Note, *supra* note 1 (analysis of child hearsay exceptions of other states which provide for the introduction of the hearsay statement to the jury).

roboration of the child's hearsay statement prior to the admission of the statement. A showing of corroboration is necessary to satisfy the "particularized guarantees of trustworthiness" required by *Roberts*.

Conclusion

Sexual abuse of children is a crime with serious social consequences. In understandable zeal to effectively deal with the problem of sexual abuse of children, several states have passed child hearsay exceptions. The California legislature added section 1228 to the Evidence Code in January 1985. Section 1228 is a limited child hearsay exception that allows use of the out-of-court statement of a child to establish the corpus delicti in child sexual abuse cases for the purpose of admitting the defendant's confession into evidence.

In *Herbert v. Superior Court*, the California Third District Court of Appeal held that the right of confrontation is not limited to the trial stage of criminal proceedings, but extends to any phase in which witnesses are called for questioning. Therefore, the right to confrontation should apply to the hearing provided for by section 1228, at which witnesses will recount the statement of the child in order to establish the corpus delicti.

In *Ohio v. Roberts*, the United States Supreme Court held that the confrontation clause limits the extent of admissible hearsay. The Court enunciated a two-part test: first, the prosecution must demonstrate that the witness is unavailable; and second, if the evidence does not fall within a firmly-rooted hearsay exception, the evidence must be excluded, absent a showing of "particularized guarantees of trustworthiness." Section 1228 fails to meet the requirements established in *Roberts*. The language of section 1228 appears to authorize a finding of unavailability when a child merely refuses to testify. California, however, has interpreted the unavailability doctrine as requiring the court to take coercive steps to elicit the testimony of the recalcitrant witness prior to a finding of unavailability. Additionally, section 1228 does not require that independent corroboration of the child's statement be presented prior to the admission of the statement. Corroborative evidence of the alleged sexual abuse must be presented prior to the admission of the statement in order to satisfy the showing of "particularized guarantees of trustworthiness" mandated by the *Roberts* decision. Therefore, because the hearsay exception created by section 1228 does not fulfill the *Roberts* criteria, admission of a child's hearsay statement pursuant to Evidence Code sec-

tion 1228 would deny the defendant the right to confront the witness against him.

The implementation of the child hearsay exception in Evidence Code section 1228 may result in more convictions, but the use of critical hearsay statements not subject to full cross-examination would also greatly increase the risk of convicting innocent people. In view of the current wave of hysteria surrounding the crime of sexual abuse of children, steps must be taken to insure the accused is provided a fair and impartial trial, rather than searching for ways to obtain more convictions in order to appease the anger of society.

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