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THE EFFECTS OF THE ABOLITION OF THE CORROBORATION REQUIREMENT IN CHILD SEXUAL ASSAULT CASES

The nation's growing awareness of sexual abuse of children has resulted in an increase in the number of reported cases of abuse throughout the country.¹ Child protection agencies nationwide report that an estimated 1.5 million alleged child abuse cases were reported in 1983 and approximately 71,961 of these abuse cases involved allegations of child sexual maltreatment.² The true incidence of child sexual abuse, however, remains difficult to measure as it is the most under-reported form of abuse.³ Moreover, even though more cases of child sexual assault are going to court than ever before,⁴ it is estimated that approximately 90% of all child abuse cases across the country are never prosecuted.⁵

In the District of Columbia, the statistics are equally alarming. In the first six months of 1986, the Metropolitan Police Department investigated 347 sexual assault cases and 39.7% of these cases involved a child alleging sexual maltreatment.⁶ Between 1978 and 1985, Children's Hospital Medical

1. D. WHITCOMB, E. SHAPIRO & L. STELLWAGEN, *WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS* 8 (1985) [hereinafter D. WHITCOMB].

2. *Id.* at 2.

3. NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, *CHILD SEXUAL ABUSE: LEGAL ISSUES AND APPROACHES 2* (1981) [hereinafter *CHILD SEXUAL ABUSE*]. The available statistics are sketchy because only recently have states included a provision for separating child sexual abuse statistics from the aggregate statistics of other forms of abuse. *Id.* See D. WHITCOMB, *supra* note 1, at 2, "The Bureau of Justice Statistics estimates that only one-third of all crimes, and 47 percent of violent crimes, are reported to the police. Moreover, young victims are only half as likely as the total population to report crimes to the police." *Id.*

4. D. WHITCOMB, *supra* note 1, at 8. This is due to a higher level of reports resulting from "high levels of media attention and public outrage over sexual crimes against children." *Id.*

5. *Id.* at i. "In many of these cases, the decision not to proceed is based on concerns about the child's possible performance on the witness stand or the impact of the court process on the victim's recovery." *Id.* The reason for the high percentage of cases which are not prosecuted has gone virtually unexplained. "Both community members and criminal justice professionals are increasingly concerned about [the] apparent ineffectiveness in dealing adequately with the crime of child sexual abuse." *Id.*

6. Metropolitan Police Department, *Sex Offense Investigation Report 1* (June 30, 1986). In 1985, there were 789 cases of sexual assault reported in the District of Columbia. Two hundred and sixty-three of these cases, or 33%, were victims under the age of 16. Metropolitan Police Department, *Sex Offense Investigation Report 1* (Dec. 31, 1985).

Center counseled 2,376 cases involving sexually abused children through its victim's assistance project.⁷

Historically, the District of Columbia has imposed the legal requirement of corroboration on all sex-related crimes.⁸ After the District's case was presented, the judge could, at the request of the defense, direct a verdict of acquittal based on lack of corroborative evidence.⁹ In 1975, the District of Columbia Court of Appeals abolished this requirement for cases involving sexually abused adult females.¹⁰ In 1985, the District of Columbia City Council followed the judiciary's lead and abolished the corroboration requirement for child complainants.¹¹

This Note will trace the evolution and the demise of the legal requirement of corroboration as it was applied in the District of Columbia. An analysis of the evolution will reveal that the courts have become more flexible in applying the corroboration requirement in the last decade than in the past. This Note will conclude that, despite formal abolition, corroboration remains an essential element in the successful prosecution of child sexual abuse cases because of the nature of the offense. Consequently, the legislative abolition, although meritorious, will probably have few practical benefits.

I. THE EVOLUTION AND ABOLITION OF THE CORROBORATION REQUIREMENT

In *Lyles v. United States*,¹² the earliest known reference to the need for corroboration in District of Columbia sex crime cases, the Court of Appeals

7. D. LLOYD, LEGAL OUTCOME OF CHILDREN'S HOSPITAL NATIONAL MEDICAL CENTER CHILD SEXUAL ABUSE CASES 1/10/78-12/31/85, at 2 (1986).

8. See *infra* note 20 and accompanying text.

9. Lloyd, *The Corroboration of Sexual Victimization of Children*, in CHILD SEXUAL ABUSE AND THE LAW, A REPORT OF THE AMERICAN BAR ASSOCIATION 103 (J. Bulkley ed. 1982). "The corroboration requirement in sex crimes is analogous to the government having the burden of refuting an implied charge of recent fabrication." *Fitzgerald v. United States*, 443 A.2d 1295, 1305 (D.C. 1982). The District of Columbia statutes that the corroboration requirement pertained to included: rape, D.C. CODE ANN. § 22-2801 (1981); sodomy, D.C. CODE ANN. § 22-3502 (1981); assault with intent to rape, D.C. CODE ANN. § 22-501 (1981); indecent acts with a child, D.C. CODE ANN. § 22-3501 (1981); incest, D.C. CODE ANN. § 22-1901 (1981); lewd, indecent, or obscene acts, D.C. CODE ANN. § 22-1112 (1981).

10. *Arnold v. United States*, 358 A.2d 335, 344 (D.C. 1976) (en banc). The court noted that the requirement was to protect the defendant from a conviction based on false charges. However, the court was "persuaded that the requirement . . . presently serves no legitimate purpose" because the defendant has adequate constitutional safeguards. *Id.* at 343.

11. D.C. CODE ANN. § 23-114 (Supp. V 1986). "For purposes of prosecutions brought under title 22 of the D.C. Code, independent corroboration of a child victim is not required to warrant a conviction." *Id.*

12. 20 App. D.C. 559 (1902). The corroboration requirement did not exist at common law. 7 WIGMORE ON EVIDENCE § 2061, at 342 (3d ed. 1940).

for the District of Columbia Circuit¹³ suggested in dictum that corroboration was necessary for a conviction if the complainant's testimony was not credible.¹⁴ The court, however, did not create a legal requirement of corroboration in sex crime cases.¹⁵ In the next relevant case, *Kidwell v. United States*,¹⁶ the United States Court of Appeals for the District of Columbia Circuit reversed a conviction which was supported solely by the complainant's testimony.¹⁷ In reversing the conviction, the court observed that in sex offense cases where the courts had sustained convictions, "the circumstances surrounding the parties at the time were such as to point to the probable guilt of the accused, or, at least, corroborate indirectly the testimony of the prosecutrix."¹⁸ Although the cases decided immediately after *Kidwell* did not interpret that case as imposing a corroboration requirement,¹⁹ subsequent cases misread *Kidwell* as holding that corroboration was a legal prerequisite to conviction in sex offense cases.²⁰

13. This case and others cited in this Note were decided prior to the Home Rule Act of 1983, D.C. CODE ANN. §§ 1-201 to 1-295 (1981).

14. 20 App. D.C. at 562. The court stated, "[t]he crime of rape is not always easy to establish. It most generally depends upon the testimony of a single witness to the actual or alleged commission of the crime, and unless her testimony is beyond question or doubt, or made so by surrounding circumstances, there is danger in conviction." *Id.* (emphasis added).

15. *Id.* In fact the court indicated that a conviction could be obtained solely on the testimony of the complainant if that testimony was believable beyond a reasonable doubt. *Id.*

16. 38 App. D.C. 566 (1912). The defendant was charged and convicted of carnal knowledge committed against his niece who was under the age of 16. *Id.* at 568.

17. *Id.* at 574. The prosecutrix testified that she lived in defendant's home and that he had been having intercourse with her for three years "whenever an opportunity was afforded." *Id.* at 573.

18. *Id.* This was not the sole reason why the court reversed the conviction. The court emphasized that the prosecutrix's allegations were not credible in view of her "incorrigible character" and the "respectable standing" of the defendant. *Id.*

19. *Mears v. United States*, 55 F.2d 745 (D.C. Cir. 1932); *Weaver v. United States*, 299 F. 893 (D.C. Cir. 1924). In *Weaver* the Court of Appeals for the District of Columbia found the complainant's testimony "so directly discredited, as to be unworthy of belief." 299 F. at 897. This passage indicates that the court was applying the requirement that the government present sufficient evidence so that a jury could find the defendant guilty beyond a reasonable doubt. The court cited a portion of *Kidwell* which suggests that a conviction for rape can be obtained without corroboration on the "unassailed testimony of a single witness." *Id.* (emphasis in original). In *Mears*, the defendant's conviction for carnal knowledge of a fifteen year old girl was sustained. No reference was made to any legal requirement of corroboration. 55 F.2d at 745. See *McKenzie v. United States*, 126 F.2d 533 (D.C. Cir. 1942) (although the conviction was reversed on other grounds, there was no suggestion of a requirement of corroboration to establish a prima facie case).

20. *Kidwell* often has been cited for the proposition that corroboration is a legal requirement. See, e.g., *United States v. Huff*, 442 F.2d 885, 888 (D.C. Cir. 1971); *United States v. Bryant*, 420 F.2d 1327, 1330-31 (D.C. Cir. 1969); *Coltrane v. United States*, 418 F.2d 1131, 1134 (D.C. Cir. 1969); *Allison v. United States*, 409 F.2d 445, 448 (D.C. Cir. 1969); *Dade v. United States*, 407 F.2d 692, 694 (D.C. Cir. 1968); *Barber v. United States*, 392 F.2d 517, 519 (D.C. Cir. 1968); *Borum v. United States*, 409 F.2d 433, 437 (D.C. Cir. 1967), cert. denied, 395

Lyles and *Kidwell*²¹ were both rape cases involving adult female complainants. In *Kelly v. United States*,²² the District of Columbia Circuit extended the corroboration requirement to sex offenses which were lesser sex offenses than rape, and in *Wilson v. United States*,²³ the court explicitly extended the corroboration requirement to cases in which the complainant was a child.²⁴ The court of appeals reasoned that cases of sexually abused children required corroboration because a child's testimony lacked the reliability of an adult's.²⁵ Therefore, the court concluded, if an adult's testimony must be corroborated, then surely, a child's must be corroborated.²⁶

In *Borum v. United States*,²⁷ the court clarified the procedure to be followed in sex crime prosecutions. The court stated that "[w]hile the matter of corroboration is initially for the trial court, like any other question as to the legal sufficiency of the evidence to warrant submission of the case to the jury, it is the latter's function to decide whether the standard of corroborative proof has been met."²⁸ The court, citing *Kidwell*, indicated that corroboration was required as to both the corpus delicti and the identification of the accused,²⁹ and the jury must be instructed that to convict they must find

U.S. 916 (1969); *Miller v. United States*, 207 F.2d 33, 35 (D.C. Cir. 1953); *Ewing v. United States*, 135 F.2d 633, 635 (D.C. Cir. 1942), *cert. denied*, 318 U.S. 776 (1943).

21. In *Kidwell*, although the prosecutrix was under sixteen when the alleged incident occurred, she was past the age of consent when she testified. 38 App. D.C. at 573.

22. 194 F.2d 150, 156 (D.C. Cir. 1952) (Defendant was charged with inviting one to accompany him for lewd and immoral purposes contrary to D.C. CODE ANN. § 22-2701 (1940). This offense was a misdemeanor, while previously the corroboration requirement was applied only to felonies.)

23. 271 F.2d 492 (D.C. Cir. 1959) (defendant convicted of taking indecent liberties with an 11 year old girl).

24. *Id.* at 493. The court noted that the "[a]ppellant was guilty if anyone was, for he alone was with the child at the time of the alleged offense. But there was no evidence of any sort, except the testimony of the child herself . . ." *Id.* at 492. "[W]e now hold that the *corpus delicti* . . . may not be established by the child's uncorroborated testimony on the witness stand." *Id.* at 493.

25. *Id.* at 493. The court relied on M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 374 (1952). 271 F.2d at 493. "It is well recognized that children are more highly suggestible than adults. Sexual activity, with the aura of mystery that adults create about it, confuses and fascinates them. Moreover, they have . . . no real understanding of the serious consequences of the charges they make. . . . [M]ost courts show an admirable reluctance to accept the unsubstantiated testimony of children in sexual crimes." *Id.* at 493 (citation omitted).

26. *Id.* at 493. The court stated that "[a] woman's uncorroborated tale of a sex offense is not more reliable than a man's. A young child's is far less reliable." *Id.* at 492-93.

27. 409 F.2d 433 (D.C. Cir. 1967), *cert. denied*, 395 U.S. 916 (1969). The defendant broke into a home by striking the 80 year old resident over the head with a pistol. Shortly thereafter a female neighbor came into the house and the defendant forced her to undress and submit to sexual intercourse. *Id.* at 435.

28. *Id.* at 438.

29. *Id.* at 438. The court found sufficient corroborative evidence in the following: the

corroboration of each element.³⁰

As the court expanded the corroboration requirement to encompass more factual situations,³¹ it applied the requirement more stringently. In *Allison v. United States*,³² the appellant was convicted of intent to gain carnal knowledge of an eleven year old female.³³ Although the complainant's younger brother witnessed the defendant "on top of" the complainant and two witnesses testified as to the victim's report and demeanor immediately after the incident,³⁴ the court concluded that the story lacked sufficient corroboration and reversed the conviction.³⁵ The court explained that the corpus delicti must be corroborated in addition to the identification of the accused.³⁶ Sufficient corroboration of the corpus delicti entails corroboration of every element of the offense³⁷ and in this case, the court found that the element of intent was not sufficiently corroborated.³⁸

The District of Columbia courts, perhaps recognizing that this stringent standard at times produced unrealistic and unjust results,³⁹ began to retreat

complainant called the police immediately following the intruder's exit; medical evidence of intercourse was presented; a laundryman overheard the initial conversation between the complainant and the defendant, and appellant's fingerprints were found at the scene of the crime. *Id.* at 438.

30. *Id.* at 437 n.16.

31. See *Wilson v. United States*, 271 F.2d 492 (D.C. Cir. 1959); *Kelly v. United States*, 194 F.2d 150 (D.C. Cir. 1952); see also *supra* notes 23-30 and accompanying text.

32. 409 F.2d 445 (D.C. Cir. 1969).

33. *Id.* at 447. The defendant was also charged with taking indecent liberties with a minor child in violation of § 22-3502(a) but was acquitted. *Id.*

34. *Id.* at 448. At trial, testimony revealed that the complainant was walking with her younger brother and cousin when the defendant coaxed them into his house. *Id.* at 447. He then sent the young boys to the store and when he was alone with complainant he threw her onto the couch, pulled down his zipper, got on top of her, and tried to pull her pants down. *Id.* at 447-48. When the boys returned they could hear the complainant screaming and through the keyhole of the door could see the appellant on top of the complainant. *Id.* at 448. The complainant escaped, ran home, and immediately, in a hysterical state, told a friend that "some man had pulled her in the house." *Id.* An officer testified that the complainant told him that the appellant "tried to put his private in her." *Id.*

35. *Id.* at 452. The court remanded to the district court to enter judgment of guilty to the charge of taking indecent liberties with a minor child. *Id.*

36. *Id.* at 448. See *Borum*, 409 F.2d at 437 n.16 (indicating that both the identity of the accused and the corpus delicti must be corroborated).

37. *Allison*, 409 F.2d at 449.

38. *Id.* at 449-50. "Putting aside for a moment the matter of corroboration, we have no doubt that the Government's case established an intent to commit carnal knowledge." *Id.* "If this testimony were corroborated it would surely support a jury finding that, beyond a reasonable doubt, appellant entertained the intention to carnally know the prosecutrix." *Id.* at 450. "Since . . . the *corpus delicti* was uncorroborated, appellant's conviction . . . cannot stand." *Id.*

39. See *United States v. Gray*, 477 F.2d 444, 445 (D.C. Cir. 1973); *United States v. Terry*, 422 F.2d 704, 708 n.6 (D.C. Cir. 1970) (criticizing the *Allison* standard). The strict rule of corroboration, that every element of the offense must be corroborated, "compel[s] the Govern-

from this standard.⁴⁰ In *Gray v. United States*,⁴¹ the United States Court of Appeals for the District of Columbia Circuit, held that the corroboration requirement had been met and stated that "corroborative evidence [is] sufficient when it would permit the jury to conclude beyond a reasonable doubt that the victim's account of the crime was not a fabrication."⁴² The court reasoned that the rule should be flexible and the quantum of proof should depend on the facts of each case.⁴³ The District of Columbia Court of Appeals subsequently adopted this standard and its reasoning in *Moore v. United States*.⁴⁴ The result was that the strict standard of *Allison* no longer controlled while the new standard of *Gray* and *Moore* applied to sexual offenses in the District of Columbia.⁴⁵

Three years after *Gray* and *Moore*, in *Arnold v. United States*,⁴⁶ the District of Columbia Court of Appeals, sitting en banc, abolished the requirement in cases with a "mature female" prosecutrix.⁴⁷ *Arnold* involved two adult females who alleged that the defendant raped them on separate occa-

ment to prove virtually its entire case twice: once by the victim's testimony and again by independent evidence." *Gray*, 477 F.2d at 445.

40. See *Gray*, 477 F.2d at 445 (corroboration requirement is flexible and quantum of proof depends on facts of each case); *Terry*, 422 F.2d at 704 (corroboration is any evidence outside of the victim's testimony that has probative value); *Fitzgerald v. United States*, 443 A.2d 1295, 1301 (D.C. 1982) (sufficient corroboration need only consist of factual circumstances which tend to support the victim's testimony); *Moore v. United States*, 306 A.2d 278 (D.C. 1973) (sufficient corroboration exists if trier of fact could reasonably believe victim's story); *Evans v. United States*, 299 A.2d 136 (D.C. 1973) (circumstantial evidence may be used to corroborate victim's testimony).

41. 477 F.2d 444 (D.C. Cir. 1973). The appellant, who was convicted of rape and burglary, argued that, according to *Allison*, every element of the offense had to be corroborated. He urged that penetration, an element of rape, had not been corroborated. *Id.* at 445.

42. *Id.*

43. *Id.* Factors which the court indicated should be considered in determining whether the standard of corroboration had been met include: the age of the victim; impressionability; and motivation to falsify or exaggerate. *Id.*

44. 306 A.2d at 278. The defendant summoned the complainant, a 10 year old female, into his apartment where he subsequently pulled down her pants. *Id.* at 279-80. The court of appeals applied the standard set forth in *Gray*; that there is sufficient corroboration "if it would permit the jury to conclude beyond a reasonable doubt that the victim's account of the crime was not a fabrication." *Id.* at 280 (citing *United States v. Gray*, 477 F.2d 444, 445 (D.C. Cir. 1973)).

45. Under the new standard, both the identity of the accused and the corpus delicti still required corroboration. See *Gray*, 477 F.2d at 445-46. However, there still may be corroboration under this standard, if, in the totality of the circumstances, one element is uncorroborated while the others are strongly corroborated.

46. 358 A.2d 335 (D.C. 1976) (en banc).

47. *Id.* at 344. "[W]e abrogate the requirement in future rape and lesser included sex related cases, insofar as mature females may be involved . . ." *Id.* The court cautioned that the issue of credibility of the prosecutrix would still remain important. *Id.*

sions.⁴⁸ In both cases the complainants claimed that the defendant lured them into his car and then threatened them with bodily harm and death until they submitted to sexual intercourse.⁴⁹ Medical evidence confirmed intercourse in both situations but the defendant relied on consent as a defense.⁵⁰ There was no evidence demonstrating that the women resisted.⁵¹ At trial, the prosecution requested that the jury not be instructed as to a legal necessity of corroboration.⁵² The court granted the motion⁵³ and did not instruct the jury as to the legal necessity of corroboration.⁵⁴ The jury found the defendant guilty and he appealed.⁵⁵

The District of Columbia Court of Appeals noted that the trial court, by disregarding a long line of precedent,⁵⁶ erred in failing to give the instruction,⁵⁷ but because sufficient corroboration existed, the error was harmless and conviction was upheld.⁵⁸ The court reasoned that the corroboration requirement protected defendants against false accusations,⁵⁹ but concluded that the defendants have the benefit of other adequate procedural safeguards and, therefore, the corroboration was unnecessary in this case.⁶⁰ Despite the

48. *Id.* at 336-38.

49. *Id.*

50. *Id.* at 339.

51. *Id.* at 340.

52. *Id.* at 339.

53. *Id.* The judge commented:

I see no reason under the sun in this day and age . . . to say that on the uncorroborated testimony of a victim a defendant can be convicted of kidnapping while armed, armed robbery arising out of the same transaction and . . . where he then commits a rape he can be convicted of the kidnapping while armed on the uncorroborated testimony of the complainant . . . but cannot be convicted of assault with intent to commit rape on her uncorroborated testimony

Id.

54. *Id.* at 340. The judge instructed the jury as follows: "You may consider whether or not the witness has been corroborated by other independent evidence, or whether the witness lacks corroboration with respect to any relevant issue . . ." *Id.*

55. *Id.*

56. *Id.* "A long line of decisions in this jurisdiction hold that the accused [charged with a sexual offense] may not be convicted without some evidence . . . corroborating the testimony of the victim." *Id.* "By its refusal to give the instruction on corroboration . . . the trial court defied established precedent . . ." *Id.* at 341.

57. *Id.*

58. *Id.* at 342. "Satisfied that appellant had a fair and impartial trial and that the trial court's refusal to give the required instruction did not affect any substantial right, we conclude that the error was harmless." *Id.* (citing *Schneble v. Florida*, 405 U.S. 427 (1972)).

59. *Id.*

60. *Id.* at 344. The court noted that "proof beyond a reasonable doubt is sufficient for a conviction." See *Estelle v. Williams*, 425 U.S. 501 (1976); *Cool v. United States*, 409 U.S. 100 (1972) (per curiam); *In re Winship*, 397 U.S. 358 (1970) (all discussing proof beyond a reasonable doubt). The court implied that this standard of proof was adequate to protect the defendant against false accusations. 358 A.2d at 343-44. The court also stated that the requirement

broad language, the court only abolished the requirement in cases involving "mature females."⁶¹ While *Arnold* left many questions unanswered,⁶² it was quite clear that its holding would not be applied to cases involving child victims.⁶³

In its application of *Arnold*, the District of Columbia Court of Appeals in *Davis v. United States*⁶⁴ faced the question of which victims would be considered "mature" for the purpose of determining whether the corroboration requirement would be applied.⁶⁵ The prosecutrix was a female who alleged that the defendant had raped her.⁶⁶ The trial court concluded that the *Arnold* exception applied because she was found to be "mature." The jury was not instructed as to the necessity of corroboration.⁶⁷ On appeal, the court of appeals considered whether the trial court had the discretion to decide the issue of maturity, and if not, whether the victim was "mature" within the meaning of *Arnold*. The court of appeals upheld the conviction stating that the trial court acted well within its discretion in determining that the complainant was mature.⁶⁸ The court emphasized that age does not determine maturity and the trial court, which may observe the complainant's demeanor, is in the best position to decide the issue.⁶⁹

serves no legitimate purpose because it probably has little effect on the jurors' minds because they are normally suspicious of such charges anyway. Also it serves little practical purpose because the judge has the power to set aside the verdict. *Id.* at 343 (quoting 7 WIGMORE ON EVIDENCE § 2061, at 354 (3d ed. 1940)). The court also pointed out that the requirement was not known at common law and recognized that the rule did not stem from constitutional or statutory provisions. *Id.*

61. 358 A.2d at 344. See *supra* note 10 and accompanying text. The court concluded, "[W]e mandate that in the future no instruction directed specifically to the credibility of any mature female victim of [a sex offense] and the necessity for corroboration of her testimony shall be required or given in the trial . . ." 358 A.2d at 344.

62. The court limited its holding to cases where "mature females may be involved." 358 A.2d at 344. The court never indicated why mature females were any different from other classes of possible victims. Other dicta indicated that the court was unhappy with this rule in all cases. The court stated that the rule "serve[d] no legitimate purpose." *Id.* at 343. See *supra* note 61. Finally, the court stated that "we know of no good reason why . . . we should not now purge from our jurisprudence the requirement and all of its demeaning implications." 358 A.2d at 344.

63. See *In re L.A.G.*, 407 A.2d 688 (D.C. 1979); *In re J.W.Y.*, 363 A.2d 674 (D.C. 1976); *Robinson v. United States*, 357 A.2d 412 (D.C. 1976). All hold that the *Arnold* rule did not apply in cases with child victims.

64. 396 A.2d 979 (D.C. 1979).

65. *Id.* at 980. The court indicated that the defendant correctly observed that the *Arnold* court did not define "maturity." *Id.*

66. *Id.*

67. *Id.*

68. *Id.* The court observed that age alone is not determinative of maturity. *Id.* (citing 7 WIGMORE ON EVIDENCE § 2061, at 451-53 (1978)).

69. *Id.* The reviewing court must give the trial court's determination of maturity "consid-

Six years after *Arnold, Fitzgerald v. United States*⁷⁰ questioned the corroboration requirement as applied to children. The prosecution charged the defendant with assault and intent to commit rape.⁷¹ Evidence at trial indicated that the girl entered the defendant's car for a ride to the store. Under the pretext of visiting a friend, the defendant pulled into an alley, stopped the car and attempted to rape the complainant.⁷² She escaped by opening the car door and slipping out of the car onto the ground.⁷³ Defendant then told her that if she told anyone "he would climb through her window and kill her."⁷⁴ The victim was visibly upset when she returned home but reported the crime to no one until she told a friend the next day.⁷⁵ The attempted rape was not reported to authorities until eleven days later.⁷⁶ The medical examination by this time revealed no evidence of the assault.⁷⁷ Consequently, at trial, the defendant moved for judgment of acquittal for lack of corroborative evidence.⁷⁸ The court denied the motion because it found sufficient corroboration in "the crying, . . . the running to her room, and the other things . . ."⁷⁹ After determining the legal sufficiency of the corroboration, the court failed to instruct the jury as to the necessity of corroboration, thus treating the victim as an adult under *Arnold*.⁸⁰ The jury convicted

erable latitude" because he has the opportunity to see and hear the victim at trial. *Id.* at 980-81.

70. 412 A.2d 1 (1980), *reh'g en banc*, 443 A.2d 1295 (D.C. 1982).

71. *Id.* at 1297. Appellant was also charged with taking indecent liberties with a minor in violation of D.C. CODE ANN. § 22-3501(a) (1981) and enticing a minor child contrary to D.C. CODE ANN. § 22-3501(b) (1981). The defendant was acquitted on these two counts. *Id.* at 1297 n.1.

72. 443 A.2d at 1297-98. Complainant initially entered the defendant's car to accompany him to the store. He had been a friend of the complainant's step-father and she had known him since she was young. *Id.* at 1297.

73. *Id.* at 1298.

74. *Id.*

75. *Id.* "Upon their return to Mrs. Geathers' house, complainant ran into the house crying. Mrs. Geathers asked what was wrong. Complainant said that her head hurt and ran upstairs. Further inquiry by Mrs. Geathers was fruitless." *Id.*

76. *Id.*

77. *Id.*

78. *Id.* Defense counsel stated, "You have nothing here other than the statement of the girl claiming an allegation of oral sodomy. You have a delay in the report . . . no medical [evidence], no bruises, no cuts or anything and I submit that this is just insufficient to send to the jury." *Id.*

79. *Id.*

80. *Id.* *But see* *Borum v. United States*, 409 F.2d 433 (D.C. Cir. 1967) *cert. denied*, 395 U.S. 916 (1969); *Arnold v. United States*, 358 A.2d 335 (D.C. 1976) (*en banc*). The court, by considering the sufficiency of the corroborating evidence, was applying the corroboration requirement, but then under *Borum* the judge should have instructed the jury as to the necessity of corroboration for the conviction. Since the jury was not instructed in this manner, it was actually instructed as if the victim were "mature" under *Arnold*.

the defendant.⁸¹

The District of Columbia Court of Appeals reversed the conviction, holding that the failure of the court to instruct the jury as to corroboration was reversible error.⁸² On the issue of the corroboration requirement as applied to children, the court of appeals stated that a child's testimony was less reliable than that of an adult.⁸³ It reasoned that since children are more susceptible to suggestion and curious about sex while not fully cognizant of the consequences of the charges that they make, proper protection of the defendant requires corroboration in these cases.⁸⁴

The dissent argued that the reasons the *Arnold* court gave for abolishing the requirement as to adult female complainants applied equally to child victims.⁸⁵ It faulted the majority for concluding that child witnesses are less reliable than adults⁸⁶ and argued that psychological reports indicated otherwise.⁸⁷ It maintained that the rule was discriminatory and should be abolished in all cases.⁸⁸

In 1985, the District of Columbia City Council passed the Child Abuse Reform Act of 1984.⁸⁹ This Act abolished the corroboration requirement

81. 443 A.2d at 1298.

82. *Id.* at 1303. "We are unable to say here . . . that the absence of a corroboration instruction was not 'so clearly prejudicial to substantive rights as to jeopardize the very fairness and integrity of the trial.'" *Id.* (citing *Watts v. United States*, 362 A.2d 706, 709 (D.C. 1976) (en banc)). *But see Arnold*, 358 A.2d at 341 (holding that the failure of the court to give the corroboration instruction was not reversible error).

83. 443 A.2d at 1299. "Courts have traditionally been skeptical of sexual charges by children . . ." *Id.*

84. *Id.* The court relied, as *Wilson* did, on M. GUTTMACHER & H. WEIHOFEN, *supra* note 25 and accompanying text.

85. 443 A.2d at 1308. The dissent noted that "this archaic obstacle to prosecution has been maintained in cases involving children—the victims most in need of protection." *Id.*

86. *Id.* The dissent observed, "The majority's justification for distinguishing between 'mature' females and other complainants lies in its apparent belief that there is a greater danger of false accusations in sex offense cases involving child victims." *Id.*

87. *Id.* The dissent relied on Peters, *Children Who Are Victims of Sexual Assault and the Psychology of Offenders*, 30 AM. J. PSYCHOTHERAPY 398 (1976), Rosenfeld, *Fantasy and Reality in Patients' Report of Incest*, 40 J. CLINICAL PSYCH. 159, 161 (1979).

88. 443 A.2d at 1308. The dissent noted that "the corroboration requirement in its present form only serves to perpetuate discrimination against children of both sexes as well as adult male victims." *Id.* at 1308-09.

89. D.C. CODE ANN. § 23-114 (Supp. V 1986). Prior to this Act, in 1981, the District of Columbia City Council passed the District of Columbia Sexual Assault Reform Act of 1981, Act No. 4-69, which was signed by the Mayor on July 21, 1981 and transmitted to Congress pursuant to § 602(c)(2) of the District of Columbia Self-Government and Government Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774, 814 (1973). The United States House of Representatives disapproved the Act on October 1, 1981. If this Act had passed it would have abolished the corroboration requirement in 1981. *See H.R. RES. 208*, 97th Cong., 1st Sess. (1981), *reprinted in* 28 D.C. Reg. 4526 (1981).

prospectively for prosecutions brought under title 22 of the District of Columbia Code.⁹⁰ The abolition of the corroboration requirement was intended to eliminate the obstacles hindering prosecution, enabling the city to try more cases on the merits and bring more sex offenders to justice.⁹¹

In *Gary v. United States*,⁹² a case that arose after the Child Abuse Reform Act of 1984 was passed but before its effective date, the District of Columbia Court of Appeals abolished the corroboration requirement.⁹³ The defendant, who was found guilty of raping the sixteen year old complainant, argued that the trial court committed reversible error under *Fitzgerald* by not instructing the jury on the legal requirement of corroboration.⁹⁴ In abolishing the requirement, the court of appeals observed, as discussed in *Arnold* and the dissenting opinion of *Fitzgerald*, that corroboration served no useful purpose because the defendant had adequate protection regardless of who the victim may have been.⁹⁵ The court concluded that there was no valid basis to distinguish a child's testimony from an adult's.⁹⁶ It added that children's reports of sexual attacks had been discounted too long by the courts.⁹⁷

90. See *supra* note 11. Note that title 22 of the District of Columbia Code is titled Criminal Offenses under part IV, Criminal Law and Procedure.

91. See *infra* note 98.

92. 499 A.2d 815 (D.C. 1985), *cert. denied*, 106 S. Ct. 3279 (1986). The defendants argued that they were charged under the wrong statutes. They were charged under the code that existed before the District of Columbia Sexual Assault Reform Act of 1981. See *supra* note 89. The defendants claimed that since the one house veto was held to be unconstitutional under *INS v. Chadha*, 462 U.S. 919 (1983), the Reforms under the 1981 act were valid, and consequently, they were charged under the wrong statute. The court disagreed, holding that the *Chadha* decision applied prospectively only. *Id.* at 817-32.

93. The Act was adopted by the District of Columbia City Council on October 23, 1984 and signed by the Mayor on November 8, 1984. 31 D.C. Reg. 5977 (1984). It became law on May 3, 1985. D.C. CODE ANN. § 23-114 (Supp. V 1986).

94. *Gary*, 499 A.2d at 833.

95. *Id.*

Since the reasons for this court's holding in *Arnold v. United States*, . . . where we abolished the requirement for corroboration when a mature female is involved, are equally applicable to all sex offenses, regardless of the sex or age of the victim or perpetrator, we now abolish the requirement entirely.

The constitutional protections provided the defendant are adequate in a sex case and the corroboration requirement no longer serves a useful purpose. . . . The asserted purpose of the corroboration requirement was to support and test the credibility of the complaining witness. There is no reason to distinguish between a mature female and a mature male sex offense victim. Nor is there any logical reason to raise barriers to the jury evaluation of the credibility of a minor in a sex offense where we do not require it in other situations.

Id. (citations omitted).

96. *Id.*

97. *Id.* at 833-34.

II. THE PRACTICAL EFFECTS OF ABOLISHING THE CORROBORATION REQUIREMENT

Since the legal necessity of corroboration has been abolished, it is possible, although unlikely, for convictions in sex related offenses to be based upon the uncorroborated testimony of a single child witness, provided that the witness' credibility has not been impeached. The legislature and the court's decision to abolish the antiquated and discriminatory requirement is praiseworthy because it attempts to remove obstacles to prosecution. However, while it is true that more child sex abuse cases will now be tried on the merits,⁹⁸ it is unlikely in practice to have many practical benefits.⁹⁹ Although corroboration is no longer a legal necessity, it remains of utmost importance to the prosecution and yet it is difficult to obtain. Thus, it is doubtful that the absence of the legal requirement of corroboration will facilitate prosecution.

When corroboration was required, the court moved away from the unrealistically strict standards of the earlier cases¹⁰⁰ toward a less rigid totality of the circumstances test as applied in the later cases of *Gray*, *Moore*, *Arnold*, and *Fitzgerald*.¹⁰¹ Under this test, if the complainant's testimony was credible and the identity of the perpetrator and most elements of the corpus delicti were corroborated, the case would withstand defendant's motion for acquittal and ultimately the case would be sent to the jury.¹⁰² This, however, was not the only aspect of sex crime cases in which the court became more tolerant. The court also exercised greater leniency in the area of evidence admissibility.¹⁰³ For example, in *Arnold* the court admitted the testimony of the victims' confidants including a friend, a minister, and an attorney who each testified about conversations that took place the day following the rape.¹⁰⁴ Perhaps because of the difficulty of obtaining corroborative evidence in sex crime cases, the court in *Arnold* admitted evidence which

98. W. Rolark, Report of the D.C. City Council on Bill 5-426 (June 25, 1984) (unpublished report). "With this requirement eliminated, it is expected that more child abuse cases will be papered, and more cases will be tried on the merits." *Id.*

99. *Arnold v. United States*, 358 A.2d 335, 348-49 (D.C. 1976) (en banc) (Mack, J., dissenting) (indicating that the abolishment of the requirement without a restructuring of the penal code would do more to hinder the prosecution).

100. *See supra* notes 33-39 and accompanying text.

101. *See supra* notes 40-46 and accompanying text.

102. *See supra* note 45; *see also* *United States v. Gray*, 477 F.2d 444, 444-46 (D.C. Cir. 1973); *Moore v. United States*, 306 A.2d 278 (D.C. 1973).

103. *Arnold*, 358 A.2d at 348 (Mack, J., dissenting). Generally, this would not have been admissible under the spontaneous declaration exception to the hearsay rule because the complainants had time to reflect between the rape and the various conversations. *See infra* note 106 and accompanying text.

104. *Arnold*, 358 A.2d at 337-38.

otherwise may have been inadmissible hearsay.¹⁰⁵ In child sexual assault cases, the court has relaxed evidentiary standards such as the spontaneous declaration exception to the hearsay rule¹⁰⁶ and the complaint of rape exception.¹⁰⁷

In the future, without the requirement, the court may tend to restrict its current view of admissible evidence. In some cases, the complainant's testimony will be the sole evidence that goes to the jury.¹⁰⁸ Realistically, this

105. 358 A.2d at 348 (Mack, J., dissenting).

106. The spontaneous declaration exception to the hearsay rule allows a declaration made by a victim to another to be admitted as substantive evidence of the truth of the matter asserted. *Fitzgerald v. United States*, 443 A.2d 1295, 1303 (D.C. 1982). See generally Bulkley, *Evidentiary Theories for Admitting a Child's Out-of-Court Statement of Sexual Abuse at Trial in CHILD SEXUAL ABUSE AND THE LAW* 154 (1981). The court has recognized that in the absence of medical evidence "[t]he purpose of admitting fresh complaint testimony is . . . to meet in advance a charge of recent fabrication [which is implicit in the corroboration requirement] . . ." *Fitzgerald*, 443 A.2d at 1303 (citing *State v. Tirone*, 64 N.J. 222, 227, 314 A.2d 601, 604 (1974)). See *supra* note 9. The spontaneous declaration must be made within a short time after the incident while the victim is in an emotional state. It may not be the product of a calm narrative where the victim has had the chance to reflect and possibly fabricate the whole story. *Fitzgerald*, 443 A.2d at 1303-04. See, e.g., *In re Lewis*, 88 A.2d 582 (D.C. 1952) (4 year old child's statement to mother admissible since child made statements while under the influence of recent sexual assault); *Snowden v. United States*, 2 App. D.C. 89, 94 (1893) (spontaneous utterance exception to the hearsay rule extended in cases of child sexual abuse so that a distraught young victim's statement to her grandmother upon arriving home was admissible).

The District of Columbia courts have generally relaxed this hearsay exception where the declarant was a child both in cases where the child was too young to testify and where the child appeared as a witness. *Beausoliel v. United States*, 107 F.2d 292 (D.C. 1939), expressly indicated that relaxed standards should be applied to child sexual assault cases. See *Wheeler v. United States*, 211 F.2d 19 (D.C. Cir.), cert. denied, 347 U.S. 1019 (1953) (suggesting a relaxed standard although not expressly indicating the effect of declarant's age). But see *Brown v. United States*, 152 F.2d 138 (D.C. Cir. 1945) (indicating the dangers inherent in relaxing the rules).

107. Another evidentiary exception is the complaint of rape. Under this exception evidence that a report of the abuse was made is admissible solely to show that the victim was not silent. The content of such a report is not admissible. *Fitzgerald*, 443 A.2d at 1305; 29 MCCORMICK ON EVIDENCE § 297, at 709 (1972); WIGMORE ON EVIDENCE § 1135, at 297-314 (1972). The evidence that the report was made is admissible only if the report was made promptly or there is an explainable delay in reporting. *Fitzgerald*, 443 A.2d at 1305. "This theory is premised on the necessity for admitting the fact of the complaint in sex crimes, because of the unique requirement that the sex crime be corroborated." *Id.* at 1303 (emphasis in original). This is almost always applicable in cases involving child victims because a delay in reporting may occur as a consequence of a threat or bribe to keep silent. *Id.* at 1305. See Testimony of David W. Lloyd on Behalf of the Child Sexual Abuse Assistance Program before the D.C. City Council, Public Hearing No. 4 on the District of Columbia Basic Criminal Code Act of 1979 (Feb. 21, 1980). Therefore, in the District of Columbia, "if a child sex complainant tells a parent, friend, a police officer, or almost anyone about the sex incident, that is some evidence of corroboration as a matter of law . . ." *Fitzgerald*, 443 A.2d at 1303 n.12.

108. CHILD SEXUAL ABUSE, *supra* note 3, at 16. If the child's testimony is the sole evidence to go to the jury, the defendant will also be less likely to plead guilty. *Id.*

implies that the defense must work harder to place the complainant's testimony in doubt. As a result, the complainant will be subjected to closer scrutiny during the investigatory stages and perhaps a more rigorous cross-examination.¹⁰⁹

Clearly, the absence of the requirement confers an immediate benefit upon prosecutors by alleviating their concern over the possibility that the court will direct a verdict and acquit the defendant due to lack of corroborative evidence.¹¹⁰ However, the prosecutor must still concern himself with obtaining enough corroborative evidence to avoid the judge setting aside the verdict or having the conviction reversed on appeal due to the insufficiency of the evidence.¹¹¹ In addition, the prosecutor must obtain sufficient evidence to overcome the jury's suspicion of the child's testimony.¹¹²

With a legal corroboration requirement absent, the issue of whether the evidence corroborates the child's testimony is totally within the province of the jury. Juries are suspicious of allegations that are sex related¹¹³ and additionally may believe certain prevalent myths about children such as their suggestibility, curiosity, and tendency to fantasize about sex.¹¹⁴ These assumptions, which may automatically place the child's credibility in doubt, are erroneous. Psychological studies demonstrate that children only fantasize about circumstances within their experience and observation.¹¹⁵ Although children are likely to be curious, they are unlikely to make false reports about sex.¹¹⁶ Finally, studies show that children are no more sug-

109. *Arnold*, 358 A.2d at 348 (Mack, J., dissenting) (indicating that the abolishment of the corroboration requirement without further reform will make the trial more difficult on the victim).

110. *See supra* note 9 and accompanying text.

111. Lloyd, *supra* note 9, at 103.

112. *Id.* Jurors' preconceived beliefs about children may have a powerful impact on their evaluation of the child's credibility. J. BULKLEY, RECOMMENDATIONS OF IMPROVING LEGAL INTERVENTION FOR INTRAFAMILY CHILD SEXUAL ABUSE CASES 33 (1982); D. Shackleton, Chairperson, Comm. on Human Services, Committee Comments on Bill 5-425 (June 29, 1984); Goodman, Golding & Haith, *Jurors' Reactions to Child Witnesses*, 40 J. SOCIAL ISSUES 139, 141 (1984) [hereinafter Goodman].

113. Annotation, *Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*, 31 A.L.R. 4th 120 (1986). There are three false presumptions concerning sex crime cases in general: (1) a great number of cases are false reports; (2) the jury is prejudiced against the defendant; and (3) rape is an accusation which is difficult to defend against. J. BULKLEY, *supra* note 112, at 31; L. HOLMSTROM & A. BURGESS, THE VICTIM OF RAPE 238 (1978); H. KALVEN & H. ZEISEL, THE AMERICAN JURY 70-71 (1966); S. KATZ & M. MAZUR, UNDERSTANDING THE RAPE VICTIM 213-14 (1979); D. LLOYD, *supra* note 9, at 103-04.

114. *See supra* note 25 and accompanying text.

115. *See supra* note 112.

116. *See supra* note 112.

gestible than adults.¹¹⁷ Therefore, jurors should not be any more skeptical about a child's testimony than that of an adult. Studies show, however, that jurors are more skeptical.¹¹⁸

These fallacies, which may place the child's credibility in doubt, may be reinforced in the minds of the jurors if the judge gives a discretionary instruction which states in relevant part: "Children are likely to be more suggestible than adults. Moreover, children may not have a full understanding of the serious consequences of [the testimony they give] [the charges they make]"¹¹⁹ This cautionary instruction, which is based on fallacious assumptions,¹²⁰ underscores the importance of corroboration from the prosecutorial standpoint.

Unfortunately, corroboration is an element found lacking in many of these cases. Due to the nature of the crime, there are rarely any eyewitnesses.¹²¹ Medical evidence is also found lacking as well because in many cases the sexual contact falls short of penetration.¹²² Also, in 80% of the sex related crimes committed against children in the District of Columbia, there is no medical evidence of resistance because the child victim is generally not forcibly raped but rather is threatened or bribed.¹²³ Finally, many times a child does not show signs of emotional distress immediately following the assault but instead the child's behavior may change in subtle and often misunderstood ways.¹²⁴

III. CONCLUSION

The legislature and courts admirably have abolished the corroboration re-

117. *See supra* note 112.

118. Goodman, *supra* note 112, at 143-44. "In sum, jurors are likely to enter the courtroom with biases against children's credibility, but these biases can be overcome by sufficient evidence. If the evidence is ambiguous, jurors' attitudes about children's credibility may be one important influence on the final verdict." *Id.*; see J. BULKLEY, *supra* note 112, at 33; Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1382-83 (1972) (suggesting that even absent the corroboration requirement, prosecutors rarely pursue a case relying solely on complainant's testimony).

119. H. GREEN & T. GUIDOBONI, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA (3d ed. 1978), instruction 2.21.

120. *See supra* notes 115-18 and accompanying text.

121. Lloyd, *supra* note 9, at 107. If there is eyewitness testimony in these cases corroboration is rarely an issue anyway because the defendant will normally plea bargain. *Id.*

122. CHILD SEXUAL ABUSE, *supra* note 3, at 16.

123. *Id.* Testimony of David W. Lloyd on Behalf of the Child Sexual Abuse Assistance Program before the D.C. City Council, Public Hearing No. 4 on the District of Columbia Basic Criminal Code Act of 1979 (Feb. 21, 1980). Also, in cases of intra-family sexual abuse cases, reports are made long after abuse has occurred and, therefore, physical evidence may be nonexistent. *Id.*

124. *Id.* at 4, reprinted in *Fitzgerald v. United States*, 443 A.2d 1295, 1308 (D.C. 1982).

quirement and, in doing so, have dismissed a discriminatory and antiquated rule based on faulty assumptions about the nature of sex related cases and complainants. While this may be one step toward bringing sex offenders to justice, it is doubtful that this step will bring about many practical benefits. Corroboration with the rule in place or in its absence is still essential to prosecution and is a severe detriment where it is lacking.

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