University of Arkansas at Little Rock Law Review

Volume 18 | Issue 1 Article 6

1995

Evidence—Former Testimony Exception to the Hearsay Rule Poses Unexpected Hazards to Parents Who Testify in Juvenile Court Probable Cause Hearings. Hamblen v. State, 44 Ark. App. 43 (1993).

Joel P. Landreneau

EVIDENCE—FORMER TESTIMONY EXCEPTION TO THE HEARSAY RULE POSES UNEXPECTED HAZARDS TO PARENTS WHO TESTIFY IN JUVENILE COURT PROBABLE CAUSE HEARINGS. *HAMBLEN V. STATE*, 44 Ark. App. 54 (1993).

I. INTRODUCTION

In *Hamblen v. State*,[1] the Arkansas Court of Appeals held that testimony given by a witness in a probable cause hearing in juvenile court is later admissible in a criminal trial stemming from the same matter when the witness is unavailable to testify at the criminal trial pursuant to Rule 804(b)(1) of the Arkansas Rules of Evidence, the former testimony exception to the hearsay rule for unavailable witnesses.[2] By holding that testimony in juvenile custody proceedings properly falls within the former testimony exception to the hearsay rule, the court arguably reached a different result than that reached in *Scott v. State*,[3] a decision widely cited as the principal Arkansas case on the hearsay exception to the former testimony of an unavailable witness.[4] Therefore, the *Hamblen* court's holding appears to expand the use of prior statements by an unavailable witness to a degree not contemplated by the court in *Scott*.

This casenote examines the state of Rule 804(b)(1) in the wake of *Hamblen v. State*. It begins with a description of the facts of the case in Part I. In Part II, the note summarizes the legal context in which the *Hamblen* case was decided. Part III analyzes the court's reasoning in *Hamblen*. Then, Part IV explores the significance of the case. Finally, the note concludes that one may not be able to reconcile *Hamblen v. State* with *Scott v. State*.

---

1. 44 Ark. App. 54, 866 S.W.2d 119 (1993).

2. *Id.* at 61, 866 S.W.2d at 122. The court held that prior testimony in a civil hearing is admissible in a subsequent criminal trial, even when the accused is not represented by counsel at the preliminary hearing and did not cross-examine witnesses. *Id.*

3. 272 Ark. 88, 612 S.W.2d 110 (1981). In *Scott*, the Arkansas Supreme Court held that former testimony provided in a preliminary hearing of a criminal nature was not admissible in the subsequent criminal trial, even when all parties were represented by counsel. *Scott*, 272 Ark. at 95, 612 S.W.2d at 113-14.

4. *See, e.g.*, State v. Gonzales, 824 P.2d 1023, 1029 n.4 (N.M. 1992) (citing *Scott* as authority for a case-by-case analysis of the admissibility of former testimony at subsequent criminal trials); Rodriguez v. State, 711 P.2d 410, 414 (Wyo. 1985) (adopting *Scott*'s case-by-case approach); Commonwealth v. Bohannon, 434 N.E.2d 163, 171 (Mass. 1982) (same as *Gonzales*); *see also* Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 601 (1988) (quoting *Scott* to support the proposition that preliminary hearing testimony can rarely produce substantially the same cross-examination as would be produced at trial).

II. FACTS

On October 27, 1991, Larry Daniel Hamblen took his five-week old son, Kendall, to the emergency room at Methodist Hospital in Jonesboro.[5] The child had multiple bruises on his arms and palms, the bones above his left ankle were broken, and his right leg was broken.[6] Kendall also had an older fracture of the clavicle bone, but it was nearly healed.[7] Furthermore, Kendall's brain was beginning to swell.[8]

On October 28, 1991, the Juvenile Division of the Craighead County Chancery Court entered an emergency custody order placing Kendall in the custody of the Division of Children and Family Services (DCFS).[9] On or about October 28, Larry Daniel Hamblen was charged with first degree battery and permitting abuse of a child.[10]

On October 30, 1991, the chancery court held a hearing to determine if probable cause existed to continue the October 28 emergency order placing the child with DCFS; consequently, it set a hearing date to determine whether the child was dependent-neglected.[11] Present at the

---

5. *Hamblen*, 44 Ark. App. At 55, 866 S.W.2d at 119-20.

6. *Id.* at 55, 866 S.W.2d at 120.

7. Brief and Abstract for Appellant at 3, Hamblen v. State, 44 Ark. App. 54, 866 S.W.2d 119 (1993) (No. CACR-92-01216).

8. *Hamblen*, 44 Ark. App. at 55, 866 S.W.2d at 120.

9. *Id.* at 56, 866 S.W.2d at 120. The court relied on ARK. CODE ANN. § 9-27-314, which provides:

> (a) In any case where there is probable cause to believe a juvenile is dependent-neglected or in need of services and that immediate emergency custody is necessary to protect the health or physical well-being of the juvenile from immediate danger or to prevent the juvenile's removal from the state, the court shall issue an ex parte order for emergency custody to remove the juvenile from the custody of the parent, guardian, or custodian and shall determine the appropriate plan for placement of the juvenile.
>
> (b) The emergency order shall include:
>
> (1)Notice to the juvenile's parents, custodian, or guardian of the right to a hearing and that a hearing will be held within five (5) business days of the issuance of the ex parte order;
>
> (2)Their right to be represented by counsel;
>
> (3)Their right to obtain appointed counsel if indigent, and the procedure for obtaining appointed counsel; and
>
> (4)The location and telephone number of the court, and the procedure for obtaining a hearing.

ARK. CODE ANN. § 9-27-314 (Michie 1991), *amended by* Act of March 7, 1995, No. 533, § 4.

10. *Hamblen*, 44 Ark. App. at 55, 866 S.W.2d at 119.

11. *Id.* at 56, 866 S.W.2d at 120. ARK. CODE ANN. § 9-27-325(h)(2) requires that proof by a preponderance be established for a child to be adjudicated dependent-neglected. ARK. CODE ANN. § 9-27-325(h)(2) (Michie 1991), *amended by* Acts of March 7, 1995, No. 533,

hearing were Larry D. Hamblen and Kendall's mother, Donna Reams.[12] Neither Hamblen nor Reams were represented by counsel.[13] Hamblen had been previously denied indigent status because he was employed full-time at minimum wage.[14] The Chancellor advised Hamblen of his right to counsel, which he stated he understood, and Reams expressed her desire to proceed with the hearing pro se.[15] Hamblen expressed that he wanted to proceed without representation as well.[16] The Chancellor then advised both parties of their right not to testify and that any testimony they gave could be used against them in the criminal proceedings then pending.[17] Both Hamblen and Reams expressed their understanding of the judge's admonitions.[18]

During the hearing, Reams testified that she observed Hamblen shake Kendall on several occasions.[19] Further, she testified that she and Hamblen were the child's only caregivers and that the injuries had to occur while the child was in their care.[20] She also testified that Hamblen had a bad temper, but that in their two years of living together he had never hit her.[21] Following her testimony, the Chancellor asked Hamblen if he had any questions of Reams and he replied, "I had one a while ago, but I done forgot."[22]

Prior to Hamblen's criminal trial, Reams notified the circuit court and the prosecutor that she would exercise her Fifth Amendment right not to testify.[23] The State then gave notice that it intended to use Reams's sworn testimony at the juvenile court hearing as evidence against Hamblen at the

---

§ 6.

12. *Hamblen*, 44 Ark. App. at 56, 866 S.W.2d at 120.
13. *Id.* at 57, 866 S.W.2d at 120.
14. Brief and Abstract for Appellant at 4, *Hamblen* (No. CACR 92-01216).
15. *Hamblen*, 44 Ark. App. at 57, 866 S.W.2d at 120.
16. *Id.*
17. *Id.* at 57, 866 S.W.2d at 120-21.
18. *Id.* at 57, 866 S.W.2d at 121.
19. *Id.*
20. Brief and Abstract for Appellant at 82, *Hamblen* (No. CACR 92-01216).
21. *Id.*
22. *Id.* at 83.
23. *Hamblen*, 44 Ark. App. at 58, 866 S.W.2d at 121; *see also* United States v. Zurosky, 614 F.2d 779, 792 (1st Cir. 1979) (holding that a witness who invokes Fifth Amendment rights is "unavailable" for the purposes of admitting former testimony pursuant to FED. R. EVID. 804(a)(1)).

criminal trial.[24] At trial, the circuit court entered the statement into evidence over Hamblen's objections.[25]

Hamblen appealed to the Arkansas Court of Appeals, claiming the circuit court erred in admitting Reams's statement into evidence.[26] Hamblen based his appeal on *Scott v. State* in which the Arkansas Supreme Court held that a preliminary criminal hearing with a limited transcript and a bare opportunity to cross-examine witnesses did not comply with the Sixth Amendment's confrontation clause.[27] The Arkansas Court of Appeals nevertheless affirmed Hamblen's conviction, holding that the evidence presented in the juvenile court hearing and submitted at trial met the "reliability" test used by the United States Supreme Court in *California v. Green*.[28] The court determined that Reams's testimony was given at a hearing not significantly different from an actual trial, rather than the more limited hearing at issue in *Scott*,[29] and that Hamblen had the opportunity and

---

24. *Hamblen*, 44 Ark. App. at 58, 866 S.W.2d at 121. The prosecution gave this notice pursuant to ARK. CODE ANN. § 16-85-210 (Michie 1987), which provides:

> (a) If any witness fails to enter into the recognizance required by § 16-85-208, or if the magistrate, from the proceedings had before him, or from testimony on oath, has reasonable grounds to believe that any witness who has entered into recognizance may nevertheless not appear and testify at the trial of the cause, the witness shall be examined on behalf of the state of the defendant on application made for that purpose.
>
> (1)The examination shall be *preceded by notice* to the other party and shall be by question and answer in the presence of the defendant and the prosecuting attorney or his deputy or other attorney for the prosecution, *with opportunity given for cross-examination,* and the testimony given shall be transcribed in writing.

ARK. CODE ANN. § 16-85-210 (Michie 1987) (emphasis added).

25. Brief and Abstract for Appellant at 66, *Hamblen* (No. CACR 92-01216).

26. *Id.* at 84.

27. 272 Ark. at 95, 612 S.W.2d at 114. The Sixth Amendment to the United States Constitution provides that all persons who have been criminally accused shall have the right to confront the witnesses against them. U.S. CONST. amend. VI.

28. *Hamblen*, 44 Ark. App. at 61, 866 S.W.2d at 122. In *California v. Green*, the United States Supreme Court first articulated the modern test to determine when prior statements of an unavailable witness can later be admissible in a criminal trial. 399 U.S. 149, 165 (1970). Such testimony must possess "indicia of reliability" in order to satisfy the Sixth Amendment's Confrontation Clause. *See infra* note 74 and accompanying text.

29. *Hamblen*, 44 Ark. App. at 61, 866 S.W.2d at 122. The custody hearing was conducted in Juvenile Court pursuant to ARK. CODE ANN. § 9-27-325, which provided many of the same procedural safeguards found in criminal proceedings. The statute stated:

> (d) The court shall be a court of record. A record of all proceedings shall be kept in the same manner as other proceedings of chancery court and in accordance with rules promulgated by the Arkansas Supreme Court.
>
> (e) Unless otherwise indicated, the Arkansas Rules of Evidence shall apply.
>
> (f) Except as otherwise provided in this subchapter and until rules of procedure for juvenile court are developed and in effect, the Arkansas

a similar motive to develop testimony at the preliminary hearing as he had at the criminal trial.[30] Thus, the court concluded that the trial court properly admitted Reams's hearsay testimony when she was later unavailable to testify.[31]

III. BACKGROUND

A. Hearsay Rule Analysis

The *Hamblen* court admitted Reams's prior testimony pursuant to Arkansas Rule of Evidence 804(b)(1), which establishes the requirements for the use of prior testimony of an unavailable declarant.[32] Rule 804(b)(1) requires that a defendant have an opportunity and similar motive to develop testimony at the preliminary hearing as he or she would have at trial.[33] The federal courts operate under the same rule.[34]

> Rules of Civil Procedure shall apply to all proceedings and the Arkansas Rules of Criminal Procedure shall apply to delinquency proceedings.
>
> (g) All defendants shall have the right to compel attendance of witnesses in accordance with the Arkansas Rules of Civil Procedure and Arkansas Rules of Criminal Procedure.

ARK. CODE ANN. § 9-27-325 (Michie 1987), *amended by* Act of March 7, 1995, No. 533, § 6.

See also ARK. CODE ANN. § 9-27-314 and *supra* note 10 for additional procedural requirements applicable to probable cause hearings in juvenile court where the issue of a child's dependent-neglected status is determined.

30. *Hamblen*, 44 Ark. App. at 61, 866 S.W.2d at 122. Hearsay is defined in Rule 801 of the Arkansas Rules of Evidence as "an oral or written assertion made by one [other than] the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ARK. R. EVID. 801. This rule mirrors the corresponding federal provision. *See* FED. R. EVID. 801.

Likewise, Arkansas's former testimony exception is identical to Rule 804(b)(1) of the Federal Rules of Evidence. Rule 804(b)(1) of the Arkansas Rules of Evidence provides that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, *had an opportunity and similar motive* to develop the testimony by direct, cross, or redirect examination.

ARK R. EVID. 804(b)(1) (emphasis added).

31. *Hamblen*, 44 Ark. App. at 61, 866 S.W.2d at 122. "Unavailable" for court testimony, of course, is a legal term that includes situations, like this one, where a witness does not testify on the basis of a legally provided privilege not to testify.

32. ARK. R. EVID. 804(b)(1).

33. *Id.*

34. FED. R. EVID. 804(b)(1).

Federal courts construing the language in Rule 804(b)(1) have held that the "opportunity" requirement in the rule does not mandate that the party seeking to exclude the former testimony must have exercised the opportunity.[35] If defense counsel makes a tactical decision not to cross-examine the declarant at the prior hearing, the defense may be prevented from excluding that testimony at a subsequent trial on the ground that there was no opportunity to cross-examine the declarant.[36] The opportunity to develop prior testimony for the purposes of this hearsay exception, however, is not established merely by the presence of counsel.[37] If the former testimony was given under circumstances where the defendant had inadequate time to prepare a cross-examination, or where the defendant's presence was not required, then the fact the defendant did attend the prior hearing does not in itself establish adequate opportunity to develop the testimony of the declarant.[38] Factors that determine when the opportunity requirement is met include: the nature of the former tribunal and the extent to which it permits or restricts cross-examination, the amount of notice given to the defendant at the prior hearing, and the nature of the cross-examination itself.[39]

The "similar motive" element of Rule 804(b)(1) must also be satisfied in order for the former testimony of an unavailable declarant to be admissible in a later proceeding.[40] The rule requires that the factual issue for which the former testimony was offered be similar to that for which it is offered at the subsequent trial at which the declarant is unavailable.[41] This provision does not require that the issues present an identical motive,

35. United States v. Zurosky, 614 F.2d 779, 793 (1st Cir. 1979).

36. *Id.*

37. United States v. Taplin, 954 F.2d 1256, 1258 (6th Cir. 1992).

38. *Id.* In *Taplin*, the Sixth Circuit overturned Collin Taplin's drug conviction. The conviction had been founded substantially on evidence presented by a co-conspirator in a suppression hearing at which Taplin's presence was not required. *Id.* The hearing was to determine whether Bailey had standing to join Taplin's motion to suppress evidence recovered during their arrest. *Id.* Although Taplin did attend the hearing, the Sixth Circuit held that mere presence did not constitute "opportunity" when the hearing at which the prior testimony sought to be admitted was not one involving the "defendant qua defendant." *Id.* The Sixth Circuit declared that "[o]pportunity under 804(b)(1) means more than naked opportunity." *Id.*

39. *See* Glen Weissenberger, *Federal Rule of Evidence 804: Admissible Hearsay from an Unavailable Declarant*, 55 U. CIN. L. REV. 1079, 1097-98 (1987) (analyzing the Rule 804 hearsay exceptions).

40. ARK. R. EVID. 804(b)(1); FED. R. EVID. 804(b)(1).

41. *See* Weissenberger, *supra* note 39, at 1101-02.

merely a similar one.[42] The similar motive requirement is met if the two proceedings present a substantial similarity of issues.[43]

B. Confrontation Clause Analysis

Any use of prior testimony in a criminal proceeding that satisfies the requirements in Rule 804(b)(1) must also satisfy constitutional requirements imposed by the Sixth Amendment to the United States Constitution.[44] However, this right has never been held to mandate a literal confrontation at the trial in which the defendant is convicted.[45]

In *Mattox v. United States*, a criminal defendant was convicted at his second criminal trial based in part upon testimony given by two witnesses at his first trial who died before the second trial began.[46] Both of these witnesses had been duly sworn and cross-examined at the first trial.[47] The Court reasoned that the purpose of the Confrontation Clause was preserved when the testimony from prior witnesses was subject to cross-examination[48] and that admission of such testimony is needed to serve the interests of justice.[49] Although the Court cited a considerable body of law to support its holding,[50] the Court was careful to frame the holding as an exception to the criminal defendant's protected right to an adversarial proceeding.[51]

Seventy years later, the United States Supreme Court made the Sixth Amendment's Confrontation Clause protections applicable to the states

---

42. *See* Weissenberger, *supra* note 39, at 1101-02.

43. *See* Weissenberger, *supra* note 39, at 1101-02. When, however, the issue at a preliminary hearing is the privacy of a co-conspirator, and the issue at trial is the defendant's guilt or innocence, the defendant does not have a similar motive to develop testimony at the preliminary hearing to the extent that he has at his criminal trial. *Taplin*, 954 F.2d at 1259.

44. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . .").

45. Mattox v. United States, 156 U.S. 237 (1895).

46. *Id.* at 240.

47. *Id.*

48. *Id.* at 242-43. The *Mattox* decision often has been quoted to describe the purpose of the Confrontation Clause:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were . . . used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id.

49. *Id.* at 244.

50. *Id.* at 240-42.

51. *Mattox*, 156 U.S. at 243.

through the Due Process Clause of the Fourteenth Amendment.[52] In *Pointer v. Texas*, the Court held that the testimony of a co-defendant presented at a preliminary hearing was inadmissible in the subsequent criminal trial where the defendant had no lawyer and therefore had no adequate opportunity to cross-examine witnesses.[53] The *Pointer* Court equated confrontation with cross-examination and held that the Confrontation Clause was violated when the defendant had no meaningful opportunity to cross-examine the witness whose testimony was later used against him.[54] The Court expressly stated, however, that it would reach a different result if the prior statement sought to be admitted had been taken at a "full-fledged hearing."[55]

In later cases, the Supreme Court has not required the death of the witness in order to admit the prior testimony. The Court has held that the witnesses must simply be unavailable for the later trial.[56] In *Barber v. Page*, the Court held that prior testimony was inadmissible when the prosecution did not make good faith efforts to secure the presence of the witness whose prior testimony was sought to be admitted, even when the prior testimony was subject to a full cross-examination.[57] In dicta, the Court suggested that it would possibly uphold the admissibility of prior testimony given at a preliminary hearing when the witness is actually unavailable and when the defendant had the opportunity to cross-examine the witness.[58]

In *California v. Green*, prior testimony subject to cross-examination was admitted at trial to impeach the current testimony of the same witness.[59]

---

52. Pointer v. Texas, 380 U.S. 400, 403 (1965).

53. *Id.* at 407-08.

54. *Id.* at 405 ("There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.").

55. *Id.* at 407. Here, the Court opened the door for upholding the use of prior testimony in a criminal proceeding when the testimony was garnered under two conditions: (1) When the defendant was represented by counsel, and (2) the witness was actually subjected to a "complete and adequate opportunity" to cross-examine. The Court did not so hold until California v. Green in 1972. *See infra* note 72 and accompanying text.

56. Barber v. Page, 390 U.S. 719 (1968).

57. *Id.* at 725. *See also* Satterfield v. State, 248 Ark. 395, 451 S.W.2d 730 (1970) (holding that the prosecutor must make a good faith effort to obtain a witness at trial before the witness is considered unavailable for purposes of the former testimony exception to the hearsay rule).

58. *Barber*, 390 U.S. at 725-26. In what may be termed a lukewarm adoption of this idea, the Court stated "there may be some justification" for such a holding. *Id.* Given this reception, it is unclear if the Court was prepared to hold that a possible co-defendant who pleaded the Fifth Amendment right to avoid self-incrimination would be "unavailable" for the purpose of admitting prior testimony from a preliminary hearing, as was the case in *Hamblen*.

59. California v. Green, 399 U.S. 149 (1970).

Although this case did not consider the situation where testimony is later admitted because the witness is unavailable, it did discuss the circumstances under which earlier testimony can later be admitted and still satisfy the demands of the Confrontation Clause.[60] In this case, the proffered testimony was given under the following circumstances: (1) the declarant gave the former testimony under oath; (2) the defendant was represented by counsel at the preliminary hearing; (3) the defendant had the opportunity to cross-examine the witness at the preliminary hearing; and (4) the declarant's statements sought to be admitted were taken before a judicial tribunal that maintained a record of the proceedings.[61] The Court held that testimony taken under these circumstances would be admissible even if the witness had been unavailable for trial.[62]

In his dissent, Justice Brennan maintained that preliminary hearings are sufficiently different from trial as to preclude meaningful confrontation.[63] He asserted that the issues presented at the two hearings are vastly different—the hearing seeks to determine whether probable cause exists to proceed with trial; trial seeks to determine guilt beyond a reasonable doubt.[64] He expressed the concern that probable cause hearings are rarely more than uncontested proceedings in which the outcome is certain and the defense has valid reasons not to cross-examine the State's witnesses for fear of revealing its theory of defense and giving the State free discovery.[65] Consequently, he feared that it would be possible for a defendant to be convicted wholly on evidence presented at a preliminary hearing that, for tactical reasons, was not contested at the hearing.[66]

By 1980, the United States Supreme Court's approach to determining the admissibility of prior testimony under the Confrontation Clause had evolved into a two-pronged analysis.[67] First, the Court inquires into whether the testimony was previously given by one who is now unavailable for

60. *Id.* at 165.
61. *Id.*
62. *Id.*
63. *Id.* at 196-97 (Brennan, J., dissenting).
64. *Id.* at 197 (Brennan, J., dissenting).
65. *Id.* (Brennan, J., dissenting). Moreover, Justice Brennan saw a distinction between a witness who is physically unavailable to testify and one who pleads their rights under the Fifth Amendment. *Id.* at 202. He challenged the reliability of the former testimony in the latter situation, as he saw the witness as seeking to incriminate another while avoiding cross-examination at a criminal trial. *Id.* (Brennan, J., dissenting).
66. *Id.* at 200 n.8 (Brennan, J., dissenting).
67. Ohio v. Roberts, 448 U.S. 56, 65 (1980).

trial.[68] "Unavailability" requires that the prosecution make good faith efforts to secure the presence of the witness,[69] or make a showing that, because of the weight of the other evidence against the defendant, such efforts are not likely to result in producing a witness of more than peripheral significance.[70] Second, the Court examines whether the offered testimony bears sufficient "indicia of reliability" to enable the trial court to place the testimony before the jury without a literal confrontation at trial,[71] or whether the testimony gives the trier of fact "a satisfactory basis for evaluating the truth of the prior statement."[72] Examples of "indicia of reliability" include: (1) the extent to which the statement is spontaneous or against the penal interests of the person making the statement;[73] (2) whether the declarant was under oath; (3) whether the defendant was represented by counsel at the prior hearing; (4) whether the defendant had the opportunity to cross-examine the witness; and (5) whether the proceedings were conducted before a tribunal equipped to prepare a record of the proceedings.[74] The United States Supreme Court has asserted that the purpose of the Confrontation Clause is "to advance a practical concern for the accuracy of the truth-determining process . . . ."[75]

---

68. *Id.*; *see also* Mancusi v. Stubbs, 408 U.S. 204, 211-13 (1972) (holding that a prior witness who was a permanent resident of Sweden and was therefore beyond the subpoena power of the state court was unavailable for the purposes of Confrontation Clause analysis).

69. Barber v. Page, 390 U.S. 719, 724-25 (1968).

70. Dutton v. Evans, 400 U.S. 71, 87 (1970).

71. *Id.* at 89.

72. California v. Green, 399 U.S. 149, 161 (1970).

73. *Dutton*, 400 U.S. at 89.

74. *Green*, 399 U.S. at 165.

75. *Dutton*, 400 U.S. at 89. This view of the Confrontation Clause, one guaranteeing the reliability of evidence used in criminal trials, has been severely criticized by some commentators. *See* Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557 (1988). The author posits that modern interpretation of the Confrontation Clause removes it from among the substantive provisions of the Bill of Rights and renders it "a minor adjunct to evidence law." *Id.* at 558. He asserts that the Sixth Amendment constitutionalized the adversary system, and, although we might believe that accuracy in the truth-determining process is one of the benefits of the adversary system, it is not the right to accurate truth determination but rather the right to confrontation of witnesses endemic to the adversary system that is guaranteed by the Confrontation Clause. *Id.* at 585. He concludes that, when examining Confrontation Clause issues, courts should study whether the practice at issue unconstitutionally infringes on our adversary system, not whether the practice furthers or hinders the accuracy of the ultimate verdict. *Id.* at 586.

Using the *Dutton* view of the Confrontation Clause, the Seventh Circuit distinguished between testimony that would be admissible under the former testimony exception to the hearsay rule (that which contains "circumstantial guarantees of trustworthiness"), and testimony that would be permissible by the Confrontation Clause (that which possesses "adequate indicia of reliability"). United States v. Mokol, 939 F.2d 436, 439 (7th Cir. 1991). The court, however, refrained from articulating the precise contours of the distinction. *Id.*

Prior to *Hamblen v. State*, Arkansas's treatment of this constitutional issue reflected a concern for the issues Justice Brennan raised in his dissent in *California v. Green*.[76] In *Scott v. State*,[77] the circuit judge admitted into evidence a transcript of a preliminary hearing held in Little Rock Municipal Court in which Cherylinda Ford testified that the defendants were felons in possession of firearms on her property.[78] The day the case was to go to trial, the State announced Ford would be unavailable to testify, although it is clear the State did make an effort to produce her.[79] The transcript was admitted pursuant to Arkansas Rules of Evidence 804(b)(1).[80]

On appeal, the Arkansas Supreme Court considered whether the prior testimony possessed the "indicia of reliability" required by the Sixth Amendment.[81] Citing the relevant United States Supreme Court authorities, the court observed that the question of the admissibility of former testimony rests upon the circumstances in which it was taken.[82] Beside the procedural steps observed during the preliminary hearing, such as the swearing of witnesses and the maintenance of a record, the "indicia of reliability" inquiry focused mainly on the defendant's opportunity to develop the witness's testimony and the defendant's motive for doing so.[83] Here, the court stated there was no indication that a transcript was taken at the request of the judge.[84] Moreover, the court noted that cross-examination of the witness was scant and that the witness may have had motive to incriminate one over the other because one of the defendants was her former boyfriend.[85] Even though both defendants were represented by counsel at the preliminary hearing, the court reasoned that there might be sound reasons not to exercise the right of cross-examination.[86] Finally, the State did not notify the

---

76. *See supra* notes 64-67 and accompanying text.
77. 272 Ark. 88, 612 S.W.2d 110 (1981).
78. *Id.* at 90, 612 S.W.2d at 111.
79. *Id.* at 91, 612 S.W.2d at 111.
80. *Id.* at 91, 612 S.W.2d at 112.
81. *Id.* at 92, 612 S.W.2d at 112.
82. *Id.* at 92-93, 612 S.W.2d at 112-13 (citing Pointer v. Texas, 380 U.S. 400 (1965); Barber v. Page, 390 U.S. 719 (1968); California v. Green, 399 U.S. 149 (1970); Mancusi v. Stubbs, 408 U.S. 204 (1972) (ordered as provided)).
83. *Id.* at 95, 612 S.W.2d at 113.
84. *Id.*
85. *Id.* at 94, 612 S.W.2d at 113.
86. *Id. See also* California v. Green, 399 U.S. 149, 197 (1990) (Brennan, J., dissenting) (asserting strategic decisions not to engage in cross-examination at a prelimiary hearing as a reason to question the reliability of testimony given there).

The court also noted that preliminary proceedings for criminal matters are constitutionally sound if they comply with the terms as listed in the Arkansas Rules of Criminal Procedure. *Scott*, 272 Ark. at 94, 612 S.W.2d at 113. The court hastened to note that a hearing is described as an "informal, non-adversarial" hearing intended to determine

defendant of its intent to use the prior testimony at trial as required by section 16-85-210 of the Arkansas Code.[87]

When analyzing whether Ford's prior testimony could be admitted in the criminal trial, the court then reviewed two decisions from other states. In *People v. Smith*,[88] the Colorado Supreme Court held that prior testimony at a criminal probable cause hearing can never be admitted at trial when the witness later becomes unavailable.[89] Rejecting the Colorado approach outright,[90] the Arkansas Supreme Court instead held that admissibility depends on the circumstances surrounding the prior hearing.[91] In *Fisher v. Commonwealth*,[92] a Virginia court concluded that a preliminary hearing was sufficient to satisfy the constitutional requirement for a "full-fledged hearing" when the witness whose testimony was sought was subject to vigorous cross-examination.[93]

After reviewing these authorities from other states, the Arkansas Supreme Court adopted a case-by-case approach to the question.[94] In applying that approach, the court held that the requirements of "opportunity" and "motive" to develop testimony, as required by Arkansas Rules of Evidence 804(b)(1), were not sufficiently present to characterize the

---

only whether the accused should be detained pending further proceedings. *Id.*; ARK. R. CRIM. P. 8(c). The court therefore indicated that hearings conducted pursuant to this rule "might or might not" be full-fledged hearings required by *Green*. *Scott*, 272 Ark. at 94, 612 S.W.2d. at 113.

87. *Scott*, 272 Ark. at 95, 612 S.W.2d at 113. ARK. CODE ANN. § 16-85-210 allows a witness to be examined by either party on application made for that purpose when the magistrate has reasonable grounds to believe the witness will not appear at trial. ARK. CODE ANN. § 16-85-210 (Michie 1987). The state failed to show it had complied with the requirements in this statute. *Scott*, 272 Ark. at 95, 612 S.W.2d at 113.

88. 597 P.2d 204 (Colo. 1979).

89. *Id.* at 208.

90. *Scott*, 272 Ark. at 95, 612 S.W.2d at 114.

91. *Id.* at 92, 612 S.W.2d at 112. Other states have adopted a similar fact-based standard for determining the admissibility of prior testimony in criminal trials. For example, the Pennsylvania Supreme Court determined that a defendant who was unaware of a witness's prior inconsistent statement to police did not have adequate opportunity to cross-examine the witness on that issue during the preliminary hearing and was therefore predjudiced when that testimony was admitted at trial. Commonwealth v. Bazemore, 614 A.2d 684, 687 (Pa. 1992). The court so held in the context of a prior Pennsylvania decision that upheld the admissibility of former testimony when the defendant was represented by counsel at the preliminary hearing and had the opportunity for full cross-examination. Commonwealth v. McGrogan, 568 A.2d 924 (Pa. 1990).

Likewise, the Wyoming Supreme Court adopted a case-by-case basis to determine the admissibility of prior testimony in Rodriguez v. State, 711 P.2d 410, 414 (Wyo. 1985).

92. 232 S.E.2d 798 (Va. 1977).

93. *Id.* at 802.

94. *Scott*, 272 Ark. at 95, 612 S.W.2d at 113.

preliminary hearing in *Scott* as "full-fledged."[95] Hence, testimony given at that preliminary hearing was inadmissible at the subsequent criminal trial.[96] The court reasoned that it was unclear whether the defendant would even have had the right to cross-examine the witness extensively at the preliminary hearing.[97] Also, the court looked to Rule 8 of the Arkansas Rules of Criminal Procedure, which describes probable cause hearings as "informal and non-adversarial."[98] Although this provision in the Rules does not preclude a finding that the hearing is "full-fledged," it did indicate that detailed inquiries into the merits of the case are not contemplated at the preliminary hearing, and the record from the preliminary hearing in *Scott* lacked the information needed to demonstrate that a full-fledged hearing took place.[99] This finding rendered the testimony from the preliminary hearing inadmissible.[100] Additionally, the court decided that the motive to develop testimony at the preliminary hearing was unlike the one at trial because of the limited scope of the preliminary hearing. [101]

More recently, however, the Arkansas Supreme Court did allow testimony from a preliminary criminal proceeding to be admitted into evidence at the subsequent criminal trial.[102] In *Scroggins v. State*, the Arkansas Supreme Court held that testimony presented against a defendant at a hearing to suppress evidence before trial was admissible at a defendant's criminal trial.[103] Several key factors distinguished this case from *Scott*. First, the prior testimony was given at a hearing in which witnesses were sworn and a record was made.[104] Also, the hearing was held upon motion of the defense.[105] The defendant was represented by counsel, who not only cross-examined the witness, but also extensively cross-examined beyond the original scope of the hearing to consider the question of suppression.[106] The court concluded that these factors united to provide the trier of fact a satisfactory basis upon which to determine the truth, and thus the prior testimony was admissible.[107] Clearly, prior to the *Hamblen* decision,

95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 94, 612 S.W.2d at 113 (citing ARK. R. CRIM. P. 8(c)).
99. *Id.* at 95, 612 S.W.2d at 114.
100. *Id.*
101. *Id.* at 95, 612 S.W.2d at 113.
102. Scroggins v. State, 312 Ark. 106, 848 S.W.2d 400 (1993).
103. *Id.* at 111, 848 S.W.2d at 403.
104. *Id.* at 111-12, 848 S.W.2d at 403.
105. *Id.* at 111, 848 S.W.2d at 403.
106. *Id.* at 112, 848 S.W.2d at 403.
107. *Id.* at 115, 848 S.W.2d at 404-05.

Arkansas courts had used the fact-specific rule established in *Scott* to arrive at divergent conclusions.

IV. REASONING IN HAMBLEN

In *Hamblen v. State*, the Arkansas Court of Appeals held testimony from a probable cause hearing regarding the continuation of an emergency custody order admissible in the father's subsequent criminal trial for child abuse.[108] The court so held even though Hamblen was not represented by counsel, as was the defendant in *Scroggins*.[109] Additionally, Hamblen conducted no cross-examination on the testimony later admitted against him at his criminal trial, as had the defendant in *Scroggins*.[110]

The court based its decision upon five factors which led it to conclude that Hamblen's right to confront the witnesses against him was not compromised.[111] First, the court noted that Hamblen was informed of his right to counsel and agreed to proceed without counsel.[112] Hamblen stated that he would like to have counsel appointed for him, but he had previously been denied indigent status for the criminal proceedings.[113] Second, Hamblen was told that he would be criminally charged in this same matter and that he had the right not to testify, as any testimony he would give would be used against him in the criminal trial.[114] Third, Hamblen had the opportunity to cross-examine Reams's statement that he shook the child, but

---

108. Hamblen v. State, 44 Ark. App. 54, 61, 866 S.W.2d 119, 122 (1993). The emergency custody order placed the father's child in the custody of the Arkansas Department of Human Services. *Id.*

109. *Id.* at 60, 866 S.W.2d at 122.

110. *Id.* at 61, 866 S.W.2d at 122. The view that prior testimony not subject to cross-examination can be admitted later at trial is not unprecedented, as federal courts have determined that only the opportunity to cross-examine need be available. *See supra* notes 36-41 and accompanying text. State courts have come to similar conclusions. In State v. Gonzales, the New Mexico Supreme Court admitted testimony in a criminal trial when the defendant's counsel waived the defendant's right to cross-examination for tactical reasons at the preliminary hearing. 824 P.2d 1023, 1029 (N.M. 1992).

111. *Hamblen*, 44 Ark. App. at 61, 866 S.W.2d at 122.

112. *Id.* at 60, 866 S.W.2d at 122.

113. *Id.* at 57, 866 S.W.2d at 120.

114. *Id.* at 57, 866 S.W.2d at 120-21. One must note, however, that although the court advised Hamblen that his own testimony could later be used against him in a criminal trial, neither the opinion nor the brief and abstract for appellant indicates that the judge informed Hamblen that the testimony of others could be used against him in the criminal proceedings, or of the importance of cross-examining witnesses who give testimony unfavorable to his defense in the criminal matter. Therefore, the judge's warning in this matter served more to prevent trial error in the criminal trial on Fifth Amendment grounds than to preserve the defendant's Sixth Amendment Confrontation Clause rights.

he declined to do so.[115] Fourth, having satisfied the "opportunity" requirement, Hamblen also had similar motives in developing testimony at the juvenile court proceeding: (1) avoiding the "implication of child abuse," (2) avoiding possible conviction of child abuse, and (3) avoiding losing custody of his child.[116] Fifth, Reams's statements were reliable,[117] as her testimony was adverse to her desire to maintain custody of her child.[118] For these reasons, the court concluded that the circumstances of the juvenile court's probable cause hearing and protection of Hamblen's rights were not significantly different from those available at trial; therefore, Reams's prior statements were sufficiently reliable to admit into evidence at Hamblen's criminal trial.[119]

V. SIGNIFICANCE

The Arkansas Court of Appeals, in *Hamblen*, applied the same fact-based "circumstances surrounding the hearing" test as it had in *Scott.* Nevertheless, they arguably reached the opposite conclusion. In *Hamblen*, ironically, the prior testimony was admissible despite some key factual differences from *Scott* that would suggest there was even less reason to hold the defendant's Confrontation Clause rights adequately protected. First, the defendant was represented by counsel in *Scott*; Hamblen was not. Second, a party to the action cross-examined, to some extent, the challenged

---

115. *Id.* at 61, 866 S.W.2d at 122. Here again, the issue whether the unexercised right to cross-examine the adverse witness at a preliminary hearing satisfies a defendant's Sixth Amendment Confrontation Clause rights was reserved by the United States Supreme Court in Ohio v. Roberts; therefore, the constitutionality of the precise fact scenario presented in *Hamblen* has yet to be determined by the United States Supreme Court.

Other courts have held, however, that the mere opportunity to cross-examine, though unexercised, is sufficient to allow the prior testimony to be admitted at the later proceeding. *See, e.g.*, People v. Zapien, 846 P.2d 704, 729 (Cal. 1993).

116. *Hamblen*, 44 Ark. App. at 61, 866 S.W.2d at 122.

117. *Id.* at 61, 866 S.W.2d at 121. *See also* Dutton v. Evans, 400 U.S. 71, 89 (holding that defendant's statement, due to its spontaneity and its tendency to be against his penal interest, was sufficiently reliable to submit it to a jury absent confrontation). It could be argued, however, that Reams's statements were consistent with her penal interest--not being named a co-defendant in the ensuing criminal matter.

118. *Hamblen*, 44 Ark. App. at 61, 866 S.W.2d at 122. At the time of the juvenile court hearing, Reams shared a residence with Hamblen. Brief and Abstract for Appellant at 83, *Hamblen* (No. CACR-92-01216). Presumably, this fact made Reams's statement regarding Hamblen's violent tendencies one against her own interests, as the juvenile court would be more likely to grant the State's petition to retain custody if her statements were taken as true.

119. *Hamblen*, 44 Ark. App. at 61, 866 S.W.2d at 122 (citing California v. Green, 399 U.S. 149, 165 (1970) (holding that statements from preliminary hearings are admissible at a criminal trial if they are given "under circumstances closely approximating those that surround the typical trial.")).

testimony in *Scott*; Reams was not cross-examined in this case. Hamblen was criminally convicted based, in part, on testimony provided in a civil proceeding which showed little, if any, characteristics of an adversarial proceeding. Finally, the use of the prior testimony in *Hamblen* runs counter to the express public policy of the State of Arkansas to protect children by encouraging forthright testimony in juvenile proceedings.[120]

By contrast, the *Scroggins* court held such testimony admissible only after the defendant was actually represented by counsel, after counsel actually cross-examined the witness whose prior testimony was sought to be admitted, and after that cross-examination was so thorough that it exceeded the original scope of the hearing.[121] It is clear that the juvenile court hearing, as defined in section 9-27-314 of the Arkansas Code, is formal in nature, as it requires appointment of counsel for indigents,[122] application of the Arkansas Rules of Civil Procedure,[123] maintenance of a formal record,[124] and application of the Rules of Evidence.[125] It is equally clear from the record, in *Hamblen*, that Larry Daniel Hamblen was convicted of child abuse based in part upon statements made by another person who could have been prosecuted for the same crime and whose statements were subjected to no more cross-examination than, "I had [a question] a while ago, but I done forgot."[126]

---

120. ARK. CODE ANN. § 12-12-518 provides:

> It is the public policy of the State of Arkansas to protect the health, safety, and the welfare of minors within the state. In order to effectuate that policy:
>
> . . . .
>
> (5)Transcripts of testimony introduced in a child maltreatment proceeding *pursuant to this section* shall not be received into evidence in any other civil or criminal proceeding.

(emphasis added). ARK. CODE ANN. § 12-12-518 (Michie Supp. 1993).

The limitation of this prohibition to proceedings is governed by ARK. CODE ANN. §§ 12-12-501 to -518, which provide for administrative determinations of the presence or absence of maltreatment. The limitation means that such testimony can be used in custody proceedings in juvenile court held pursuant to ARK. CODE ANN. § 9-27-325, as was the case in *Hamblen*. *See* ARK. CODE ANN. §§ 12-12-501 to -508 (Michie 1987 & Supp. 1993); ARK. CODE ANN. § 9-27-325 (Michie Repl. 1993). One can argue that the public policy in protecting children by encouraging testimony is the same in both types of proceedings, and this similarity would seem to add greater weight to excluding the former testimony admitted in *Hamblen*.

121. Scroggins v. State, 312 Ark. 106, 111-12, 848 S.W.2d 400, 403 (1993).

122. ARK. CODE ANN. § 9-27-314(b)(3) (Michie Repl. 1993).

123. § 9-27-314(c) (requiring formal service of process); § 9-27-325(f) (providing the right to compel the attendance of witnesses).

124. § 9-27-325(d).

125. § 9-27-325(e).

126. *See supra* notes 21-23 and accompanying text.

Although the outcomes in *Scott* and *Hamblen* seem difficult to reconcile, one cannot fully understand the holding in *Hamblen* without first examining the significant ways in which juvenile court probable cause hearings for child custody differ from standard probable cause hearings in criminal matters. The probable cause in a criminal proceeding rarely develops a significant adversarial nature because the defense may want to avoid revealing its theory early in the proceeding. The defense has a stronger incentive to acquiesce in the probable cause hearing and reserve ammunition for the trial that will almost surely follow. Therefore, a finding of probable cause regarding a suspect is routinely the outcome.

Conversely, the immediacy of the outcome in dependent-neglected probable cause hearings, as compared with criminal probable cause hearings, bears a stronger incentive for the defendant to make substantive efforts to prevail, because the accused parent who does not prevail does not take their child home from the court house. For most people, this is more than just being charged with a crime. Additionally, because judges remove a child from his or her parents very reluctantly, it is safe to say that if the court was willing to take custody of a child on an ex parte order just a few days before, the state does not need to do much to extend the order pending adjudication within thirty days. Therefore, the parent who wants to return home with his or her child has a great motivation to prevail at the dependent-neglected probable cause hearing, as well as a significant burden to overcome in showing that the ex parte order should not be continued pending a full hearing.

Despite these differences in probable cause hearings, the Arkansas Court of Appeals has taken a bold step in allowing the former testimony at issue in *Hamblen*. Hamblen was told of his right to counsel, and he failed to exercise it, after being denied indigent status for purposes of appointed counsel. Hamblen was offered the right to cross-examine the adverse witness and waived it without the presence of counsel. The United States Supreme Court, in *Ohio v. Roberts*, left open the question whether a criminal defendant who is represented by counsel could waive the right of cross-examination in a preliminary hearing and not suffer a violation of his Sixth Amendment Confrontation Clause rights when the untested testimony is later admitted into evidence against him at a criminal trial. *Hamblen* ventures one step further: not only need the defendant waive his right to cross-examination, he can also waive those rights without the aid of counsel in a preliminary hearing in a related civil matter, and his Confrontation Clause rights still will not be compromised when the testimony is admitted at a subsequent criminal trial. This holding constitutes a significant expansion of the former testimony exception to the hearsay rule as

articulated in *Pointer v. Texas*,[127] where the Confrontation Clause was violated when the unrepresented defendant had no "meaningful opportunity" to cross-examine witness testimony.[128]

Given the wealth of medical evidence against Hamblen in this case, it is doubtful that the testimony of Reams made any significant difference in his eventual conviction. Nevertheless, the holding in *Hamblen* does establish a rule of evidence law that raises the stakes for parents who appear in juvenile court for probable cause custody hearings. It also begs for a complete explanation from the bench of the peril faced by parents who proceed in such hearings without representation by counsel.

Finally, one interesting question remains: Will *Hamblen* effectively overturn the *Scott* and *Scroggins* holdings?

Joel P. Landreneau

127. 380 U.S. 400 (1965).
128. *Id.* at 406-07.