#005

COUNTY PROSECUTORS ASSOCIATION OF NEW JERSEY

March 26, 2021

Via Electronic Mail & Regular Mail

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex; PO Box 037
Trenton, N.J. 08625-0037

Re: Comment on the Proposed Amendment to N.J.R.E. 803(c)(27)
By the Committee on the Rules of Evidence
Deadline -- March 26, 2021

Dear Judge Grant:

Kindly accept this letter pursuant to the Supreme Court's Notice to the Bar of February 9, 2021, inviting comment on Proposed Amendments to the "tender years exception" to the hearsay rule, codified at N.J.R.E. 803(c)(27). This comment responds to Parts I and III of the 2019-2021 Report of the Supreme Court Committee on the Rules of Evidence ("the Report").

The Report proposes four amendments to the present Rule 803(c)(27): to (1) "clarify" the burden of proof applicable to establish the trustworthiness of the out-of-court statement, from "probability" to "preponderance of the evidence"; (2) limit the Rule's "incompetency proviso" to "civil cases only"; (3) limit the "incompetency proviso" to disqualification pursuant to subsection (b) of Rule 611, rather than 611 generally; and, (4) add a reminder within the rule that it cannot be applied in such a way to "violate a defendant's constitutional right to confrontation."

For the reasons explained below, the County Prosecutor's Association of New Jersey ("CPANJ") objects to the proposed amendment numbered (2) above.

As a threshold matter, the Committee reviewed N.J.R.E. 803(c)(27) for amendment at the Supreme Court's suggestion in State in re A.R., 234 N.J. 82, 102 (2018). Our reading of the relevant portion of the A.R. opinion indicates that the original tender-years exception rule's "incompetency proviso" cited to the predecessor to N.J.R.E. 601(b) but subsequent amendments, seemingly

inadvertently, resulted in the presently worded rule that references 601 generally. It thus appears that the A.R. Court's concern that the "incompetency proviso of the present version of N.J.R.E. 803(c)(27) is flawed" (A.R., 234 N.J. at 87) could be rectified simply by the proposed amendment numbered (3) above. We would not object to that. As indicated however, the Committee's proposal goes further, objectionably so.

New Jersey Supreme Court jurisprudence makes clear that admissibility of hearsay statements is determined by a two-step analysis: the first question is whether the evidence satisfies a state hearsay exception; the second is whether its admission accords with the constitutional right of confrontation. State v. Chun, 194 N.J. 54, 138-39 (2008); see State v. Buda, 195 N.J. 278, 292 (2008). Our Evidence Rules codify our state law, our state hearsay exceptions. Satisfaction of one or more of these Rules is an inquiry separate and distinct from the constitutional confrontation question; and, statements that satisfy state hearsay law will nonetheless be excluded if their use at the defendant's trial would run afoul of the Confrontation Clause. See, e.g., State ex rel. J.A., 195 N.J. 324, 336, 341 (2008).

For this reason, and as the Committee noted in the Report, "all Evidence Rules must be applied in accordance with constitutional principles and this need not be expressly stated" in our state Evidence Rules. Report, at 11.

Despite recognizing that federal constitutional law need not be codified in state evidence rules in order to have full force, the Committee strained to do just that -- to amend N.J.R.E. 803(c)(27) to appreciate a "new landscape under Crawford " and "evolving jurisprudence regarding the Confrontation Clause." Report, at 8, 11. However well-intentioned the Committee's efforts, when there is an attempt to capture federal constitutional law by codification in a state rule, that codification becomes state evidence law. As long as the state rule remains in effect it will be binding on state courts and litigants, even if it proves an incorrect or overly restrictive interpretation of federal law, and even if the constitutional law changes.

Specificity will illustrate. There are federal confrontation clause cases that hold that the "incapacity to understand the duty to testify truthfully does not automatically offend the Confrontation Clause when the witness in question is a young child." Walters v. McCormick, 122 F.3d 1172, 1175-76 (9th Cir. 1997), cert. denied, Walters v. Mahoney, 523 U.S. 1060 (1998); accord United States v. IMM, 747 F.3d 754, 770 n.16 (9th Cir. 2014); but cf. Haliym v. Mitchell, 492 F.3d 6890, 702-03 (6th Cir. 2007) (dicta). There are states whose witness competency laws allow child sexual assault victims to testify about sexual abuse without qualification -- absent requirement of understanding truth/falsity or right/wrong. See, e.g., Colo Rev. Stat. § 13-90-106(b); Mo Rev. Stat. § 491.060(2); Ga. Code Ann. § 24-6-603(b); Utah Code Ann. § 76-5-410. And, United States Supreme Court jurisprudence has found confrontation rights vindicated where the defendant had the opportunity to expose to the trier of fact, through cross-examination at trial, a witness's deficiencies, including features that could bring capacity into question, such as memory loss, malleability, and unresponsiveness. United States v. Owens, 484 U.S. 554 (1988); United States v. Kappell, 418 F.3d 550, 555-56 (6th Cir. 2005); Bugh v. Mitchell, 329 F.3d 496, 508 (6th Cir. 2003).

The above-cited law implies that a defendant's right of confrontation would not be violated if a child witness with a competency issue under 601(b) were permitted to testify at the defendant's trial, so long as the defendant was afforded an opportunity to cross-examine the child. If adopted, however, proposed amendment (2) would close that door as a matter of state law, based on assumptions the Committee has made about the "evolving" "landscape" of confrontation clause jurisprudence -- law that necessarily would be litigated at a 104 hearing every time 803(c)(27) is invoked and law that is binding on New Jersey courts and litigants regardless of its codification in 803(c)(27).

CPANJ asserts that our children are among the most vulnerable, innocent, and fragile of society's members; law enforcement must not be denied any constitutionally-available tools to prosecute those who sexually prey upon and violate children. Our Supreme Court accurately has noted that a child is typically the only witness to sexual abuse against him or her, State v. Bueso, 225 N.J. 193, 204 (2016), and that rigid application of legal formalities to a child witness as to oath "might effectively bar the prosecution of such offenses." State in re R.R., 79 N.J. 97, 111 (1979). State Evidence Rules must not be changed to impose unnecessary, non-constitutionally mandated handicaps on the State, nor to confer unjust windfalls on sexual predators.

CPANJ submits that a proper statement of our state law tender-years hearsay exception would read as follows:

> A statement by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil case if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; [and] (b) the court finds, [by a preponderance of the evidence,] in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy[.] and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601. [Nothing in this rule shall permit a court to admit a statement if doing so would violate a defendant's constitutional right to confrontation.]

Subsection (c) of the original, and proposed amended, rules is unnecessary, because it addresses admissibility requirements pursuant to the confrontation clause, depending upon whether the statement is testimonial and, in the case of the proposed amendment, the proceeding is criminal. The confrontation clause applies regardless of such verbiage. And, addition of the last sentence, proposed by the Committee and to which we have no objection, would remind the court that admissibility must consider and comport with constitutional confrontation rights. Along with the above suggestion, N.J.R.E. 601 would need to be amended to read:

> Every person is competent to be a witness unless (a) the court finds that the proposed witness is incapable of expression so as to be understood by the court and any jury either directly or through interpretation, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth, [except this disqualification shall not apply when the witness is a child under the age of 12 whose statement is to be offered in evidence pursuant to N.J.R.E. 803(c)(27)], or (c) as otherwise provided by these rules.

Finally, CPANJ objects to Section III of the Report which recommends that the Court adopt a two-part protocol for assessing the competency of child witnesses under Rule 601(b). The proposed protocol was developed by a Dr. Thomas D. Lyon and consists of "two versions," "a carefully-worded oral test for children aged nine and older and a picture-based test for younger children and other children unable to accurate[ly] answer the oral questions." Report, at 25.

CPANJ has no basis for assessing the Lyon protocol, as our only exposure to it is its description in the Report. We are unaware whether other "protocols" were considered, or whether Dr. Lyon's protocol has been peer-reviewed or tested for efficacy. Despite the Committee's "anticipation" that utilization of the Lyon protocol would lead to more findings of child witness competency (Report, at 10), we lack data as to how frequently child-witnesses are disqualified under current practice, and lack any evidence that number would change with use of the Lyon protocol.

The Committee considered the protocol pursuant to a footnote in the Supreme Court's opinion in State v. Bueso, 225 N.J. at 214 n.6, which reads, "We suggest that to assist trial courts and counsel, the Criminal Practice Committee consider developing model questions for use in competency determinations involving child witnesses." The Committee's recommendation does not abide this; instead, the Report recommends that "trial courts be directed to use only the oral questions or the picture-based methods to assess the competency of child witnesses." Report, at 26-27 (emphasis added).

CPANJ objects to this complete curtailment of the very broad discretion with which trial judges have traditionally been vested in determining a child's qualification under 601(b). The breadth of that discretion, ironically, is repeatedly emphasized in the Bueso opinion. 225 N.J. at 205-06, 211 (discretion to allow prosecutor to question child); Id. at 206-07, 212 (discretion to permit leading questions); Id. at 207-10 (discretion in determining questions and follow-up questions to be asked). The Bueso footnote did not call for abolition of the court's discretion, rather supplementation of it with model questions.

We object to the recommendation that trial courts "be directed to use only" the Lyon protocol for use in competency determinations involving child witnesses. As stated above, we object to any rule that would disqualify a child witness under 601(b) from testifying in an 803(c)(27) case. We believe that County Prosecutors should be given the opportunity to vet the Lyon protocol before it is adopted as part of any model procedure under state law.

Respectfully submitted,

/s/ Esther Suarez

ESTHER SUAREZ
PRESIDENT, CPANJ

cc: Gurbir S. Grewal, Attorney General
Jennifer Davenport, Principal Law Enforcement Advisor
County Prosecutor's Association of New Jersey