# Getting Forensic Interviews Admitted

## 11 Strategies for Child Abuse Prosecutors

*By Robert J. Peters & Christa Miller*

Forensic interviews of children who have experienced abuse are designed to elicit details of a child's experience in a scientifically defensible manner and child-friendly environment. During a trial, the forensic interview is often the most critical, persuasive piece of evidence for the jury's consideration. Sometimes the dynamics of sexual abuse, pressures exerted by perpetrators, or other stressors result in a child recanting their disclosure, rendering the forensic interview crucial to the State's case. Even when recantation does not occur, child statements in forensic interviews possess a power and authenticity that juries need to observe, especially in the many cases where significant time has passed between the forensic interview and the trial. Finally, when prosecutors successfully admit forensic interviews, the disclosures will be entered into evidence regardless of the child's experience on cross-examination. This reduces the incentives for defense attorneys to mistreat or attack the child during their testimony. Thus, pretrial motions to admit forensic interviews, filed and argued well in advance of trial, can help the prosecutor adapt to any adverse rulings and adjust trial strategies, if necessary.

This guide is a practical companion to Zero Abuse Project's treatise "Child Statement and Forensic Interview Admissibility," which provides extensive case law, state statutes, hearsay exceptions, and courtroom accommodation provisions, as well as sample motions for prosecutors.[1] The purpose of this article is to synthesize these sources of law and summarize common strategies used by U.S. prosecutors to admit forensic interviews into evidence.

## Basic Admissibility Framework

A significant body of law[2] supports the introduction of out-of-court statements related to child abuse into evidence: victims' audio/video recordings, supporting documentation such as written reports, or testimony about their recollection.

[1] Robert J. Peters et al., *Child Statement and Forensic Interview Admissibility*, Zero Abuse Project (2022), available at https://www.zeroabuseproject.org/category/publications.

[2] *Id.*

- Under Rule 801 of the Federal Rules of Evidence and equivalent state rules, hearsay ("a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion") consists of a statement not made while testifying at the current trial or hearing but is offered into evidence "to prove the truth of the matter asserted in the statement." Hearsay is not admissible unless a relevant exception, statute, or rule applies.[3]

- A hearsay statement faces an additional hurdle to admissibility if the statement is testimonial, meaning that it arises in an accusatory context and is (1) in response to questions regarding a past crime, (2) made to a law enforcement agent or someone acting on their behalf as part of a criminal investigation, or (3) made with a reason to believe the statement will be used as evidence in court.[4] If a statement is testimonial, then the declarant must testify to comport with the defendant's Sixth Amendment right to confrontation through cross-examination.[5]

- If the statement is nontestimonial, meaning it was (1) made to a family member, friend, healthcare professional, or other third party who is not acting on behalf of law enforcement or (2) made in the context of an ongoing emergency, relating "actually occurring" events "rather than describing past events"—then its introduction does not implicate the Sixth Amendment's confrontation clause, and the prosecution need only clear the hearsay hurdle.[6]

- Critically, the U.S. Supreme Court in *Ohio v. Clark*, 135 S.Ct. 2173 (2015) noted that "statements by very young children will rarely, if ever, implicate the Confrontation Clause."[7] Teresa Garvey of Aequitas[8] noted the Court's recognition "that preschool children understand little, if anything, about the justice system and are unlikely to contemplate that their statements might be used in court. In addition, the Court noted that there was historical pre-Constitutional precedent for admitting the statements of child witnesses without cross-examination."[9]

Jurisdictions may impose additional requirements on statements contained within forensic interviews and related expert testimony. For instance, depending on the state, a forensic interviewer called to testify as an expert witness may be required to detail their own training on how to conduct interviews without leading questions.[10] They may also need to testify that they and the victim were alone in the interview room, supervised by MDT members or the interviewer's direct supervisor, and that any

---

[3] Rule 802, Federal Rules of Evidence.
[4] *State v. Spencer*, 169 P.3d 384 (Mont. 2007); Bell v. State, 928 So. 2d 951 (Miss. 2006).
[5] *Davis v. Washington*, 547 U.S. 813 (U.S. 2006); *Hammon v. Indiana*, 547 U.S. 813 (U.S. 2006); *Woodlin v. State*, 3 A.3d 1084 (Del. 2010); *Keys v. State,* 337 A.2d 18 (Del.1975); *Hatcher v. State,* 337 A.2d 30, 32 (Del. 1975); *Johnson v. State,* 338 A.2d 124 (Del. 1975); *State v. Wedgeworth*, No. 88,903., 2003 WL 22831456, at *1 (Kan. Ct. App. 2003); *State v. Eley*, 203 So.3d 462, 2016 La. App. LEXIS 1667 (La. App. 1 Cir. 2016), writ denied, 224 So.3d 982, 2017 La. LEXIS 1763 (La. 2017), writ denied, 2019 La. App. LEXIS 1262 (La. App. 1 Cir. July 17, 2019); *Myer v. State*, 943 A.2d 615 (Md. 2008); *Adoption of Arnold*, 741 N.E.2d 456 (Mass. App. Ct. 2001); *Crawford v. Washington*, 124 S. Ct. 1354 (2004); *Osborne v. State*, 942 So.2d 193 (Miss. Ct. App. 2006); *State v. Lewis*, 388 S.W.3d 252, 2012 Mo. App. LEXIS 1485 (Mo. Ct. App. 2012); *State v. Howell*, 226 S.W.3d 892, 896-97 (2007); *State v. Lamb*, 161 Or. App. 66, 983 P.2d 1058 (Or. Ct. App. 1999); *Coronado v. State*, 351 S.W.3d 315, 324-25 (Tex. Crim. App. 2011)
[6] *Davis v. Washington*, 547 U.S. 813 (U.S. 2006); *Hammon v. Indiana*, 547 U.S. 813 (U.S. 2006); *State v. Ahmed*, 782 N.W.2d 253 (Minn. Ct. App. 2010); *Hobgood v. State*, 926 So.2d 847 (Miss. 2006); *Foley v. State*, 914 So.2d 677 (Miss. 2005); *State v. Spencer, Id.*
[7] *Ohio v. Clark*, 135 S.Ct. 2173, 2181-82 (2015).
[8] Aequitas is a nonprofit organization that provides training, resources, and consultations in cases involving sexual or intimate partner violence, child abuse, human trafficking, and related crime. *See generally* "Aequitas," https://aequitasresource.org/.
[9] Teresa Garvey, Ohio v. Clark: A Bit of Confrontation Clarification, A Few Tantalizing Hints, Issue #30, Aequitas (2017).
[10] *State v. Franklin*, 585 S.W.3d 431, 454-55 (Tenn. Crim. App. 2019).

recording remains unaltered.[11] Some jurisdictions permit supervisors of forensic interviews to testify when the original interviewer is unavailable for testimony[12] or consider the age of the child in the context of admissibility.

## Civil Proceedings

The confrontation clause applies only to criminal prosecutions, so prosecutors in civil child abuse and neglect cases must only clear the hearsay hurdle to admissibility. In some states, testimony introduced in civil or family court proceedings can be admissible in criminal court when the statements involve alleged abuse or neglect of a child. In civil or family courts, hearsay does not implicate the confrontation clause, and typically, child statements have a rebuttable presumption of admissibility in these trials.[13]

In particular, Massachusetts' admissibility and hearsay exception rules focus heavily on child welfare. Children's out-of-court statements that are not related to sexual abuse are admissible if they fall within an established exception to the hearsay rule or are offered for a nonhearsay purpose. Statements that are related to sexual abuse can be admissible, within certain parameters, in cases involving termination of parental rights (TPR) or in custody proceedings apart from TPR.[14]

Tennessee's child statement hearsay exception allows for statements about psychological abuse or neglect in addition to physical and sexual abuse. The statements can be offered as part of civil actions related to dependency, neglect, severe child abuse, or TPR, as well as child custody, shared parenting, or visitation.[15] In Kansas, a hearsay exception applies to statements made by a child, to prove the crime or that a child is a juvenile offender or a child in need of care. The child has to be an alleged victim of the offense or a child in need of care, and has to be found via hearing to be disqualified or unavailable as a witness.[16]

---

[11] *State v. Hilliard*, 278 So.3d 1065, 2019 La. App. LEXIS 1416 (La. App. 2 Cir. 2019), writ denied, 2020 La. LEXIS 1490 (La. July 24, 2020).
[12] *State v. Hunter*, 252 So.3d 1053, 2018 La. App. LEXIS 1634 (La. App. 4 Cir. 2018), writ denied, 267 So.3d 612, 2019 La. LEXIS 943 (La. 2019), cert. denied, 140 S.Ct. 205, 205 L.Ed.2d 108, 2019 U.S. LEXIS 5537 (U.S. 2019)
[13] *See e.g.,* Rule 8(a), West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings.
[14] Massachusetts ALM G. Evid. § 1115(d). *See also* ALM G. Evid. §803 (24), where a hearsay exception exists for the out-of-court statement of a child describing sexual contact in a foster-care placement proceeding, provided the statement (1) meets reliability requirements, (2) the person to whom the statement was made or who heard the child make the statement testifies, (3) and the statement is found to be offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort.
[15] TN R REV Rule 803(25).
[16] K.S.A. 2017 Supp. 60-460(dd).

## Admissibility Strategies

Although firmly rooted exceptions to the hearsay rule may vary state to state, the following hearsay exceptions and other avenues to admissibility are typically codified by state legislatures or established in case law, and all are applicable to child statements in child abuse cases. Not all states recognize all exceptions, and states may differ in their analysis of the same exception.

1. Residual or Catchall Hearsay Exception
2. Medical Treatment Exception
3. Excited Utterance Exception
4. State of Mind Exception
5. Present Sense Impression Exception
6. Prior Consistent Statements
7. Prior Inconsistent Statements
8. Tender Years Exception
9. Prompt Outcry Exception
10. Forfeiture by Wrongdoing
11. Remainder of Writings or Recorded Statements

If a statement is inadmissible under one exception, a different exception may apply. For example, a victim's statement made to a medical professional in pursuit of diagnosis and treatment could be admissible under the medical exception to hearsay, even if the residual hearsay exception does not apply, or the victim's testimony at trial does not support the statement.[17]

The underlying rationale of different hearsay exceptions are key. For example, the tender years exception focuses on the purpose of the interview as a whole, while the medical treatment exception considers the declarant's purpose in making individual statements.[18]

### 1. Residual Hearsay Exception

This "catchall" exception, sometimes simply referred to in state statutes as "other exceptions" (or in Oklahoma, "exceptional circumstances"[19]), relies on guarantees of trustworthiness and frequently mirrors Rule 807 of the Federal Rules of Evidence.[20] To determine a statement's reliability and trustworthiness, courts focus on the circumstances around the statement's making.[21] The statement (1) must be offered as evidence of a material fact, (2) must be more probative on the point for which it

[17] *In re Personal Restraint of Grasso*, 151 Wash.2d 1, 84 P.3d 859, 868 (Wash. 2004) (en banc).
[18] *State v. Manuel T.*, --- A.3d ----, 2020 WL 8255326 at *6 (Conn. 2020) quoting *State v. Maguire*, 78 A.3d 828, 850 (Conn. 2013).
[19] 12 Okla. Stat. Ann. § 2804.1.
[20] *State v. Freeman*, 269 S.W.3d 422, 428 (Mo. banc 2008); *People in re M.W.,* 374 N.W.2d 889 (S.D. 1985); *State v. Mercado*, *Id.*
[21] *Idaho v. Wright*, 497 U.S. 805. 819 (1990; *State v. Hollander*, 590 N.W.2d 341 (Minn. Ct. App. 1999).

is offered than any other evidence which the proponent can procure through reasonable efforts, and (3) must serve the interest of the rules of evidence and the pursuit of justice.[22] In addition, the statement's proponent must provide advance notice to the adverse party of their intent to introduce it.

The statement must be reliable. Courts rely on several indicia of reliability[23] to make this determination, including (though not limited to):

- The victim's spontaneity without the use of leading questions[24]
- The child's age, mental state, and/or competency to testify[25]
- The child's consistency and repetition across statements[26]
- The child's lack of motivation[27] (or the time needed[28]) to fabricate
- Descriptions of age-inappropriate actions and/or terminology not typical of a child's age or developmental capacity[29]
- The child's ability to understand the distinction between the truth and a lie[30]
- The child's statements being made in a safe and controlled environment with trusted professionals[31]
- Whether more than one person heard the child's statement[32]
- Corroborative behaviors in the child, such as aggression, night terrors, or inappropriately sexualized behavior among others[33]
- Whether the child recanted their statement[34]

---

[22] *People v. Katt*, 639 N.W.2d 815 (Mich. Ct. App. 2001); *Government of the Virgin Islands v. Morris*, 191 F.R.D. 82, 42 V.I. 135 (V.I. 1999); *State v. Hollander*, *Id.*; *State v. Hollywood*, 67 Or. App. 546, 680 P.2d 655 (Or. Ct. App. 1984)
[23] *Idaho v. Wright*, 497 U.S. 805. 819 (1990); *Matter of T.P.*, 838 P.2d 1236 (Alaska 1992); *Fitzsimmons v. State*, 309 So.3d 261 (Fla. Dist. Ct. App. 2020)
[24] *State v. Adams*, 845 S.E.2d 217, 220-21 (S.C. Ct. App. 2020); *State v. Sevigny*, 722 N.W.2d 515 (N.D. 2006); *People v. Rojas*, 181 P.3d 1216 (Colo. App. 2008); *People v. Cernazanu*, 410 P.3d 603 (Colo. App. 2015); *State v. Anderson*, 608 N.W.2d 644, 660 (S.D. 2000).
[25] *State v. Adams*, 845 S.E.2d 217, 220-21 (S.C. Ct. App. 2020); *State v. Anderson*, 608 N.W.2d 644, 660 (S.D. 2000).
[26] *People v. Rojas*, 181 P.3d 1216 (Colo. App. 2008); *People v. Cernazanu*, 410 P.3d 603 (Colo. App. 2015); *State v. Anderson*, 608 N.W.2d 644, 660 (S.D. 2000).
[27] *State v. Anderson*, 608 N.W.2d 644, 660 (S.D. 2000).
[28] *Rye v. State*, 373 S.W.3d 354 (Ark. Ct. App. 2009).
[29] *People v. Sharp*, 909 N.E.2d 971 (Ill. App. Ct. 2009), *Woodlin v. State*, 3 A.3d 1084 (Del. 2010); *State v. Krick*, 643 A.2d 331 (Del. Super. Ct. 1993); *Norris v. State*, 53 N.E.3d 512, 2016 Ind. App. LEXIS 123 (Ind. Ct. App. 2016); *Perryman v. State*, 80 N.E.3d 234, 2017 Ind. App. LEXIS 290 (Ind. Ct. App. 2017); *State v. Cagle*, 928 N.W.2d 685, 2019 Iowa App. LEXIS 472 (Iowa Ct. App. 2019); *State v. Schoenwetter*, 452 N.W.2d 549, 550 (S.D. 1990); *In re K.U.*, 140 P.3d 568 (Okla. Civ. App. 2006); *People v. Rojas*, *supra*.; *People v. Cernazanu*, *supra*
[30] *Clem v. State*, 90 S.W.3d 428 (Ark. 2002); *Cabrera v. State*, 206 So.3d 768 (Fla. Dist. Ct. App. 2016); *Adoption of Arnold*, 741 N.E.2d 456 (Mass. App. Ct. 2001); *State in Interest of A.R.*, 188 A.3d 332 (N.J. 2018).
[31] *Adoption of Arnold*, 741 N.E.2d 456 (Mass. App. Ct. 2001).
[32] *People v. Rojas, supra.*
[33] *Adoption of Arnold,* supra.
[34] *Rye v. State*, 373 S.W.3d 354 (Ark. Ct. App. 2009).

- Whether it is an embarrassing event the child would not normally relate[35] or the child made the statement while still upset or in pain[36]
- The credibility of the person testifying to the child's statement[37]

Not all states recognize the residual hearsay exception.[38] However, statements that are not introduced to prove the truth of their content or the asserted matter may be admissible, for instance to show a statement's effect on the hearer.[39]

## 2. Medical Treatment Exception

Generally, state statutes define this hearsay exception as "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."[40]

The rationale behind this exception is that a statement made to a treating medical professional, motivated as it is to seek healing, is more likely to be truthful.[41] However, these statements have their own indicia of reliability used to establish whether the child has the ability or intent to make a statement for purposes of medical treatment or diagnosis.[42] Depending on the jurisdiction, these could include:

- Whether the child was suffering pain or distress at the time of the statement
- Whether the examination was related to the incident of abuse
- Whether the child understands the physician's general role
- The professional's use of open-ended, non-leading questions
- Whether the child was influenced by other adults, and the child's ability and willingness to communicate freely with the physician
- Where the examination was conducted, such as in a medical facility, and whether the exam was used to diagnose and treat the child
- Whether the examination occurred during family disputes, such as for custody, if an attorney initiated the exam, and/or the exam's timing relative to trial.[43]

---

[35] *Rye v. State*, 373 S.W.3d 354 (Ark. Ct. App. 2009).
[36] *People v. Rojas, supra*.
[37] *Rye v. State*, 373 S.W.3d 354 (Ark. Ct. App. 2009); *Rodriguez v. State*, No. 04-20-00036-CR, 2021 WL 799895, at *1 (Tex. App. 2021) (citing *Bays*, 396 S.W.3d at 584, 592).
[38] *State v. Cross*, 421 S.W.3d 515, 518 (2013); *State v. Flood*, 219 S.W.3d 307 (Tenn. 2007).
[39] *State v. Flood, Id.*; *State v. McCoy*, 459 S.W.3d 1, 11 (Tenn. 2014) quoting *State v. Furlough,* 797 S.W.2d 631, 647 (Tenn.Crim.App.1990).
[40] Rule 803(4), Federal Rules of Evidence.
[41] *Colvard v. Com*, 309 S.W.3d 239 (Ky. 2010); *Breeding v. Dodson Trailer Repair Inc.*, 679 S.W.2d 281, 285 (Mo. banc 1984); *State v. Waddell*, 130 N.C. App. 488, 504 S.E.2d 84 (N.C. Ct. App. 1998).
[42] *State v. Christensen*, 458 P.3d 951 (Idaho 2020); *State v. Munroe*, 20 A.3d 871 (N.H. 2011).
[43] State v. Christensen, Id.; State v. Muttart, 875 N.E.2d 944 (Ohio 2007)

Communicating with the child through an educational paraprofessional, if supporting documentation such as an individualized education plan (IEP) provides for it, should not be considered undue influence, but rather a necessity for treatment.[44]

The medical exception to hearsay is extensively covered in most states' case law, and most rulings reflect that a broad application of the exception is appropriate. Rulings allow for this exception when a child's or caregiver's[45] statement to a medical professional — a physician, nurse, or therapist[46] — is made for diagnostic and not investigative (i.e., to build a case against a defendant) purposes,[47] even if the information given is minimal.[48] A treating physician or mental health professional must have either attended the forensic interview or viewed the video-recorded statement, and needs to have relied on it for diagnosis or treatment, if they provide the basis for its admissibility.[49] Medical records are generally admissible as business records, and medical history necessary for diagnosis and treatment can include statements regarding the cause of a person's condition, as long as the statements relate to diagnosis and treatment.[50]

Conversely, courts have considered forensic interviews to be conducted for investigative purposes:

- when a child victim has already received some treatment for their injuries,
- a law enforcement officer or agent thereof is present and/or takes an active role in questioning during the exam,
- the medical professional states the examination's forensic purpose,
- the doctor does not rely on the examination results for treatment or diagnosis,[51] and/or
- the police are not responding to an ongoing emergency.[52]

Perpetrator identification by the child is considered relevant to treatment or diagnosis in many states, although some courts have ruled otherwise.[53]

## 3. Excited Utterance Exception

Another well-traversed exception is the "excited utterance": a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or

---

[44] *Bush v. State*, 2008 WY 108, 193 P.3d 203, 209 (Wyo. 2008) citing *Simmers v. State*, 943 P.2d 1189, 1197–1198 (Wyo. 1997).
[45] *State v. Almanza*, 820 S.E.2d 1 (Ga. 2018); *State v. E.R.*, 457 N.J. Super. 377, 199 A.3d 1224 (N.J. Super. Ct. Law Div. 2016).
[46] *State v. Sloan*, 72 P.3d 138 (Utah Ct. App. 2003).
[47] *State v. Maguire*, 78 A.3d 828 (Conn. 2013); *State v. Arroyo*, 935 A.2d 975 (Conn. 2007); *Reynolds v. State*, 142 N.E.3d 928, 2020 Ind. App. LEXIS 47 (Ind. Ct. App. 2020); *State v. Crews*, 406 S.W.3d 91, 94 (2013) (distinguishing between medical professionals and case managers); *State v. Munroe*, *Id.*; *Government of the Virgin Islands v. Morris*, 191 F.R.D. 82, 42 V.I. 135 (V.I. 1999); *State v. Payne*, 225 W.Va. 602, 694 S.E.2d 935, 940 (W. Va. 2010); *State v. Edward Charles L.,* 183 W.Va. 641, 398 S.E.2d 123 (W. Va. 1990); *Misty D.G. v. Rodney L.F.*, 221 W.Va. 144, 650 S.E.2d 243, 249-50 (W. Va. 2007).
[48] *State v. Stinnett*, 958 S.W.2d 329, 331 (Tenn. 1997).
[49] *State v. Thompson*, 820 P.2d 335 (Ariz. Ct. App. 1991); *State v. Barkley*, 315 Or. 420, 846 P.2d 390 (Or. 1993).
[50] *State v. Langston*, 889 S.W.2d 93, 97 (1994) citing *State v. Jones*, 835 S.W.2d 376, 382 (Mo. App. E.D. 1992) and *U.S. v. Pollard*, 790 P.2d 1309, 1313 (7th Cir. 1986); *State v. Naucke*, 829 S.W.2d 445, 458 (Mo. banc 1992), *cert. denied*, 506 U.S. 960, 121 L.Ed.2d 348, 113 S.Ct. 427.
[51] *Davison v. State*, 282 P.3d 1262 (Alaska 2012); *State v. Mendez*, 146 N.M. 409, 211 P.3d 206 (N.M. 2009).
[52] *State v. Beadle*, 173 Wash.2d 97, 265 P.3d 863 (Wash. 2011) (en banc) quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006).
[53] Robert J. Peters, et al., *Child Statement and Forensic Interview Admissibility*, Zero Abuse Project (2022), available at https://www.zeroabuseproject.org/category/publications.

condition.[54] "The theory on which the excited utterance exception rests is that 'a guarantee of reliability surrounds statements made by one who participates in or observes a startling event, provided they are made while under the stress of excitement.'"[55]

To qualify, the statement must be spoken within a timeframe too narrow for the utterer to have (a) collected their thoughts or fabricated the words[56] or (b) been unduly influenced by other parties, potentially through questioning.[57] Some state courts stress the lack of motive or capacity to fabricate a statement that meets other "excited utterance" criteria.[58] Additionally, the child must still be in a state of shock from the assault, particularly at younger ages.[59] The child must make "a natural [factual] declaration or statement growing out of the event, and not a mere narrative of a past, completed affair."[60]

Physical signs of "excitement," including (for example) crying, running away, or uncontrollable soiling[61] are relevant, although not always necessary for admissibility; child victims can become subdued (rather than upset) as a result of abuse, and this demeanor does not necessarily indicate "reflective thought."[62] However, "subdued" may be a different emotional response from one that appears to be calm, collected, or otherwise not emotion-dominated.[63] Parents may testify to their child's out-of-court statements about abuse, if the statements meet the criteria for an excited utterance.[64] In addition, a parent's own out-of-court statements to a first responder, for example, may constitute excited utterances.[65]

Whether statements made to law enforcement officers can count as "excited utterances" depends on the jurisdiction and case circumstances. For example, a statement made to a police officer following statements made to relatives or friends may not be permissible,[66] but an impulsive or otherwise emotional statement, for example in a 911 phone call, may still qualify.[67] Time frames are a gray area as well. Those exceeding nine hours are often not a bar to admissibility under the excited utterance hearsay exception; some courts allow more than twenty-four hours to pass.[68]

---

[54] Rule 803(2), Federal Rules of Evidence.
[55] *State v. Smith*, ___ W. Va. ___, 358 S.E.2d 188, 193 (1987).
[56] *State v. Murray*, 375 S.E.2d 405, 409 (1988), quoting *State v. Young*, 166 W. Va. 309, 273 S.E.2d 592 (1980).
[57] *State v. Thompson*, 820 P.2d 335 (Ariz. Ct. App. 1991); *In Interest of Doe*, 761 P.2d 299 (Haw. 1988); *People v. Perez*, 2015 Guam 10 (Guam 2015); *People v. Martin*, 2018 Guam 7 (Guam 2018); *State v. Field*, 165 P.3d 273 (Idaho 2007); *People v. Zwart*, 600 N.E.2d 1169 (Ill. 1992); *State v. Dudley*, 856 N.W.2d 668 (Iowa 2014); *State v. Whisonant*, 515 S.E.2d 768, 772 (S.C. 1999) (quoting S.C.R.E. 803(2)); *State v. Kinross*, 906 P.2d 320 (Utah Ct. App. 1995).
[58] *State v. Smith*, 315 N.C. 76 337 S.E.2d 833 (N.C. 1985); *State v. Tlamka*, 1 Neb. App. 612, 511 N.W.2d 135 (Neb. Ct. App. 1993); *State v. Edwards*, 485 N.W.2d 911 (Minn. 1992).
[59] *Jackson v. State*, 305 So.3d 440 (Ala. Crim. App. 2019); *State v. McLaughlin*, 246 N.C. App. 306, 786 S.E.2d 269 (N.C. Ct. App. 2016).
[60] State *v. Murray, Id.*
[61] *People v. Martin*, *Id.*; *Pratt v. Commonwealth*, NO. 2016-CA-001816-MR, 2018 WL 6266488, at *1 (Ky. Ct. App. 2018).
[62] *State v. Kay*, 927 P.2d 897 (Idaho Ct. App. 1996).
[63] *Tienda v. State*, 479 S.W.3d 863 (Tex. App. 2015).
[64] *People v. Martin, Id.*
[65] *State v. Bergevine*, 942 A.2d 974 (RI 2008)
[66] *State v. F.R.,* 34 N.E.3d 498 (Ohio Ct. App. 2015)
[67] *In re Ne-kia S.,* 566 A.2d 392 (RI 1989); *Tienda v. State, Id.*; *State v. Huntington*, 216 Wis.2d 671, 575 N.W.2d 268 (Wis. 1998) citing *Muller v. State,* 94 Wis.2d 450, 466, 289 N.W.2d 570 (1980))
[68] *State v. Dwyer*, 149 Wis.2d 850, 440 N.W.2d 344, 346 (Wis. 1989)

## 4. Then Existing Mental, Emotional, or Physical Condition, or "State of Mind" Exception

Generally defined across state statutes as "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will,"[69] the Then Existing Mental, Emotional, or Physical Condition exception is offered to prove either the declarant's state of mind, emotion, or physical sensation at a certain time, or the declarant's subsequent conduct, when their state of mind is an issue in the action.[70] For example, introducing a statement that demonstrates a child victim's attitude towards sex, rather than the truth of the matter at hand, is permissible,[71] as is the introduction of a video recording showing a child's use of anatomical dolls to demonstrate sexual conduct.[72] Critically, the statement must involve a *then-existing* state of mind (i.e. "my private parts really hurt"), rather than a statement of memory or belief (i.e., "my private parts really hurt yesterday").

## 5. Present Sense Impression Exception

Defined as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter," a present sense impression differs from either an excited utterance or a prompt outcry by focusing on the element of immediacy.[73] Missouri requires the statement to be made simultaneously or near-simultaneously with the occurrence of an event or act, which the statement must describe using the declarant's own senses.[74] This element mitigates reliability issues with memory or time issues, and can often be corroborated by other witnesses.[75] However, some states, like Massachusetts, do not recognize the present sense impression as an exception to hearsay.

## 6. Prior Consistent Statements

To be admitted as exceptions to the hearsay rule, prior statements generally require the witness who made the statement to be present and subject to cross-examination.[76] Most jurisdictions define these statements according to whether they are consistent or inconsistent with testimony being given.[77]

---

[69] Rule 803(3), Federal Rules of Evidence.
[70] Fla. Stat. §90.803(3)(a).
[71] *Church v. Commonwealth*, 230 Va. 208, 335 S.E.2d 823, 825 (Va. 1985).
[72] *Huskey v. State*, 989 P.2d 1, 1999 Okla. Crim. 3 (Okla. Crim. App. 1999).
[73] Rule 803(1), Federal Rules of Evidence; *People v. Perez, Id.*
[74] *State v. Smith*, 265 S.W.3d 874, 879 (Mo. App. 2008) citing 2 McCormick on Evidence § 271, at 251 (6th ed. 2006).
[75] *State v. Taylor*, 298 S.W.3d 482, 492-493 (2009).
[76] 11 Del. C. § 3507; HRS § 626-1, Rule 802.1(2).
[77] Notably, under Delaware admissibility law—rather than as an exception to hearsay—prior statements can be introduced whether or not they are consistent with testimony. *See* 11 Del. C. § 3507 Maryland's prior-statement hearsay exception rule is intermingled with a "prompt outcry" requirement that focuses on "sexually assaultive behavior," if the statement is consistent with the victim's testimony or can otherwise meet particularized guarantees of trustworthiness. *See* MD R Rev. Rule 5-802.1.

Statements that are consistent with the witness's testimony can be offered to rebut attempts to impeach that witness via an express or implied charge against the witness of recent fabrication or improper influence or motive.[78] It is possible for consistency between statement and testimony to be implicit.[79] Consistency can also satisfy a corroboration requirement when the degree of corroboration needed is relatively low.[80] The existence of a prior consistent statement can also be a relevant factor in a ruling on statement admissibility through other exceptions.[81]

## 7. Prior Inconsistent Statements

Sometimes, testimony may be inconsistent with a declarant's previous statements. This exception may be invoked when a witness's memory (or lack thereof) affects their testimony.[82] The existence of a prior inconsistent statement can also be a relevant factor in a ruling on statement admissibility through other exceptions.[83]

In West Virginia, three requirements must be satisfied before a prior inconsistent statement is admitted: "(1) The statement actually must be inconsistent, but there is no requirement that the statement be diametrically opposed; (2) if the statement comes in the form of extrinsic evidence as opposed to oral cross-examination of the witness to be impeached, the area of impeachment must pertain to a matter of sufficient relevancy…" and third, the jury must be instructed regarding the non-substantive purpose of the evidence.[84] Forensic interviews have been admitted as prior inconsistent statements where the interview is not offered for the truth of the matter asserted and appropriate jury instructions are given.[85] If choosing this path to admissibility, prosecutors must carefully utilize a trauma-informed approach and consider their (and potentially expert witness) articulation of the child victim's credibility despite reliance on prior inconsistent statements.

---

[78] D.C. Code § 14-102; KRE 801A; MD R Rev. Rule 5-802.1(b).
[79] *Woodlin v. State*, 3 A.3d 1084 (Del. 2010).
[80] *Cassidy S. v. Bryan T.*, 120 N.Y.S.3d 461 (N.Y. App. Div. 2020).
[81] MI R REV MRE 803A.
[82] *State v. Burdier*, 2020 WL 3169347 (N.H. 2020).
[83] AR R REV Rule 803(25); *Rye v. State*, 373 S.W.3d 354 (Ark. Ct. App. 2009)
[84] *State v. Rodoussakis*, 204 W. Va. 58, 73-74 (1998).
[85] *State v. King*, 183 W. Va. 440, 448 (1990) ("Accordingly, the extrinsic evidence in this case, the videotaped interview, was admissible because it assisted the jury in deciding the issue of B.K.'s credibility. Moreover, the jury, on two occasions, was instructed that the videotaped interview was admitted solely on the issue of credibility. These instructions were key to the jury's understanding that the evidence contained on the videotape was not to be considered as substantive evidence, but, rather, for credibility purposes only. …In this case, the videotaped interview which was admitted into evidence was not introduced for the purpose of showing the appellant's improper or lustful disposition toward S.J.K., the victim in this case. Rather, as stated above, it was introduced to assist the jury in deciding the credibility of a material witness who was not the victim in this case, namely, B.K.").

## 8. Tender Years

A narrow majority of states provide an additional child hearsay exception when statements are made by a child under a certain age threshold.[86] Although only two states—Arkansas and Mississippi—use the phrase "tender years" in their statutes, the phrase is common in case law across several states.[87]

The basis for the tender-years exception to the hearsay rule is the concept that a child's youth renders the fabrication of their statement less likely. Such a statement is not inherently trustworthy; like other statements admitted as exceptions to hearsay, it must meet other indicia of reliability, and the prosecutor must notify defense counsel of their intent to introduce the statement.

## 9. Prompt Outcry Exception

A prompt outcry is different from an excited utterance in that it relies on timing more than emotion, generally allowing for a longer period of time to pass or for a victim to make a complaint at the first *suitable* opportunity rather than immediately.[88] Both victims and witnesses can testify to the facts and circumstances of a first outcry, including some details and timing,[89] although testimony is typically limited to the fac that an outcry was made. If another hearsay exception applies (for example, the excited utterance exception), then the contents of the outcry may be admissible.

## 10. Forfeiture by Wrongdoing

Sometimes, a declarant is unavailable to testify because a defendant or some other person has engaged in conduct that renders the declarant unavailable. Rule 804(b)(6) of the Federal Rules of Evidence codifies the doctrine that wrongdoing by the defendant forfeits their Sixth Amendment right to confrontation. Simply put, a defendant who murders a witness, cannot then complain that their constitutional rights have been violated by the absence of cross-examination. Prosecutors should be cognizant of and document defendants' attempts to procure child victims' unavailability at

---

[86] These age thresholds vary from state to state, ranging from 10 to 18.
[87] In Vermont, hearsay exceptions apply to statements made by children 12 or under, or persons with a mental illness or an intellectual or developmental disability. In addition to indicia of reliability, the statements must meet statutory criteria in civil, criminal, or administrative proceedings and not have been taken in preparation for a legal proceeding (or, for a criminal or delinquency proceeding, prior to the defendant's initial appearance before a court). The declarant must be available to testify. V.R.E. Rule 804a. In Kansas, a child victim's unprompted statements to multiple third parties, made in an informal environment, were deemed admissible because the child was too young to be able to falsify her statements. *State v. Wheeler*, No. 117,687, 2019 WL 166645, at *1 (Kan. Ct. App. 2019). In Massachusetts, children younger than 10 years old do not need to be found available for testimony. *Care and Protection of Rebecca*, 643 N.E.2d 26 (Mass. 1994). Additionally, even though a child victim in this age category might be found incompetent to testify, their out-of-court statement can still be admissible when it satisfies indicia of reliability. *In re Adoption of Olivette*, 944 N.E.2d 1068 (Mass. Ct. App. 2011). In Michigan, even though leading questions had guided a child victim's out-of-court statement and thus called its reliability (and that of the child's other statements) into question, its admission under the spontaneous statement section of the tender years exception was a harmless error. *People v. Gursky*, 786 N.W.2d 579 (Mich. 2010). Finally, in New Jersey, the "tender years" concept factors into determining the admissibility of more formal interviews that rely on anatomical dolls and/or drawings, when they meet the exception's trustworthiness requirement. *State v. Nyhammer*, 197 N.J. 383, 963 A.2d 316 (N.J. 2009).
[88] *People v. Hobbs*, 127 N.Y.S.3d 565 (N.Y. App. Div. 2020); *State v. Fahnley*, 119 A.3d 727 (Me. 2015); *Ronnie R. v. Trent*, 194 W. Va. 364, 370, 460 S.E.2d 499, 505 (1995).
[89] *Commonwealth v. King*, *Id.*; *People v. Ludwig*, 24 N.Y.3d 221 (N.Y. 2014) quoting *People v. Ludwig*, 104 A.D. 3d 1162, 261 N.Y.S. 2d 657 (N.Y. App. Div. 2013).

trial, and file appropriate motions in response.[90] Critically, forfeiture by wrongdoing should not apply in cases involving younger children; as *Ohio v. Clark* has established, "Statements by very young children will rarely, if ever, implicate the Confrontation Clause" in the first place, making forfeiture of the confrontation right unnecessary.[91]

### 11. Remainder of Writings or Recorded Statements

The introduction of a partial written or recorded statement gives rise to questions about its context. To that end, the adverse party can require the remaining statement to be introduced for contemporaneous consideration.[92] The viewing of a recorded statement in its entirety may not be necessary to make a ruling on its admissibility if a court has viewed as much as is factually necessary.[93] This path to admissibility is more pertinent to child statements outside of forensic interviews, such as text exchanges between the child and the defendant. The defendant's text messages should be admitted as a non-hearsay statement by an opposing party.[94] The child's text messages with the perpetrator, on the other hand, should be admissible as a remainder of a writing or recorded statement.[95] As the Advisory Committee Notes reflect, failure to introduce these statements provides a "misleading impression created by taking matters out of context,"[96] and jurors should have the benefit of assessing this evidence.

## Conclusion

As several hundred pages of Zero Abuse Project's "Child Statement and Forensic Interview Admissibility" treatise demonstrate, there are many paths to admitting forensic interviews and other statements by child victims into evidence.[97] This article briefly summarized 11 admissibility strategies for child abuse prosecutors, though other state-specific statutory options exist.

The authors are reminded of a young child victim who thanked the prosecutor after a successful case, but noted that even if the case had been lost, "it would have been fine by me." What ultimately mattered to the child, even more than the outcome, was the presence of someone in her corner, fighting for her.

---

[90] Robert J. Peters et al., "Then It Is Forfeit: Forfeiture by Wrongdoing and Criminal Asset Forfeiture in Cases of Child Exploitation and Human Trafficking," (2022), forthcoming.
[91] *Ohio v. Clark*, 135 S.Ct. 2173, 2181-82 (2015).
[92] Iowa Code Ann. Rule 5.106; TX R EVID Rule 106; TX R EVID Rule 107.
[93] *State v. Mercado*, 953 N.W.2d 337, 339 (Wis. 2021).
[94] Rule 801(d)(2), Federal Rules of Evidence.
[95] Rule 106, Federal Rules of Evidence ("If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.").
[96] *Id.*
[97] Robert J. Peters et al., "Child Statement and Forensic Interview Admissibility," Zero Abuse Project (2022), available at https://www.zeroabuseproject.org/category/publications/.

Given the many avenues to forensic interview admissibility and the clear benefits to both child witnesses and juries, introducing this critical evidence is a key mandate and objective for the trauma-informed prosecutor.

 This project was supported by Award No. 2019-CI-FX-K006 awarded by the Office of Juvenile Justice and Delinquency, Office of Justice Programs, Department of Justice.