WALKING THE FINE LINE: HOW ALABAMA COURTS HAVE INTERPRETED AND APPLIED THE CHILD PHYSICAL AND SEXUAL ABUSE VICTIM PROTECTION ACT

I. INTRODUCTION: THE HISTORY OF ALABAMA'S STATUTORY PROTECTION FOR CHILD ABUSE VICTIMS

Cases of physical and sexual abuse against children have several unique features that can make the crimes at issue difficult to detect and prosecute.[1] First, the crimes generally happen in secret with no one present but the offender and the child victim.[2] Second, young victims may fear that they did something to cause the abuse or that no one will believe them if they reveal what happened. Also, when the child lives with or has frequent contact with the abuser, the child may fear retaliation or the breakup of his or her family if anyone finds out about the abuse.[3] These factors can cause a significant time lapse between the commission of the crime and the beginning of any investigation, so there is not always physical evidence of the crime or the perpetrator's identity.[4] Finally, the youngest victims may be unable to communicate what has been done to them even if they somehow understand that something is wrong.[5]

Added to all of this is the problem that children are impressionable and can potentially be manipulated into making false accusations and stories.[6] If a parent or other adult suspects that the child has been hurt and begins investigating, the child may respond to repeated questions by confirming the suspicions out of a need to please the adult. Other children may embellish or invent stories to get attention, please an anxious adult who is questioning them, or punish an adult they do not like.[7]

1. For a general discussion of the problems that frequently arise in child abuse cases, *see* Canada Department of Justice, *Improving the Experience of Child Witnesses and Facilitating Their Testimony in Criminal Proceedings*, *at* http://canada.justice.gc.ca/en/cons/child/consul3.html (last updated Dec. 20, 2002).
2. *See* Nicki Noel Vaughan, *The Georgia Child Hearsay Statute and the Sixth Amendment: Is There a Confrontation?*, 10 GA. ST. U. L. REV. 367, 368 (1994).
3. *See id.*
4. *See id.*; *see also* Brian L. Schwalb, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" to Protect Both Children and Defendants*, 26 HARV. C.R.-C.L. L. REV. 185, 187 (1991).
5. *See* Schwalb, *supra* note 4, at 187.
6. *See* Thomas L. Feher, *The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?*, 14 AM. J. CRIM. L. 227, 239-41 (1987).
7. *See* Schwalb, *supra* note 4, at 185-86; *see also* DOUGLAS E. ABRAMS & SARAH H. RAMSEY,

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Due to all of these factors and potential problems, it is often difficult for a child abuse victim to be called to testify in court. For many years, experts and the public have been concerned about the damage that can occur to a child who is forced to testify in court about abuse allegedly committed by the same defendant who is sitting nearby watching the child.[8] In response to these growing concerns over the welfare of child abuse victims, many states have enacted laws that offer special protections for child abuse victims and enable the state to prosecute alleged perpetrators more effectively.[9]

Among the methods that states have adopted to protect children are statutes and rules that allow special children's rights advocates to be present during interviews with possible abuse victims and laws permitting psychological experts to testify as to the likelihood that the child did suffer the alleged abuse.[10] Many states have also eliminated the competency requirements for children who are called as witnesses in abuse prosecutions.[11] Other popular methods of protecting child witnesses are the use of closed circuit television, videotaped testimony, and screens set up in the courtroom so that the child cannot see the accused abuser.[12]

Although these measures may minimize the trauma for some child witnesses, the measures are not always effective. Some children may be unable to proceed with their testimony when faced with several adults and a barrage of questions.[13] Thus, approximately half of the states have enacted laws that allow a child's out-of-court statements about abuse to be used in criminal cases under certain circumstances.[14] Alabama is among those states whose legislatures have created special exceptions for a child victim's hearsay statements.[15]

This Comment examines the requirements of the statute creating Alabama's child hearsay exception and the ways in which Alabama courts have interpreted and applied the statute. Part II provides a general overview of the Act. Part III addresses alternatives to introducing evidence under the child hearsay statute and the chances on appeal for a defendant to overturn a conviction of child abuse based on a child's hearsay statement. Part IV looks at one area of great concern with such laws—the potential for conflict

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8. *See* ABRAMS & RAMSEY, *supra* note 7, at 279.

9. *Id.*

10. *See* Vaughan, *supra* note 2, at 369.

11. *See id.*

12. *See id.*; *see also* Coy v. Iowa, 487 U.S. 1012 (1988) (discussing an Iowa law that allowed an opaque screen to be set up in the courtroom when a minor was called to testify in a proceeding).

13. *See, e.g.*, J.W. v. State, 814 So. 2d 997, 998 (Ala. Crim. App. 2001) (explaining that a child became unavailable during the trial and could not continue testifying due to immaturity and emotional trauma); *see also* Schwalb, *supra* note 4, at 187.

14. ABRAMS & RAMSEY, *supra* note 7, at 558.

15. *See* ALA. CODE §§ 15-25-30 to -40 (1995) (originally enacted in 1989). Alabama also has statutes which allow a child under the age of sixteen to testify via closed circuit television or through a videotaped deposition, but these provisions subject the child to questioning and cross-examination and may allow the defendant to be present in the room. *See* ALA. CODE § 15-25-2 (1995) (originally enacted in 1985); ALA. CODE § 15-25-3 (1995) (originally enacted in 1985).

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between the Sixth Amendment's Confrontation Clause and child hearsay exceptions. Part IV also addresses the ways in which Alabama's legislature and courts have endeavored to minimize any such conflict. Finally, this Comment argues that Alabama courts have overextended the trustworthiness requirement in the Act; the Act should be amended to clarify the structure and applicability of the trustworthiness requirement and to better enforce the statute's purpose of facilitating child abuse prosecutions.

II. THE REQUIREMENTS OF ALABAMA'S CHILD PHYSICAL AND SEXUAL ABUSE VICTIM PROTECTION ACT

In 1989, the Alabama legislature attempted to alleviate some of the problems faced by child abuse victims with The Child Physical and Sexual Abuse Victim Protection Act.[16] The Act allows the out-of-court statements of a child who is under the age of twelve at the time of the proceeding to be admitted in certain cases when particular requirements are met.[17] The statement must be about a material element of a physical offense, a sexual offense, or an exploitation crime against the child.[18]

There are two ways for the Act to be triggered. If a child testifies by closed circuit television or a videotaped deposition, then the child's out-of-court statements may be admitted into evidence.[19] Even if a child does not testify in any manner, the child's out-of-court statement may still be admissible if the child is found to be unavailable for one of the many reasons listed in the statute and if the statement possesses a particular indicia of trustworthiness.[20] Some requirements of the Act apply in either instance, while the unavailability of the child raises additional concerns and requirements.

A. General Requirements of the Act

One of the main ways in which the Act protects the rights of criminal defendants is through the charge to the jury required by section 15-25-36.[21] The trial judge must tell the jury that the child's out-of-court statements were not subjected to the defendant's cross-examination.[22] It is enough that the court gives the requisite instruction to the jury at the close of the trial just before deliberations begin.[23] The court is not required to tell the jury

16. ALA. CODE §§ 15-25-30 to -40 (1995) (originally enacted in 1989).
17. *Id.* § 15-25-31.
18. *Id.* Section 15-25-39 further defines which crimes are included in the Act. *Id.* § 15-25-39. One notable exclusion is neglect. *See* Allen D. Cope, *Alabama's Child Hearsay Exception*, 47 ALA. L. REV. 215, 217 (1995).
19. ALA. CODE § 15-25-32 (1995).
20. *Id.*
21. *Id.* § 15-25-36.
22. *Id.*
23. *See* Edwards v. State, 612 So. 2d 1282, 1283 (Ala. Crim. App. 1992).

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that the statements have not been subjected to cross-examination at the time the statements are entered into evidence.[24]

Even when the child testifies at the proceeding, the court must give this instruction to the jury if a prior, out-of-court statement is also admitted.[25] The purpose of the jury instruction is to prevent prejudice to the defendant's rights under the Confrontation Clause.[26]

The Act also requires notice whenever a child's out-of-court statements are going to be introduced.[27] This notice must include information about the content of the statement so as to permit the other party to prepare a response.[28] Although the Act uses the language "sufficiently in advance of the proceeding," Alabama courts have not held that the notice must always come before the trial begins.[29]

The Alabama Supreme Court has determined that although the Act refers to giving "the defendant" a chance to prepare a response, the notice requirement cuts both ways.[30] Both the prosecution and defense must give notice when planning to offer a statement by the child.[31] When the state wants to use a child's statements to help convict a defendant, the defense must receive notice so as to prepare, and when the defense wants to use a child's prior statements to bolster its case or challenge a witness's credibility, the state must receive notice.[32]

B. Absent in Body but Not in Testimony: The Unavailability of the Child

When the child victim does not testify at trial in some form, the child's out-of-court statements may only be admitted if the child is declared unavailable. There are several reasons why a court may find a child witness unavailable to testify and thus open the door to the use of the child's out-of-court statements. Section 15-25-32 of the Act allows the court to find the child unavailable based on the child's death, physical or mental disability, total failure of memory, incompetence, including an inability to communicate because of fear or a similar reason, when there are reasonable grounds to believe the defendant removed the child from the court's jurisdiction, or when there is a substantial likelihood that the child would be traumatized by testifying.[33]

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24. *See id.* at 1283.
25. *See Ex parte* R.D.W., 773 So. 2d 426, 429-30 (Ala. 2000).
26. *See R.D.W.*, 773 So. 2d at 429.
27. ALA. CODE § 15-25-35 (1995).
28. *Id.*
29. *Id.*; *see, e.g.*, J.W. v. State, 814 So. 2d 997, 998 (Ala. Crim. App. 2001) (notice was given during the trial, and the defense was granted a continuance because the child was not declared unavailable until after attempting to testify at trial and being unable to continue).
30. *Ex parte* B.B.S., 647 So. 2d 709, 711-12 (Ala. 1994).
31. *See B.B.S.*, 647 So. 2d at 711-12.
32. *See id.*
33. ALA. CODE § 15-25-32 (2)(a) (1995).

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When a child's statement is going to be admitted based on the child's unavailability, there are additional requirements that must be met besides a basic showing that the child is actually unavailable under the terms of the Act. First, there must be other evidence of the criminal act.[34] The corroborative evidence of the criminal act demanded by this provision must be separate from the evidence of the circumstances surrounding the statement that is needed to show trustworthiness.[35] This can include physical evidence, statements from other witnesses, or other evidence apart from the child's own statements that corroborates what the child has said.[36] However, evidence tied to the child's making of the statement, such as when and how the statement was made or the content of the statement, cannot be viewed as corroborating evidence of the criminal act.[37]

In addition, a finding of unavailability based on the child's death, memory failure, physical or mental disability, incompetence, or the likelihood of trauma must be supported by expert testimony.[38] This requirement is probably meant to prevent debate as to whether the child is truly unable to appear and at least testify via closed circuit television or a videotaped deposition.

One potential area of conflict is the limit of a child's unavailability due to trauma or an inability to communicate. In *Idaho v. Wright*,[39] the Supreme Court expressly declined to decide if a child's alleged incompetence to communicate in court was sufficient to render the child unavailable to testify.[40] The Alabama legislature, on the other hand, specifically listed the child's inability to communicate as a ground for the court to declare the child unavailable.[41] One scholar has argued that Alabama's definition of "unavailability" may be overbroad, because it allows a child's hearsay statements to be admitted when the child is physically able to testify but would suffer emotional trauma.[42] However, Alabama's use of the word "severe" in section 15-25-32(2)a.6 and the requirement that the child's unavailability be supported by expert testimony should offer sufficient protection to defendants, because a child should not be excused from testifying when the potential trauma is less than severe.[43]

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34. *Id.* § 15-32-34.

35. *See* Richerson v. State, 668 So. 2d 130, 135 (Ala. Crim. App. 1995).

36. *See* K.D.H. v. State, No. CR-00-2081, 2002 WL 1397499, at *5 (Ala. Crim. App. June 28, 2002) (stating that circumstantial evidence is sufficient to show corroboration of the crime).

37. *See id.* (citing examples of corroborative evidence of criminal acts); *cf.* ALA. CODE § 15-25-34 (1995).

38. ALA. CODE § 15-25-33 (1995).

39. 497 U.S. 805 (1990).

40. *Wright*, 497 U.S. at 816. The Court did not need to address this issue because the defendant never challenged the trial court's finding that the child was unavailable. However, some legal scholars seem to assume that a child can and should be considered unavailable as long as testifying poses a threat to the child's mental or emotional health. *See* ABRAMS & RAMSEY, *supra* note 7, at 558-59.

41. ALA. CODE § 15-25-32(2)a.5. (1995).

42. *See* Cope, *supra* note 18, at 227-28, 238 ("[T]he Court may be less willing to deny the defendant's right to cross-examination based solely on the public policy interest of protecting the child from the psychological trauma inherent in all abuse cases.").

43. ALA. CODE § 15-25-32 (1995); *id.* § 15-25-33.

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C. The Trustworthiness Requirement

The United States Supreme Court has held that the Confrontation Clause does not automatically bar the admission of prior statements by an unavailable witness.[44] When a child is unavailable at the time of the trial, the child's out-of-court statements can be admitted if the prosecution demonstrates that the statements bear an adequate "indicia of reliability."[45] If the statement does not fall within a "firmly rooted" hearsay exception, then the statement only becomes admissible upon a particularized finding of trustworthiness.[46]

Under the structure of Alabama's Act, it initially appears that the requirement that the child's statement bear a guaranty of trustworthiness applies only in cases where the child is unavailable and not in cases where the child also testifies in some manner.[47] This reading is consistent with the United States Supreme Court's holding in *Wright*.[48] However, in *Ex parte B.B.S.*,[49] the Alabama Supreme Court held that the trustworthiness requirement applies to any situation involving the admission of a child's out-of-court statement in a physical or sexual abuse case.[50]

In *B.B.S.*, the State called the alleged sexual abuse victim, a ten-year-old girl, to the stand.[51] The child denied her father had ever abused her, and she claimed not to remember previously telling anyone that he did.[52] The prosecution then called the child's teacher, principal, a social worker, and an investigator for the District Attorney's office to testify about the girl's out-of-court statements concerning the abuse.[53] A doctor also testified that the physical evidence corroborated that the girl had been sexually abused.[54] The defense then called the child's great-aunt who lived across the street from the child and her father.[55] When the prosecution objected, the defense explained that the great-aunt would testify that the girl told the witness that the father never harmed her and that a boy at school was responsible for her injuries.[56] The trial judge disallowed the testimony on the grounds that the

44. *Wright*, 497 U.S. at 814.
45. *Id.* at 814-15.
46. *Id.* at 817.
47. *See* ALA. CODE § 15-25-32 (1995). Subsection (1) of § 15-25-32 allows for the admission of a child's out-of-court statement where the child testifies via video tape or closed circuit television. Subsection (2)a. provides that the statement may be admitted if the child is found unavailable for one of six enumerated reasons, while the trustworthiness requirement is in subsection (2)b. Section 15-25-37, which outlines the factors for determining trustworthiness, specifically refers to Section 15-25-32(2)b. as the section that requires a showing of trustworthiness. *Id.* § 15-25-37.
48. *Wright*, 497 U.S. at 824.
49. 647 So. 2d 709 (Ala. 1994).
50. *B.B.S.*, 647 So. 2d at 714-15.
51. *Id.* at 710.
52. *Id.*
53. *Id.*
54. *Id.*
55. *B.B.S.*, 647 So. 2d at 711.
56. *Id.*

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defense offered no notice and that the statement did not concern a material element of the crime charged.[57]

The Alabama Supreme Court held that the trial court's grounds for refusing to admit the great-aunt's testimony were improper and that only one provision of the Act could support the trial court's ruling—the trustworthiness requirement.[58] As originally enacted, the trustworthiness requirement was contained in subsection (c) of section 15-25-32.[59] Section 15-25-37 refers to subsection 15-25-32(2)b, so when the Act was codified, subsection (c) was moved.[60] Due to this confusion as to where the trustworthiness requirement was meant to be, the Alabama Supreme Court held that there must be a showing of trustworthiness in every child abuse case.[61] The court acknowledged that the United States Supreme Court's decisions limited the trustworthiness requirement to cases where the child is found unavailable.[62] The Alabama Supreme Court expanded the trustworthiness requirement to apply when the defense seeks to introduce a child's out-of-court statements,[63] even though the Confrontation Clause is not implicated. Thus, in any situation where a child's out-of-court statements are offered, the criteria of trustworthiness must be satisfied.[64]

The Act provides the following factors that a court can use in making the mandated trustworthiness determination:

> (1) The child's personal knowledge of the event;
> (2) The age and maturity of the child;
> (3) Certainty that the statement was made, including the credibility of the person testifying about the statement;
> (4) Any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;
> (5) The timing of the child's statement;
> (6) Whether more than one person heard the statement;
> (7) Whether the child was suffering from pain or distress when making the statement;
> (8) The nature and duration of any alleged abuse;
> (9) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
> (10) Whether the statement has a 'ring of verity,' has an internal consistency or coherence, and uses terminology appropriate to the child's age;

57. *Id.*
58. *Id.* at 713.
59. *Id.* at 713-14.
60. *B.B.S.*, 647 So. 2d at 714.
61. *Id.* at 715.
62. *Id.* at 714.
63. *See id.* at 714-15.
64. *Id.*

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(11) Whether the statement is spontaneous or directly responsive to questions;
(12) Whether the statement is suggestive due to improperly leading questions;
(13) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.[65]

Courts are not limited to just these thirteen factors.[66] When considering trustworthiness, a court should look at the totality of the circumstances surrounding the making of the statement.[67] However, the court cannot take into account any additional evidence that tends to corroborate the child's statements.[68] For example, even if there is physical evidence or testimony from another witness that corroborates the child's statements, the court cannot consider this in determining trustworthiness.[69] The court can, however, look at any combination of the factors in the Act or others that the court deems relevant.[70]

The finding of trustworthiness must appear in the record.[71] This finding does not have to come from a separate trustworthiness hearing.[72] So long as the record reflects the trial court's findings on the issue, the requirements of section 15-25-37 are satisfied.[73] In fact, it is sufficient if the trial judge overrules a defense objection to the admission of the statement and the record contains facts that indicate that trustworthiness existed.[74]

Even if a court admits an out-of-court statement without a finding of trustworthiness and the accused is convicted, the error is not automatically going to warrant a reversal. If the defense counsel failed to request a finding on the issue of trustworthiness, then the defendant can argue ineffective assistance of counsel; however, the defendant must show that he was prejudiced by this failure and that the counsel's performance was deficient.[75] This requires the defendant to prove that had an inquiry on trustworthiness been conducted, the court would likely have found the child's statement to be inadmissible.[76] Unless the record offers no evidence based on which the court could have properly admitted the statement, the defendant must present affirmative proof that the child's statement was not trustworthy.[77] If

65. ALA. CODE § 15-25-37 (1995).
66. *Id.*
67. Idaho v. Wright, 497 U.S. 805, 819 (1990).
68. *Wright*, 497 U.S. at 819.
69. *See id.* at 822 (requiring that hearsay evidence possess reliability by virtue of inherent trustworthiness).
70. *See* ALA. CODE § 15-25-37 (1995); *Wright*, 497 U.S. at 819.
71. ALA. CODE § 15-25-37 (1995).
72. *See, e.g.*, Smith v. State, 745 So. 2d 284, 290 (Ala. Crim. App. 1998).
73. *See Smith*, 745 So. 2d at 290-91.
74. *See* Knight v. State, 710 So. 2d 511, 512 (Ala. Crim. App. 1997).
75. *See* P.D.F. v. State, 758 So. 2d 1118, 1120 (Ala. Crim. App. 1999) (citing the two-pronged test of Strickland v. Washington, 466 U.S. 668 (1984)).
76. *See P.D.F.*, 758 So. 2d at 1120.
77. *See id.* at 1124 (citing Holland v. State, 654 So. 2d 77, 80 (Ala. Crim. App. 1994) ("From the

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defense counsel does object to the admission of the hearsay but fails to object precisely to the lack of trustworthiness and the resulting Confrontation Clause problems, then the issue is not preserved for appeal and the defendant will not be allowed to pursue an appeal based on the Act.[78]

III. WHEN THE ACT DOESN'T WORK (OR THE DEFENDANT DOESN'T THINK SO)

There may be situations where a party in a child abuse case wishes to introduce a child's out-of-court statements but cannot meet the requirements of the Act. When this occurs, the party may be able to introduce the statements under a pre-existing exception to the hearsay rule. A more common situation arises after a child's out-of-court statements are admitted at trial, the defendant is convicted, and the defendant then appeals on the grounds that the statements were improperly admitted or some provision of the Act was violated.

A. Alternatives to Using the Act to Introduce a Child's Statement

Before the Act was passed, a child's out-of-court statement could be admitted under one of the traditional exceptions to the hearsay exclusionary rule. The exceptions most commonly used were the excited utterance and statement for the purpose of medical diagnosis and treatment exceptions.[79] These hearsay exceptions were very limiting, because the statement had to be made to a certain person at a certain time or while the child was in a certain state of mind.[80] The medical diagnosis or treatment exception would only permit the treating physician to testify about information the child revealed that was pertinent to the treatment.[81] When the child had been treated for physical injuries, anything the child said to indicate who had committed the abuse was generally not relevant to the medical treatment, so the doctor could not testify about it. Usually only when the child was being treated for psychological damage could the child's statement about the perpetrator be introduced under the medical exception.[82] The excited utterance exception could only be used if the child made the statement while in an excited state; since child abuse victims may make statements about the abuse some time

record, we cannot say that, had trial defense counsel made a motion requesting that the trial judge conduct a hearing . . . to determine the trustworthiness of [the child's] statements, the trial judge would have found them to be inadmissible.")).

78. *See* Hudgins v. State, 615 So. 2d 1297, 1299 (Ala. Crim. App. 1993) (holding that even where defense counsel objected based on hearsay and the denial of the right to cross-examine, the issue of a Confrontation Clause violation was not properly preserved for appeal, because "[t]he right of confrontation is not necessarily coextensive with the hearsay rule.") (quoting O.M. v. State, 595 So. 2d 514, 516 (Ala. Crim. App. 1991)).

79. ABRAMS & RAMSEY, *supra* note 7, at 567-68.

80. *See* CHARLES W. GAMBLE, MCELROY'S ALABAMA EVIDENCE, §§ 261.01 (2), 261.02 (5th ed. 1996).

81. *See* Cope, *supra* note 18, at 219.

82. *See id.* at 219, n.40.

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after the event, the child was not always in the requisite excited state of mind for the statements to be admitted under this exception.[83]

The Act allows for more statements to be admitted than these traditional exceptions, yet if the Act's requirements cannot be met, the parties may still offer the statement under a traditional hearsay exception.[84] The Act specifically states that it does not affect the admission of statements that can come into evidence through any other rule, so the hearsay exceptions that existed before the Act remain open to the parties in child abuse cases.[85]

B. Appeals of Convictions Under the Act

The trial court is generally granted broad discretion in deciding to allow a child's statements to be introduced as evidence.[86] A higher court will only reverse the trial court's decision if there was an abuse of discretion; this deferential standard of review makes it difficult for a convicted defendant to prevail on an appeal based on the admission of the child victim's statements.[87]

In many Alabama appellate cases where a conviction is challenged for the improper admission of a child's hearsay statement, the court refuses to reach the issue of whether the statement was properly admitted because the court finds the issue was not effectively preserved for appeal.[88] When this happens, it is extremely hard for the defendant to win an appeal for ineffective assistance of counsel.[89] As discussed in Subpart II.C, a defendant may be denied the chance to appeal the issue even when his attorney objected at trial but did not do so on the precise grounds of the Act or the Confrontation Clause.

Even when the issue is precisely and sufficiently preserved for appeal, the appellate court is unlikely to reverse a conviction based on the improper admission of a child's out-of-court statements. First, the high standard of review indicates that a trial judge's decision to admit (or not admit, in some instances) a child's statements will rarely be overturned. Even when a judge's presumed reasons for a decision are inadequate, the appellate court may be willing to look for more evidence to sustain the trial court's initial decision.[90] It makes sense that appellate judges are reluctant to reverse a trial judge's discretionary ruling that led to the conviction of an alleged

83. *See id.* at 220.

84. *See, e.g.*, Hudgins v. State, 615 So. 2d 1297, 1300 (Ala. Crim. App. 1993).

85. ALA. CODE § 15-25-40 (1995). As section 15-25-31 states, the Act only applies to statements "not otherwise admissible in evidence." Section 15-25-40 forbids the Act from limiting or barring the admission of an out-of-court statement that would be admissible if the Act did not exist. *Id.* §§ 15-25-31, -40.

86. *See* ABRAMS & RAMSEY, *supra* note 7, at 558.

87. *See id.*

88. *See, e.g.*, P.D.F. v. State, 758 So. 2d 1118, 1120 (Ala. Crim. App. 1999); Knight v. State, 710 So. 2d 511, 512 (Ala. Crim. App. 1997); R.D. v. State, 706 So. 2d 770, 781 (Ala. Crim App. 1997).

89. *See* discussion *supra* Subpart II.C.

90. *See Ex parte* B.B.S., 647 So. 2d 709, 713-15 (Ala. 1994).

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child abuser. Especially in a system like Alabama's where all members of the judiciary are elected, it is likely that the trial court's rulings will stand in all but the most egregious of cases.

IV. THE CONFRONTATION CLAUSE AND THE ACT: DO THEY PEACEFULLY COEXIST?

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right "to be confronted with the witnesses against him."[91] The Alabama Constitution contains a similar provision.[92] The United States Supreme Court has held that the Confrontation Clause does not mean the defendant always has a right to face-to-face confrontation with the witnesses against him.[93] Face-to-face confrontation can be eliminated to further an important public policy if reliability is somehow ensured.[94] Under Supreme Court caselaw, an out-of-court statement can be admitted if the declarant is unavailable and the statement either falls within a deeply rooted hearsay exception or has an indicia of reliability.[95] The Court has recognized that in many abuse cases, the child victim may speak in a variety of situations and to many different people.[96] Thus, the Court has refused to hold that the Confrontation Clause requires the statements to be the result of an interview or investigation that followed any particular procedural safeguards.[97]

Alabama's Act conforms to the United States Supreme Court's Confrontation Clause jurisprudence. The Act creates a new hearsay exception so, under *Wright*, if the child is unavailable, there must be an indicia of reliability.[98] The Act satisfies this by requiring a particularized finding of trustworthiness to appear on the record.[99]

V. SUGGESTED CHANGES TO THE PLACEMENT AND APPLICATION OF THE TRUSTWORTHINESS PROVISION

The purpose of the Act is to promote the state's ability to prosecute child abuse offenders and protect child victims.[100] To further this important public policy, the trustworthiness requirement should not be extended to cover situations where the child has testified. Although it is unclear where the legislature intended to put the trustworthiness provision, it ought to be

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91. U.S. CONST. amend. VI.

92. ALA. CONST. of 1901 art. I, § 6 ("[I]n all criminal prosecutions the accused has a right . . . to be confronted by the witnesses against him.").

93. Idaho v. Wright, 497 U.S. 805, 814-15 (1990) (citing Ohio v. Roberts, 448 U.S. 56 (1980)).

94. Maryland v. Craig, 497 U.S. 836, 850 (1990) (citing Coy v. Iowa, 487 U.S. 1016 (1988)).

95. *See* discussion *supra* Subpart II.C.

96. *Wright*, 497 U.S. at 818.

97. *Id.*

98. *See* discussion *supra* Subpart II.C.

99. ALA. CODE § 15-25-32 (2)b (1995); *id.* § 15-25-37 (listing factors to determine trustworthiness).

100. *See, e.g.*, Cope, *supra* note 18, at 226-27.

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treated as a subsection of unavailability (which is how it is presently codified).[101] The legislature's internal cross-reference to section 15-25-32, subsection (2)b, is consistent with this reading.[102]

Often when the child testifies in court or via closed circuit television, the child's out-of-court statements are also introduced to bolster the child's testimony. In this instance, a special finding of trustworthiness should not be required. First, the defendant has the opportunity to cross-examine the child. Secondly, the hearsay statements are not the primary evidence against the defendant; the child's out-of-court statements are not the only words from the child that the jury hears. Because the child appeared before the jury in some manner, the jury is able to observe the child's demeanor and make judgments about the child's maturity and credibility.

Another situation where a child victim's statements might be introduced even when the child has testified occurs in a case like *Ex parte B.B.S.*[103] In that case, the child recanted on the stand and denied that abuse had occurred.[104] The child's prior out-of-court statements were offered by the prosecution to contradict the child's testimony in court. When an adult's prior statements are offered to rebut his testimony, there is no special requirement of reliability; the statements are offered to show that the witness has contradicted himself.[105] When this situation occurs with a child, the statements should be admitted without a special showing of trustworthiness; the prosecution should be permitted to show the child's testimony on the stand is inconsistent with the child's previous statements. The jury should be permitted to determine if the child's testimony is more reliable and trustworthy than the out-of-court statements or vice versa.

Some people fear that the Act, along with rules that declare children generally competent as witnesses, may open the door to the admission of many unreliable statements.[106] From this perspective, the Alabama Supreme Court's application of the trustworthiness requirement to all out-of-court statements by children is not only beneficial but necessary.[107] However, judges always have the power to refuse to admit evidence when the prejudicial effect of the evidence outweighs the probative value.[108] When a defendant objects on this ground, the judge may make a trustworthiness inquiry as a part of determining if the evidence has probative value and is overly prejudicial. The particularized and on-the-record finding of trustworthiness required by the Act should not be automatically mandated in situations where the child has testified in the proceedings in some way.

101. *See supra* note 47.
102. *See* ALA. CODE § 15-25-37 (1995); *supra* note 47 and accompanying text.
103. 647 So. 2d 709.
104. *B.B.S.*, 647 So. 2d at 710.
105. *See* FED. R. EVID. 613.
106. *See, e.g.*, Cope, *supra* note 18, at 227.
107. *See B.B.S.*, 647 So. 2d at 714-15.
108. *See* GAMBLE, *supra* note 80, at § 242.01 (1)(c)(7).

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As the Alabama Supreme Court discussed in *B.B.S.*, the trustworthiness requirement is codified in a different subsection than where it originally was placed by the legislature.[109] Since the ruling in *B.B.S.*, the Alabama legislature has not amended the Act to either change the positioning of the trustworthiness provision or clearly apply it to only those times when the child is unavailable.[110] The legislature should affirm the current structure of the Act and thereby make it clear that the trustworthiness requirement only applies when the child declarant is unavailable. This is consistent with both the overall purpose of the Act and the United States Supreme Court's Confrontation Clause jurisprudence.[111]

VI. CONCLUSION

The Alabama Child Abuse Victim Protection Act provides valuable protection for children who have allegedly been victimized by child abuse. It also performs the important public function of removing major obstacles that have traditionally made it difficult for the state to prosecute child abuse cases.

Alabama's legislature and courts have balanced the Act with the rights of criminal defendants under the Sixth Amendment. Various provisions of the Act create protections for defendants and safeguards to ensure that a child's out-of-court statements are only admitted under appropriate conditions. However, the Alabama Supreme Court has extended the trustworthiness requirement past the limits necessitated by United States Supreme Court Confrontation Clause decisions. This area of the Act and its application should be changed to better suit the Act's purposes of facilitating child abuse prosecutions and, above all, protecting children.

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109. *B.B.S.*, 647 So. 2d at 714.

110. *See* R.D. v. State, 706 So. 2d 770, 786 (Ala. Crim. App. 1997).

111. *See* Idaho v. Wright, 497 U.S. 805 (1990); Ohio v. Roberts, 448 U.S. 56 (1980).

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