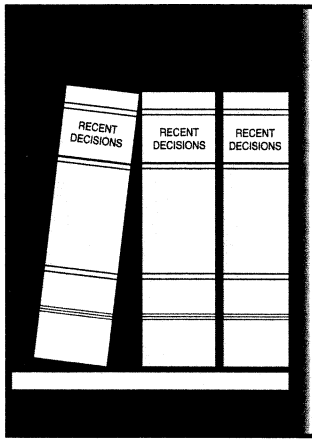
The Illinois "Outcry" Hearsay Exception

The Illinois Supreme Court held that only hearsay statements made by sexual assault victims below the age of 13 at the time of the outcry may be admitted against a defendant at trial. People v Holloway, *177 Ill 2d 1, 682 NE2d 59 (1997).*



A continuing contribution by students of the University of Illinois College of Law.

The Illinois Supreme Court held in *Holloway*[1] that prosecutors may only seek to introduce outcry hearsay testimony if the statements about an assault were made before the victim reaches age 13. Outcry hearsay is only allowed to corroborate the testimony of young victim-witnesses that have difficulty testifying. The court's decision eliminates the ambiguity that had surrounded the interpretation of section 115-10(a) of the Code of Criminal Procedure of 1963.[2] This case puts clear limits on prosecutors' use of hearsay in adolescent and child sexual assault cases.

While the court's new bright-line rule will be easier to comply with, it will also make convicting a person who sexually assaults a child under the age of 13 more difficult. This undesirable consequence will likely spark a legislative response in the immediate future.

I. Fact Summary

In November of 1987, Jerome Holloway, the defendant, traveled to Rosemont to visit his ex-wife and their three children. At the time of the visit the defendant's oldest daughter, C.H., was 11 years old. She testified that, on a Thursday afternoon during the visit C.H. returned home from school around 3 p.m. She found that her younger sisters were elsewhere in the apartment complex and that her father was home alone watching television from the couch. C.H. testified that she sat next to her father until he began to touch her in an uncomfortable manner. C.H. went on to describe an assault that included her father penetrating her both orally and vaginally.

In August of 1990, C.H. hosted a slumber party. Her older cousin Erin Dalzell was present. Erin testified at Mr. Holloway's trial that on the night of the slumber party C.H. seemed distracted and distant. She stated that C.H. was quiet and would not answer when asked what was bothering her. Eventually, C.H. confessed that she was having nightmares about her father and then related the details of the alleged attack from three years prior. At the time of these statements to her cousin C.H. was almost 14 years old. Erin convinced C.H. to report the alleged assault to her mother and stepfather and the defendant's prosecution ultimately resulted. It was testimony about C.H.'s outcry to Erin that was the subject of appeal.

Dr. Sharon Ahart testified that C.H. had been sexually abused. The defense called Lieutenant Lee Mayer of the Rosemont police. He testified to some inconsistencies between what C.H. said at trial about events surrounding the assault and what she had told him when he was investigating her complaint. According to Mayer's testimony, however, the details of the assault itself were identical both in court and when he spoke with C.H. prior to trial.

The defendant was the last to take the stand. He testified that he was never alone with C.H. during the visit and generally denied all the charges. Prior to the beginning of the trial the defense objected to the admission of the hearsay statements that C.H. had made to her cousin. These objections were overruled under section 115-10. The defendant was found guilty at his bench trial of two counts of aggravated sexual assault and sentenced to two concurrent six-year terms in prison.

II. Majority Opinion

The supreme court held in an opinion written by Justice Miller that the hearsay statements made by C.H. to her cousin when she was over the age of 13 were inadmissible. The court was faced with interpreting section 115-10(a), which states in relevant part:

> (a) In a prosecution for a sexual act perpetrated upon a child under the age of 13, including but not limited to prosecutions for violations of Section 12-13 through 12-16 of the Criminal Code of 1961, the following evidence shall be admitted as an exception to the hearsay rule:
>
> testimony by such child of an out of court statement made by such child that he or she complained of such act to another; and
>
> testimony of an out of court statement made by such child describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual act perpetrated on a child.[3]

Both the prosecution and the defense argued that the statute was unambiguous. However, the parties specifically disagreed as to the meaning to be given the phrase "such child." The state argued the phrase was merely a description of the type of crime involved and not an age limit for the admissibility of "outcry" statements. The defense submitted that the phrase was meant as a requirement that the statements be made by a declarant under age 13. The court found both interpretations to be reasonable because the statute was ambiguous.

The court then turned to the statute's legislative history to clear the ambiguity. The court first took notice of the difficulty prosecutors have historically had winning convictions in child sexual assault cases. The history surrounding section 115-10(a) suggested that it was the young victims' lack of cognitive and verbal skills that prevented them from adequately expressing the details of the crime in court. According to the court, the legislature saw a need to bolster the testimony of very young victim-witnesses in order to facilitate successful prosecution of this crime. The legislature responded by creating a hearsay exception that would allow the victim and third parties to bolster the victim's testimony with statements that the victim had complained of the crime to another out of court.

As support for this conclusion, the court cited the discussion of the bill in question on

1. *People v Holloway*, 177 Ill 2d 1, 682 NE2d 59 (1997). Unless otherwise indicated, all references in sections I, II, and III are to this citation.
2. 725 ILCS 5/115-10(a) of the Code of Criminal Procedure of 1963.
3. Id.

the floor of the legislature in 1982. The court gave weight to the statements of Representative Jaffe. Jaffe explained that the bill was meant to allow corroboration of the victim's testimony.[4] The court also considered strongly the comments of Representative Stearney. He questioned the need for corroboration of a 17-year-old's testimony. In 1982, the bill was meant to include victims 18 and under.[5] This floor discussion demonstrated to the majority that outcries were to be allowed into evidence only when the case involved a young victim with difficulty testifying. The majority agreed that this was a narrow hearsay exception not concerned with reliability but with corroboration.

The court concluded that the legislature was primarily concerned with a young victim's ability to understand and communicate what had happened. The court supported this by pointing to the drop in the relevant age from 18 to13. Further, the court pointed to amendments to section 115-10 that were enacted in 1993 and 1994.[6] The 1993 amendments expand the number of crimes perpetrated against children that the hearsay exception applies to, and extend the hearsay exception's protection to mentally retarded victims. The 1994 amendments convinced the court that the hearsay exception was meant to aid victims with an impaired ability to testify.

The court rejected the state's contention that outcries made at any age should be admitted if the underlying crime was committed when the victim was under 13. In so doing, the court noted that its decision is consistent with prior appellate court decisions on the same issue.[7] The court also reasoned that the interpretation they came to is consistent with similar laws in at least 12 other states and is, therefore, the one the legislature intended.[8]

Based on its reading of section 115-10(a) the court held that C.H.'s outcry statements to her cousin were inadmissible. The court then looked at the evidence remaining when the hearsay was removed and determined that the exclusion of the hearsay warranted a new trial.

III. Dissenting Opinion

Chief Justice Freeman strongly rejected the majority's conclusion that the purpose of section 115-10(a) was to bolster the testimony of witnesses who are likely to have difficulty testifying at trial. Rather, the chief justice passionately urged that the rationale for the rule is in the original common law exception for outcries in rape cases. It was his contention that the need to allow hearsay testimony in sexual assault cases is predicated on the victim's ability to quickly and accurately report the offense.

> The basis for the admission of outcry evidence at common law was to establish that the victim did, in fact, speak out regarding the sexual assault, thereby refuting any presumption arising from the evidence of her silence that nothing untoward occurred.[9]

The chief justice regarded section 115-10 to be a codification of this common law exception. He therefore read section 115-10 (a)'s requirement that the victim be younger than 13 to be a description of the criminal act and not so much a physical characteristic of the victim for the purpose of admitting hearsay. When Freeman read the "such child" phrase in subsections (1) and (2), he read it to be shorthand for the sexual assault of a child and not a requirement that the victim be under a certain age at the time of outcry or of trial to have the hearsay admitted. Freeman's position very closely mirrored the state's interpretation of the statute.

Freeman found support for his interpretation first by comparing the relative applications of his reading and that of the majority. Freeman's reading allowed hearsay testimony even from declarants older than 13 subject only to the other requirements of section 115-10(b). Section 115-10(b) allows outcry hearsay testimony to be admitted when the declarant has grown older than 13 at the time of the outcry 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 safeguards of reliability; and (2) the child either testifies at the proceedings or is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.[10] This reading better facilitates the agreed goal of aiding prosecution.

Freeman pointed out that the majority's reading of the "such child" phrase required that, for outcry hearsay to be admitted, the victim must be under 13 at the time of the assault, at the time of the outcry, and at the time of trial if he or she is to testify as to the outcry. This restrictive reading leads to the result that if the victim has turned 13 at the time of the trial, he or she cannot testify as to the outcry (provided, however, that the outcry was made before the victim was 13, a third party could testify about the outcry under section 115-10(a)(2)). If the victim remains silent until age 13, the outcry is not admissible under section 115-10(a) at all.

Freeman dismissed the consistent *Bridgewater* and *E.Z.* decisions as not addressing these problems. He also dismissed the legislative history offered by the majority. Freeman saw no indication that Representative Stearney's comments addressed these problems either. He believed Stearney was merely commenting on the age of the victim at the time of the assault as that was the age that was lowered from 18 to 13 as a result of the debate.[11] Freeman made no mention of the consistency between the majority's reading of the Illinois statute and the statutes of several other states.

IV. Analysis

For two reasons Chief Justice Freeman's is not a workable solution to interpreting section 115-10. First, while his solution is more pro-prosecution, it is not as readily applied as the majority's. The majority established a bright-line rule of under age 13 at all relevant times for hearsay to be admissible, whereas Freeman required an additional hearing to determine if the hearsay is admissible. Second, the majority rule limits the use of hearsay to instances where the victim/witness is likely to have difficulty testifying and need corroboration. This rule protects defendants from hearsay testimony until the benefits to justice of its admission greatly outweigh the prejudice to the defendant. The dissent would go to great lengths to allow hearsay, though it is by its very nature unreliable testimony. At all times when an ad hoc decision that the amorphous concepts of time, place, and circumstances lift the shroud of unreliability from the testimony, Chief Justice Freeman would admit it.

Further, Chief Justice Freeman failed to acknowledge that the outcry exception to the hearsay rule is starkly different from other hearsay exceptions. Specifically, most hearsay exceptions share the characteristic that they are generally thought to be reliable. For example, statements made to doctors by a declarant pursuing medical advice[12] come under the hearsay exception because a person is unlikely to lie when his or her health is at

4. 82 Ill Gen Assem, House Proceedings, March 25, 1982, at 87 (statements of Representative Jaffe).
5. 82 Ill Gen Assem, House Proceedings, March 25, 1982, at 88 (statements of Representative Stearney).
6. 725 ILCS 5/115-10(a) (West 1994).
7. *People v E.Z.*, 262 Ill App 3d 29, 34, 633 NE2d 1022, 1026 (2nd D 1994) (child must be under the age of 13 at the time the statement is made in order to hold hearsay statements admissible under section 115-10); *People v Bridgewater*, 259 Ill App 3d 344, 349, 631 NE2d 779, 782 (4th D 1994) (age limit applies to the time the statement was made as well as to the time when the abuse allegedly occurred).
8. Fla Stat Ann § 90.803(23) (West Supp 1997) (child must be age 11 or under at time of statement); Ind. Code Ann § 35-37-4-6 (Michie 1994) (for hearsay statements to be admissible, the child must be under the age of 14 at time of trial); Minn Stat Ann § 595.02(3) (West Supp 1988) (child must be under the age of 10 at time of statement); Mo Ann Stat § 491.075 (West 1996) (child must be under the age of 12 at time of statement); Ohio R Evid 807 (Anderson 1996) (child must be under the age of 12 at time of trial or hearing); 42 Pa Cons Stat Ann § 5985.1 (West Supp 1996) (child must be age 12 or under at time of statement).
9. *People v Holloway*, 682 NE2d at 66 (Freeman dissent; citing *People v Damon*, 28 Ill 2d 464, 472-73, 193 NE2d 25, 30 (1963).
10. 725 ILCS 5/115-10(b).
11. 82 Ill Gen Assem, House Proceedings, March 25, 1982, at 88 (statements of Representative Stearney).
12. 725 ILCS 5/115-13.

stake. Statements that fall into hearsay exceptions are not believed to always be true. However, for the purposes of gathering evidence to decide cases they are thought to be generally reliable. Outcry statements have no comparable indicia of reliability. Rather, they are prosecutorial tools by design. As such, they are even more dangerous than other forms of hearsay.

Freeman did correctly point out that the nature of sexual assault makes it a difficult crime to prosecute. His rule would alleviate some of the problems created by the silence and fear that attends sexual assault victims. However, he ignored other important characteristics of child sex crimes, such as that they have a significant rate of false reporting.[13] In addition, convictions for these crimes carry harsh penalties. Defendant Holloway had been sentenced to two 6-year terms of imprisonment. Today many states have enacted sex offender registration laws. These new laws require those convicted of sex crimes to register with local authorities everywhere they live for the rest of their lives. The need for reliable testimony in these cases is obvious. Freeman's dissent ultimately argued for a rule that would be more difficult to implement and would introduce more unreliable testimony into the justice system.

The majority of the court held that, for cases of sexual assault involving a child under 13, hearsay testimony about a victim's outcry to another is admissible only when the assault and the statements took place prior to the victim turning 13. In addition, for the victim to testify as to the outcry statements, the victim must be below age 13 at the time of trial. However, as long as the underlying outcry statements were made prior to age 13, parties to whom the outcry was made may testify to the hearsay statements. This rule allows hearsay only to bolster the testimony of a witness under age 13 who might not be convincing on the witness stand. The court's decision regarding the admission of outcry hearsay is clear and the resulting rule of law will be easy for prosecutors to comply with.

The majority's opinion is strong because it recognizes the danger of hearsay. When a victim does not testify, hearsay testimony about an outcry is admissible against a defendant only where the victim made the statements under age 13. This portion of the court's rule strikes a balance between the need to protect children from the trauma of testifying in court and the need for evidence that will facilitate successful prosecutions of these crimes. If the young victim testifies, then hearsay is admitted to bolster testimony that would otherwise be weak due to the child's lack of verbal and cognitive skills. These are instances where prosecutors have a compelling need for hearsay evidence. To remove the age requirement would allow much more hearsay into evidence.

The dangers of admitting out-of-court statements are especially pronounced with children. Child witnesses may have difficulty perceiving and remembering events. They may be led by zealous investigators and their own need to feel accepted. They may lie to manipulate people or may themselves be manipulated by vengeful parents in a divorce action. These reasons are why hearsay is generally not admissible. However, the state has a compelling need for additional evidence in sexual assault cases where a child is victimized. The court's opinion appropriately fills this need but prudently minimizes instances in which the additional evidence is allowed.

The soundness of this opinion is further underscored by its consistency with other conservative decisions in this area of criminal procedure. In 1996, the supreme court refused to hear *People v Hall*.[14] The court may have denied hearing for a number of reasons. However, *Hall* represented an opportunity for the court to expand the medical treatment exception to include a child's identification of his or her attacker. Further, the court struck down a law allowing for testimony by closed circuit television in child sexual assault cases rather than expand its reading of the Illinois Constitution Confrontation Clause beyond its stated limits.[15] *Fitzpatrick* was subsequently overturned by constitutional amendment.[16] The Illinois Supreme Court has been consistently and appropriately hesitant to engage in judicial law making in this area. The court again in this case leaves changing the laws to the people and legislators of Illinois.

V. Implications

The Illinois Supreme Court's narrow interpretation of section 115-10 inevitably

13. Robert G. Marks, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 Harv J on Legis 207 (1995).

14. *People v Hall*, 168 Ill 2d 608, 671 NE2d 737 (1996).

15. *People v Fitzpatrick*, 158 Ill 2d 360, 633 NE2d 685 (1994).

16. George H. Ryan Secretary of State, State of Illinois, Proposed Amendments to the Constitution of Illinois (1994).

has implications for the future of the law in this area. The court sanctions a narrow hearsay exception in child sexual abuse cases at a time when the number of such cases is increasing.[17] Illinois' over 12,000 reported cases in 1992 accounts for 10 percent of national cases. There is strong reason to believe that the legislature will act.

Legislators are historically very sensitive and quick to act on issues concerning voters' children. As noted previously, the legislature responded quickly to the *Fitzpatrick* decision.[18] There is reason to believe that Springfield will quickly address the outcry exception to the hearsay rule. First, the legislature has demonstrated its interest in the area of law by amending section 115-10 as recently as 1993 and again in 1994.[19] Further, as the dissent points out, there is an anomaly in the statute as the court reads it.[20] It creates a situation in which a victim cannot testify at trial about an outcry made before he or she turned 13 if the victim is over 13 by the time of trial. However, in this situation the person who heard the outcry may testify to the hearsay at trial.

The strongest indicator that legislative change looms on the horizon is the recent 1995 attempt by the General Assembly to broaden the outcry exception. In response to the *E.Z.* and *Bridgewater* decisions, the Illinois House of Representatives moved to expand section 115-10 in 1995. The House passed a bill that would have raised the applicable victim age in the statute to 15.[21] The bill also included an amendment that would have allowed the outcry hearsay into evidence though the declarant was over age 15 at the time of the statements.[22] The bill went to the Senate, where a requirement that the outcry take place within one year of the incident was added. Ultimately the legislature could not agree on the bill and it did not become law.[23]

The problems of prosecuting child sexual abuse cases are getting more attention as the reporting of such cases increases. The Illinois legislature has been active in this area of criminal procedure recently and the anomaly created by *Holloway* invites further action. Moreover, it has a history of reacting quickly to decisions in this area that it finds unfavorable. Because of the current political climate it is likely that the outcry hearsay exception in section 115-10 will be expanded by the legislature soon, unless the legislature is very concerned about the risks of hearsay testimony. Illinois is not likely to imitate another state's law because it will be easy enough to expand the current one. This expansion will almost surely include an increase in the age of the child covered by the law and a restriction on the use of outcry testimony offered by third parties.

VI. Conclusion

Holloway holds that in a prosecution for the sexual assault of a child, only outcry hearsay statements made by victims who are under age 13 when the outcry is made may be admitted against the defendant in a criminal trial. The court establishes a hearsay exception guideline that is absolute and can be easily followed. The exception exists only to bolster testimony of victims with difficulty testifying. However, if the rule does not sufficiently facilitate the prosecution of child sexual assault cases, it is likely that the legislature will expand the statute's applicability without regard to the dangers of hearsay in the near future.

— Daniel K. Peugh

17. Thomas Conklin, *People v Fitzpatrick: The Path to Amending the Illinois Constitution to Protect Child Witnesses in Criminal Sexual Abuse Cases*, 26 Loy U Chi L J 321 (1995).
18. Id.
19. 725 ILCS 5/115-10(a) (West 1994).
20. *People v Holloway*, 682 NE2d 59 (Chief Justice Freeman dissenting).
21. 89th Ill Gen Assem, House Bill 160, 1995 Sess.
22. Id.
23. Id.

Pretext Stops (Continued from page 492)

fic laws. Traffic violations, even if common or minor, are still against the law and, therefore, provide police with the requisite probable cause to conduct an investigatory stop.

Second, legislating against pretext stops would increase the difficulties of the job of police by preventing them from apprehending serious crime offenders during lawful traffic stops. Third, legislation that allows inquiry into police motives would be unworkable in practice. On what basis, if not an objective basis, could a court possibly determine the "true" intent of officers when enforcing the law? Applying a subjective test would unquestionably lead to inconsistent results that, at times, would punish police accused of improper motives despite a valid arrest.[64]

Finally, even if Illinois passed legislation prohibiting pretext stops, it is still unlikely that drug offenders would receive the protection they seek. Under the dual sovereign doctrine, drug offenders may be prosecuted in federal and state courts without violating double jeopardy.[65] Thus, offenders could still be tried in the federal system, where the pretext stop argument has been eliminated. Ironically, these offenders could receive even stiffer sentences under the federal sentencing guidelines, which are more stringent and draconian than the Illinois sentencing scheme.

VIII. Conclusion

Illinois courts have sometimes used and other times rejected the lockstep approach when analyzing parallel constitutional provisions. However, in the context of unreasonable searches and seizures, the courts have not wavered. The Fourth Amendment proscription against unreasonable searches and seizures is coextensive with the scope of Article I, section 6 of the Illinois Constitution. Accordingly, Illinois courts have consistently applied federal interpretations to our constitutional provision governing searches and seizures.

Moreover, Illinois courts have foreclosed on the idea that our search and seizure clause provides any greater protection than that afforded under the Fourth Amendment. Given this history, there is no reason for the Illinois Supreme Court to depart from the *Whren* analysis for challenges of pretext stops under the Illinois Constitution.

Still, courts should be particularly cautious in their wording of the proper test in resolving pretext claims. As *Whren* and *Thompson* made apparent, there is a distinction between the "would" test and the purely objective test. Fusing the two tests causes an illogical departure from the lockstep approach.

64. *People v Anderson*, 169 Ill App 3d 289, 295, 523 NE2d 1034, 1038 (3d D 1988), citing 2 W. LaFave, *Search & Seizure* §5.2(e) at 459 (2d ed 1987) (questioning whether it is within the ability of judges to accurately determine the subjective intentions of police).
65. *Heath v Alabama*, 474 US 82, 88, 88 L Ed 2d 387, 106 S Ct 433, 437 (1985).