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Trial Procedure—An Analysis of Arkansas's Exceptional Treatment of the Contemporaneous Objection Rule in Criminal Bench Trials. Strickland v. State, 322 Ark. 312, 909 S.W.2d 318 (1995).

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TRIAL PROCEDURE—AN ANALYSIS OF ARKANSAS'S EXCEPTIONAL TREATMENT OF THE CONTEMPORANEOUS OBJECTION RULE IN CRIMINAL BENCH TRIALS. *STRICKLAND V. STATE*, 322 Ark. 312, 909 S.W.2d 318 (1995).

I. INTRODUCTION

An axiom of American jurisprudence is that issues not introduced at trial cannot form the basis of an appeal.[1] Most jurisdictions refer to this procedural requisite as the contemporaneous objection rule. Like many legal norms, however, exceptions to the general rule exist. The most common exception allows a new issue to be appealed if "plain error" occurred in the trial court.[2]

Although Arkansas does not possess a codified "plain error" exception per se, it generally adheres to the contemporaneous objection rule,[3] and allows exceptions.[4] In *Strickland v. State*,[5] the Arkansas Supreme Court attempted to articulate an appropriate justification for allowing such an exception in criminal bench trial appeals.[6] This note uses the facts and the court's reasoning in *Strickland* as a backdrop for analyzing Arkansas criminal appellate procedure. The scope of the note will be limited to defense appeals that challenge the prosecution's sufficiency of evidence and

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1. Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved - Part I*, 7 WIS. L. REV. 91, 92 (1932).

2. In United States v. Olano, 507 U.S. 725 (1993), the United States Supreme Court explained "plain error" as error that clearly or obviously affects the defendant's substantial rights. *Id.* at 1777. The *Olano* Court identified three factors that must be considered in any plain error analysis. (1) There must be "error." "Deviation from a legal rule is 'error' unless the rule has been waived." *Id.* at 732-33. (2) The error must be "plain." "'Plain' is synonymous with 'clear' or, equivalently, 'obvious.'" *Id.* at 734. (3) The error in question must "affec[t] substantial rights." This usually involves the defendant showing or demonstrating prejudice. *Id.*at 1777-78. Also, rule 52(b) of the Federal Rules of Criminal Procedure states that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." FED. R. CRIM. P. 52(b).

3. ARK. R. CRIM. P. 36.24. *See also* Marshall v. State, 316 Ark. 753, 875 S.W.2d 814 (1994); Withers v. State, 308 Ark. 507, 825 S.W.2d 819 (1992); Christina D. Ferguson, Note, Pharo v. State*: Plain Error by Any Other Name*, 44 ARK. L. REV. 779, 802-03 (1991) (recommending amending rule 36.24 to eliminate discretionary treatment of trial court appeals).

4. ARK. R. CRIM. P. 36.24. This casenote does not address appeals based on trial court violations of a party's constitutional right to a trial by jury. Appeals based on these violations are excepted from the contemporaneous objection rule. Grinning v. City of Pine Bluff, 322 Ark. 45, 50, 907 S.W.2d 690, 692 (1995). Also, for a discussion on special contemporaneous objection rules regarding preliminary motions, see Catherine M. Young, Comment, *Should a Motion in Limine or Similar Preliminary Motion Made in the Federal Court System Preserve Error on Appeal Without a Contemporaneous Objection?*, 79 KY. L.J. 177 (1990-1991).

5. 322 Ark. 312, 909 S.W.2d 318 (1995).

6. *Id.* at 318, 909 S.W.2d at 321.

to the jury/bench trial dichotomy that plagued the *Strickland* court. The conclusion proposes amending the Arkansas Rules of Criminal Procedure to discontinue disparate treatment of sufficiency of evidence appeals arising from criminal bench trial convictions.

II. FACTS

On January 21, 1993, twelve-year-old Jackie Olivio stayed home from school because of inclimate weather.[7] Jackie's 43-year-old stepfather, Kenneth Strickland, drove his wife to work, and upon returning home, asked Jackie to come to his room and lie down with him.[8] After the child agreed, Strickland placed his arm around her shoulder and began fondling her breast for five to ten minutes.[9] Jackie began crying, told Strickland to stop, and tried to get up but was held back.[10] Strickland asked the child how badly she wanted him to stop.[11] When she told him she wanted to leave, he allowed her to return to her room.[12]

Although Jackie did not mention the incident to her mother, she told her friend, Karis Rankin, on the school bus the next day.[13] Karis informed her mother, Lorraine Burris, who relayed the information to Jackie's school.[14] Based on the school's advice, Ms. Burris contacted the authorities who apprehended Strickland.[15]

Strickland waived his right to a jury trial and, at the ensuing bench trial, based his sole defense on the claim that his stepdaughter fabricated the story because of jealousy.[16] Other than his attack on the credibility of the child's testimony, however, Strickland presented no other reasons why he felt the State's evidence was insufficient for conviction.[17]

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7. Abstract and Brief for Appellant at 10, Strickland v. State, 322 Ark. 312, 909 S.W.2d 318 (1995)(No. 94-879).
8. *Id.* at 9.
9. *Id.* at 9-10.
10. *Id.*
11. *Id.* at 10.
12. *Id.*
13. *Id.* at 10, 13.
14. *Id.* at 13-14.
15. *Id.* at 14.
16. *Strickland*, 322 Ark. at 314, 909 S.W.2d at 319.
17. *Id.*

The trial court found Strickland guilty of first degree sexual abuse.[18] The judge concurred with the prosecutor that the case consisted of a secret crime with no physical evidence or witnesses to confirm or refute the charges.[19] The judge believed that secret crime cases inevitably turn on credibility and in his opinion, Jackie was the more credible party.[20]

On appeal to the Arkansas Court of Appeals, Strickland alleged that the State's evidence insufficiently supported his conviction.[21] Strickland's appeal did not challenge the trial court's finding that the child's testimony was credible. Instead, he specifically asserted that the State failed to prove two of the elements required for conviction.[22] Strickland claimed that the State failed to prove that he fondled his stepdaughter's breast and, assuming that he did commit the act, the State failed to prove that he fondled the child for sexual gratification.[23] The State argued that Arkansas's contemporaneous objection rule commanded dismissal of Strickland's appeal because it was based on novel issues not raised in the trial court.[24]

The Arkansas Supreme Court chose to intervene to clarify whether a bench trial defendant must raise the particulars of his claim of insufficient evidence in order to preserve the issue for appeal.[25] The majority found that Strickland possessed the ability to appeal, but also found that the State provided sufficient proof to affirm Strickland's conviction.[26] Consequently, the court chose to maintain a distinction between the application of the contemporaneous objection rule in bench trials and in jury trials.[27]

III. BACKGROUND

The contemporaneous objection rule requires specific and timely objection in the trial court to preserve an issue for appeal.[28] Timely means

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18. Supplemental Abstract and Brief of Appellee at 6, Strickland v. State, 322 Ark. 312, 909 S.W.2d 318 (1995) (No. 94-879). The offense results when someone 18 years or older engages in sexual contact with someone less than 14 years old who is not a spouse. ARK. CODE ANN. § 5-14-108(a)(3)(Michie 1993). Sexual contact includes "any act of sexual gratification involving the touching [of] . . . the breast of a female." ARK. CODE ANN. § 5-14-101(8)(Michie 1993 & Supp. 1995).

19. Appellee's Supplemental Abstract and Brief at 2-3, *Strickland* (No. 94-879).

20. *Id.* at SA2.

21. *Strickland*, 322 Ark. at 314, 909 S.W.2d at 319.

22. *Id.* at 319, 909 S.W.2d at 321-22.

23. Supplemental Abstract and Brief of Appellee at 1, Strickland (No. 94-879).

24. *Id.* at 2-4.

25. *Strickland*, 322 Ark. at 313, 909 S.W.2d at 318.

26. *Id.*

27. *Id.* at 317-18, 909 S.W.2d at 320-21.

28. BLACK'S LAW DICTIONARY 318 (6th ed. 1990).

an objection must be made at the first opportunity[29] and specificity requires the trial court be given an opportunity to correct the asserted error.[30] The court in *Pfeifer v. Jones & Laughlin Steel Corp.*[31] advanced three justifications for adhering to this procedural formality: (1) it encourages correction and avoidance of issues at the trial court level; (2) it prevents the adverse party from being prejudiced by the other party's failure to object at trial; and (3) it facilitates the formation of a complete trial court record which permits full appellate review of an issue.[32]

Arkansas's application of the contemporaneous objection rule is confusing and non-uniform. Although the rule is generally followed,[33] courts employ different standards depending on the nature of the appeal. For example, sufficiency of evidence appeals of jury decisions are treated differently than bench trial decisions. Furthermore, Arkansas courts have reached incompatible results regarding the requisites necessary to satisfy the rule's timeliness and specificity elements within the province of a jury or bench trial. The remainder of this section will review Arkansas's application of the contemporaneous objection rule and summarize the state of the law in sister jurisdictions.

A. Arkansas's Application of the Contemporaneous Objection Standard in Sufficiency of Evidence Appeals

1. *Civil Appeals of Jury Trials*

In order to appeal an adversarial party's evidence as insufficient, Arkansas requires the appellant in a jury trial to either move for a directed verdict at the conclusion of all the evidence, or move for a judgment notwithstanding the verdict.[34] Rule 50(e) mirrors the contemporaneous objection rule and Arkansas courts consistently require that its requisites be met to preserve a sufficiency of evidence appeal in a civil jury trial.[35]

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29. Dillard v. State, 20 Ark. App. 35, 40, 723 S.W.2d 373, 376 (1987).

30. Clark v. State, 26 Ark. App. 268, 271, 764 S.W.2d 458, 460 (1989).

31. 678 F.2d 453 (3d Cir. 1982), *vacated on other grounds*, 462 U.S. 523 (1983).

32. *Id.* at 457 n.1. For a critical analysis of these justifications, see Rhett R. Dennerline, Note, *Pushing Aside The General Rule In Order To Raise New Issues On Appeal*, 64 IND. L.J. 985, 986 (1989).

33. *See supra* note 3 and accompanying text.

34. ARK. R. CIV. P. 50(e). A directed verdict motion is analogous to a challenge to the sufficiency of evidence. Galvin v. State, 323 Ark. 125, 127, 912 S.W.2d 932, 933 (1996). In 1983, rule 50 was amended to "no longer allow the sufficiency of the evidence to be challenged by a motion for a new trial. . . ." *In re* Amendments to the Rules of Civil Procedure, 279 Ark. 470, 471, 651 S.W.2d 63, 63 (1983).

35. *See* Campbell Soup Co. v. Gates, 319 Ark. 54, 58-59, 889 S.W.2d 750, 752 (1994)

2. *Civil Appeals of Non-Jury Trials*

The *Arkansas Rules of Civil Procedure* state that a party in a non-jury trial may challenge the sufficiency of evidence at the conclusion of the opponent's evidence or at the close of all of the evidence.[36] Because of the word "may," the requirement appears to be discretionary.[37] Arkansas first addressed the issue in *Bass v. Koller.*[38] Although the *Bass* court allowed an appeal of an issue not raised during the bench trial, it failed to base the decision on a discretionary interpretation of rule 50(a).[39] Instead, the court held that because rule 50(e) specifically applies to jury trials, it implies exclusion of cases tried without a jury.[40] However, the court's opinion omitted any justification for excepting a bench trial appeal from the contemporaneous objection rule.[41]

Likewise, in *Sipes v. Munro*,[42] the court held that because rule 50(e) applies only to jury trials, it is unnecessary to move for a directed verdict in a bench trial to test the sufficiency of evidence on appeal.[43] Again, however, the *Sipes* holding merely restated the black letter rule without offering any insight into the basis for the bench trial exception.[44]

(stating that sufficiency of the evidence was preserved by making a directed verdict motion at the end of appellee's case and renewing it at the close of all the evidence); Willson Safety Prods. v. Eschenbrenner, 302 Ark. 228, 232-33, 788 S.W.2d 729, 732-33 (1990)(holding that a manufacturer waived its ability to appeal insufficiency of the jury's products liability judgment because it failed to renew its directed verdict motion at the conclusion of all evidence); City of Helena v. Chrestman, 17 Ark. App. 235, 236, 707 S.W.2d 338, 338 (1986)(refusing to address appellant's argument because it did not move for a directed verdict or for a judgment notwithstanding the verdict).

36. ARK. R. CIV. P. 50(a). Rule 50(a) essentially copies Federal Rule of Civil Procedure 50(a). *Id.* (Reporter's Notes). *See also* Jones v. Jones, 27 Ark. App. 297, 301, 770 S.W.2d 174, 176 (1989); Harpole v. Harpole, 10 Ark. App. 298, 304, 664 S.W.2d 480, 483 (1984).

37. *Strickland*, 322 Ark. at 318, 909 S.W.2d at 321. The court stated:

> Rule 50(a) thus provides a means of challenging the sufficiency of the evidence in a bench trial. . . . Use of the motion is obviously discretionary rather than mandatory because the rule provides that a party "may" make such a motion. The fact that the motion is optional keeps the use of it from being a requirement for preservation of the sufficiency issue for appeal.

Id.

38. 276 Ark. 93, 96, 632 S.W.2d 410, 412 (1982).

39. *Id.*

40. *Id.*

41. *See id.*

42. 287 Ark. 244, 697 S.W.2d 905 (1985).

43. *Id.* at 246, 697 S.W.2d at 906.

44. *Id.*

3. *Criminal Appeals of Jury Trials*

Prior to Arkansas's adoption of the *Rules of Criminal Procedure*, a general directed verdict motion sufficiently apprised the trial court of the prosecution's insufficient evidence.[45] With the adoption of the *Rules of Criminal Procedure* in 1976,[46] however, the Arkansas Supreme Court has repeatedly required the defendant to specifically apprise the trial court of the basis for the motion.[47] The rule states that a criminal defendant in a jury trial waives any opportunity to appeal the sufficiency of evidence when he fails to move for a directed verdict at the conclusion of the prosecution's evidence and at the close of the case.[48] In *Franklin v. State*,[49] the court reiterated that the motion must also be sufficiently specific to apprise the trial court of the ground for the motion.[50] The reasoning is that when specific grounds are stated and the absent proof identified, the trial court can sustain the motion or allow the State to supply the missing proof.[51]

4. *Criminal Appeals of Non-Jury Trials*

Although Criminal Rule 36.21(b), like Civil Rule 50(e), has consistently applied to jury trial appeals, the Arkansas Supreme Court has yet to

45. Walker v. State, 318 Ark. 107, 108, 883 S.W.2d 831, 831-32 (1994).

46. ARK. R. CRIM. P. 1.7(d).

47. Brown v. State, 316 Ark. 724, 727, 875 S.W.2d 828, 830 (1994)(holding defendant's appeal that the trial court erred in refusing to grant him a directed verdict on felony counts was waived because specific arguments were not raised below); Hickson v. State, 312 Ark. 171, 174, 847 S.W.2d 691, 693 (1993) (holding defendant's sufficiency of the evidence challenge need not be reviewed because defendant moved for a directed verdict on a capital felony murder charge; however, the jury acquitted him of this charge and found him guilty of second degree murder); Middleton v. State, 311 Ark. 307, 308-09, 842 S.W.2d 434, 435 (1992)(holding appellant waived right to challenge the sufficiency of the evidence by failing to move for a directed verdict at the close of the state's case, and also because defendant merely made "the usual motions" instead of apprising the trial court of the specifics of his claim at the close of all evidence); *See also* ARK. R. CRIM. P. 36.21(b). Rule 36.21 has been amended, renumbered as Rule 33.1, and retitled "Motions for Directed Verdict and Special Procedures During Jury Trial." ARK. R. CRIM. P. 33.1.

48. ARK. R. CRIM. P. 36.21.

49. No. CACR94-1002, 1995 WL 758831 (Ark. Ct. App. Dec. 20, 1995) (not designated for publication).

50. *Id.* at *1. *See also* Helton v. State, 320 Ark. 352, 354, 896 S.W.2d 887, 889 (1995) (denying appeal based on the sufficiency of the evidence because the defendant's directed verdict motion was too general); Jones v. State, 318 Ark. 704, 712, 889 S.W.2d 706, 709-10 (1994) (holding that defendant's directed verdict motion was too general to support a challenge to the sufficiency of the evidence); *Walker*, 318 Ark. at 107-09, 883 S.W.2d at 831-32.

51. *Walker*, 318 Ark. at 109, 883 S.W.2d at 832.

justify why it should not equally apply to bench trials.[52] In *Collins v. State*,[53] for example, Collins appealed that the inapplicability of rule 36.21(b) to non-jury trials lacked a rational basis.[54] Instead of addressing the claim, however, the court disposed of the argument as merely conclusory.[55]

Because no Arkansas Criminal Rule corresponds to Civil Rule 50(a), the court possesses even greater flexibility to establish contemporaneous objection requirements in criminal bench trials. Because of this flexibility the court has taken inconsistent positions. However, one benefit of this flexibility has been the emergence of a justification for maintaining the contemporaneous objection exception for bench trials.

In *Greer v. State*,[56] the court chose not to exempt bench trials from the contemporaneous objection rule.[57] Instead, the court required the defendant to move for a directed verdict at the conclusion of the State's evidence to preserve the sufficiency of evidence issue.[58] In *Igwe v. State*,[59] however, the court overruled *Greer* by holding that a criminal defendant in a bench trial is not required to move for a directed verdict to preserve the sufficiency of evidence for appeal.[60] The court's justification was that in a bench trial, a directed verdict motion automatically exists because the judge's main purpose is to evaluate the sufficiency of evidence in reaching a decision.[61]

However, less than two years later, *Stricklin v. State*[62] reversed *Igwe* and reaffirmed the *Greer* holding. Stricklin was convicted of seven counts of rape of his two minor daughters[63] and appealed on grounds different from those raised at trial.[64] The court denied Stricklin any appeal on issues not first introduced in the trial court.[65]

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52. *See* Henry v. State, 309 Ark. 1, 828 S.W.2d 346 (1992); Cole v. State, 307 Ark. 41, 818 S.W.2d 573 (1991); Crow v. State, 306 Ark. 411, 814 S.W.2d 909 (1991); Andrews v. State, 305 Ark. 262, 807 S.W.2d 917 (1991).

53. 308 Ark. 536, 826 S.W.2d 231 (1992).

54. *Id.* at 538, 826 S.W.2d at 232-33.

55. *Id.*

56. 310 Ark. 522, 837 S.W.2d 884 (1992).

57. *Id.* at 524, 832 S.W.2d at 885.

58. *Id.*

59. 312 Ark. 220, 849 S.W.2d 462 (1993).

60. *Id.* at 224, 849 S.W.2d at 464.

61. *Id.*

62. 318 Ark. 36, 883 S.W.2d 465 (1994). This case is not to be confused with the title case, *Strickland v. State*, 322 Ark. 312, 909 S.W.2d 318 (1995).

63. *Stricklin*, 318 Ark. at 37, 883 S.W.2d at 465.

64. *Id.*

65. *Id.* at 38, 883 S.W.2d at 466.

Igwe and *Stricklin* are irreconcilable.[66] Under *Igwe*, a criminal defendant can appeal sufficiency of evidence issues not raised in the bench trial by not moving for a directed verdict.[67] Under *Stricklin*, the same defendant moving for a directed verdict becomes bound to those issues included in the motion.[68]

5. *Criminal Appeals of Life Imprisonment or Death Sentence Convictions*

The *Arkansas Rules of Criminal Appellate Procedure* purport to create a contemporaneous objection exception for life imprisonment or death sentence convictions.[69] The rule states that if a sentence for life imprisonment or death is imposed, the entire record shall be reviewed for errors prejudicial to the appellant's rights.[70] Although the language appears to allow the introduction of novel appeals, Arkansas courts have not interpreted the rule consistently.

For example, in *Withers v. State*,[71] the defendant was convicted of possession of cocaine and sentenced to life in prison as a habitual offender.[72] The Arkansas Supreme Court held that Rule 16 presupposes that the defendant made a contemporaneous objection at trial to preserve the sufficiency of evidence for appellate review.[73]

In *Remeta v. State*,[74] the defendant was convicted of murder and sentenced to death.[75] The court disallowed Remeta's sufficiency of evidence appeal despite his directed verdict motion at the close of the State's case.[76]

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66. *Strickland*, 322 Ark. at 322, 909 S.W.2d at 323 (Corbin, J., concurring).

67. *Igwe*, 312 Ark. at 221, 849 S.W.2d at 462.

68. *Stricklin*, 318 Ark. at 38, 883 S.W.2d at 466.

69. *In re* Adoption of Revised Rules of Appellate Procedure, 900 S.W.2d 560, 568 (Ark. 1995) (former Arkansas Rule of Criminal Procedure 36.24 is now found at rule 16); *see also* ARK. STAT. ANN. § 43-2725 (Supp. 1973); ARK. SUP. CT. R. 11(f); ARK. R. EVID. 103(d).

70. *In re* Adoption of Revised Rules of Appellate Procedure, 900 S.W.2d at 568.

71. 308 Ark. 507, 825 S.W.2d 819 (1992).

72. *Id.* at 508, 825 S.W.2d at 820.

73. *Id.* at 511, 825 S.W.2d at 821; *see also* Ballew v. State, 21 Ark. App. 215, 216, 731 S.W.2d 222, 222 (1987) (holding defendant's appeal based on insufficient evidence waived because he failed to move for a directed verdict or otherwise preserve the issue for appeal); Fretwell v. State, 289 Ark. 91, 708 S.W.2d 630 (1986)(holding when life is at stake, the court will make its own examination of the record, but will not consider a matter not objected to at trial); Wicks v. State, 270 Ark. 781, 606 S.W.2d 366 (1980)(holding defendant's argument for reversal will not be considered absent an appropriate objection at trial).

74. 300 Ark. 92, 777 S.W.2d 833 (1989).

75. *Id.* at 94, 777 S.W.2d at 834.

76. *Id.* at 96-97, 777 S.W.2d at 835.

The court stated that because Remeta did not move for a directed verdict at the close of *all* the evidence pursuant to Criminal Rule of Procedure 36.21(b), he waived his right to appeal.[77]

The court decided otherwise in *Houston v. State,*[78] however, where the defendant was convicted by a jury of first degree murder and sentenced to a 99 year term.[79] The defendant made a motion for a directed verdict at the close of the state's case but not at the close of the trial.[80] Although the court initially noted that noncompliance with Rule 36.21(b) barred an appeal on the sufficiency of evidence, it held that a renewal of the motion would have been to no avail because the evidence was more than sufficient to show premeditation and to prove that the victim was not the aggressor.[81] The *Houston* holding appears to allow a waiver of rule 36.21(b) if, in the court's opinion, the sufficiency of evidence is heavily tilted against the defendant.[82]

B. Synopsis of The General State of The Law in Federal and Sister State Jurisdictions

Federal Rule of Criminal Procedure 29(a), "Motion Before Submission to Jury," states that by motion of a defendant or by the court's own motion, a judgment of acquittal shall be ordered if the evidence is insufficient to sustain the defendant's conviction.[83] *United States v. Pitts*[84] interpreted the rule in a bench trial setting.[85] Pitts, convicted of bank robbery, appealed the government's evidence as insufficient to support a finding of mental competence beyond reasonable doubt.[86] Pitts made a rule 29 motion at the end of the government's case, but did not renew the motion at the close of all the evidence.[87] The court stated that in a jury trial, a failure to renew waives the initial motion and waives the issue for appeal unless there is a

77. *Id.*
78. 299 Ark. 7, 771 S.W.2d 16 (1989).
79. *Id.* at 9, 771 S.W.2d 17.
80. *Id.* at 11-12, 771 S.W.2d at 19.
81. *Id.*
82. *But see Collins*, 308 Ark. at 538, 826 S.W.2d at 232 (stating that the isolated *Houston* decision was not a material deviation from the usual adherence to rule 36.21, and "[i]n no case . . . [has] a meritorious argument as to sufficiency of the evidence prevail[ed] over the defendant's failure to raise it in the trial court.").
83. FED. R. CRIM. P. 29(a).
84. 428 F.2d 534 (5th Cir. 1970).
85. *Id.* at 535.
86. *Id.* at 536.
87. *Id.* at 535.

"manifest miscarriage of justice" or "plain error."[88] The court stated that the waiver does not apply to non-jury cases, however, because the defendant's not guilty plea suffices as a motion for acquittal.[89]

Pitts was cited and further elaborated upon in *Maine v. Morgan*.[90] Morgan appealed his bench trial conviction for gross sexual misconduct because the chief witness's testimony insufficiently proved guilt beyond a reasonable doubt.[91] The court stated that contemporaneous objection requirements provide a jury trial defendant protection against an improper or irrational verdict, but are not necessary in a bench trial.[92] The court justified the holding by concluding that a bench trial defendant automatically motions for acquittal by pleading not guilty, waiving his right to a jury, and proceeding through trial.[93]

Other states agree with the *Pitts* and *Morgan* theory of allowing a bench trial appeal of novel issues. For example, in *In re J.N.H.*,[94] the District of Columbia Court of Appeals noted that the general rule requiring a motion for judgment of acquittal at the close of all the evidence is not controlling in a bench trial.[95] Likewise, *Illinois v. Crowder*[96] noted that a post-trial motion is not necessary to preserve the sufficiency of evidence issue for appeal in a bench trial.[97]

There is an equal balance of state courts, however, that strictly adhere to the contemporaneous objection rule unless "plain error" was committed in the trial court. In *People v. Carlos Santo*,[98] the New York Court of Appeals held that there was no practical reason why the contemporaneous objection requirement should not equally apply to jury and non-jury trials.[99] In *Howard v. Commonwealth of Virginia*,[100] a defendant convicted of

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88. *Id.*

89. *Id. See also* 2 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, CRIMINAL § 469 (2d ed. 1982).

90. 379 A.2d 728 (Me. 1977).

91. *Id.* at 729.

92. *Id.* at 729-30.

93. *Id.* at 730.

94. 293 A.2d 878 (D.C. 1972).

95. *Id.* at 880.

96. 529 N.E.2d 83 (Ill. App. Ct. 1988).

97. *Id.* at 85. *See also* Couser v. Maryland, 356 A.2d 612, 615 (Md. Ct. Spec. App. 1976)(stating that a motion for judgment of acquittal would be superfluous in a bench trial because the trial court's clear ruling of guilt indicated that there was sufficient evidence to deny the motion); Beck v. Alaska, 408 P.2d 996, 998 (Alaska 1965)(finding that a defendant in a bench trial did not waive right to question the sufficiency of evidence by failing to move for judgment of acquittal at close of either the state's case or close of all the evidence).

98. 658 N.E.2d 1041 (N.Y. 1995).

99. *Id.* at 1042.

100. 465 S.E.2d 142 (Va. Ct. App. 1995).

attempted rape appealed the sufficiency of the state's evidence.[101] The court held that the issue may be preserved in a bench trial if the defendant makes "a motion to strike at the conclusion of all the evidence, present[s] an appropriate argument in summation, or make[s] a motion to set aside the verdict."[102] In *Fortune v. Commonwealth of Virginia*,[103] the Virginia Court of Appeals added that the contemporaneous objection rule is satisfied if the defendant's closing argument adequately provides the trial court an opportunity to consider the issue and take corrective action.[104]

In *St. Louis County v. McClune*,[105] the Missouri Court of Appeals stated that issues not introduced in the trial court are not appealable in jury or non-jury trials.[106] Finally, in *North Dakota v. Timm*,[107] the North Dakota Supreme Court held that a defendant must challenge the sufficiency of the evidence either by motion for an advised verdict or by a motion for a new trial to preserve an issue for appeal.[108] The court noted that the word "verdict" includes a judge's findings in a bench trial and jury verdicts.[109]

IV. REASONING OF THE COURT

The *Strickland* majority rested its opinion on a literal interpretation of Rule 36.21(b) of the *Arkansas Rules of Criminal Procedure*.[110] Justice Newbern, writing for the court, initially noted that the rule only applies in a jury trial.[111] However, the State's position was that the court previously "required criminal defendants at bench trials to move for a 'directed verdict' to preserve the sufficiency of evidence issue for appeal."[112] The State cited *Igwe* and *Stricklin* as support.[113] The State interpreted the question presented in *Igwe* as narrowly limited to whether a criminal defendant in a bench trial must renew a directed verdict motion at the close of the trial.[114] Accordingly, the State suggested that *Igwe* did not modify the general requirement that a criminal defendant must challenge the sufficiency of

101. *Id.*
102. *Id.* at 144.
103. 416 S.E.2d 25 (Va. Ct. App. 1992).
104. *Id.* at 27.
105. 762 S.W.2d 91 (Mo. Ct. App. 1988).
106. *Id.* at 92.
107. 146 N.W.2d 552 (N.D. 1966).
108. *Id.* at 553.
109. *Id.* at 554.
110. *See* Strickland v. State, 322 Ark. 312, 314-16, 909 S.W.2d 318, 319-20 (1995).
111. *Strickland*, 322 Ark. at 315, 909 S.W.2d at 319.
112. *Id.*
113. *Id.*
114. *Id.* at 316, 909 S.W.2d at 320.

evidence at some point in the trial court to preserve the issue for appeal.[115] The court disposed of this argument as inconsistent with *Igwe's* rationale.[116]

The court reasserted *Igwe's* two main propositions.[117] First, the court restated that any motivation to apply 36.21(b) to bench trials is overcome by the statute's explicit reference to jury trials.[118] Second, the court noted that while it may be prudent to keep a case from a jury when the evidence is obviously insufficient to support conviction, the justification does not exist in a bench trial.[119] The court reasoned that because the judge in a bench trial is sufficiently aware of the evidence and the elements of the crime being tried, a directed verdict motion is unnecessary.[120]

The State relied on *Stricklin* for authority that a contemporaneous objection is required in a bench trial to preserve an appeal.[121] Instead of applying the *Stricklin* precedent, however, the court decided to overrule *Stricklin* to the extent that it required a motion to dismiss in a bench trial.[122] Consequently, a criminal defendant in a bench trial need not apprise the trial court of the particulars of why the State's evidence is insufficient in order to raise the issue on appeal.[123]

In their concurring opinions, Justices Dudley, Glaze, and Corbin failed to see the merits in distinguishing the procedural rules for appeals from criminal defendants who waive their right to a jury trial and those who do not.[124] Justice Dudley stated that the majority's holding was inconsistent with the court's contemporaneous objection rule.[125] Although Justice Dudley conceded that the judge should be sufficiently aware of the evidence and the elements of the crime in a bench trial, he stated two alternative propositions.[126] Equitably, Justice Dudley believed the State's right to a fair trial is prejudiced by not being informed of missing evidence and thus, not having the opportunity to cure it in the trial court.[127] Also, Justice Dudley noted that special judges, who do not regularly sit as trial judges, try criminal cases in Arkansas.[128] Pragmatically, because these judges may not

115. *Id.*
116. *Id.* at 316-17, 909 S.W.2d at 320.
117. *Id.* at 317, 909 S.W.2d at 320.
118. *Id.*
119. *Id.* at 317, 909 S.W.2d at 320-21.
120. *See id.*
121. *Id.* at 316, 909 S.W.2d at 320.
122. *Id.* at 318, 909 S.W.2d at 321.
123. *See id.*
124. *Id.* at 320-24, 909 S.W.2d at 322-24 (Dudley, Glaze, and Corbin, JJ., concurring).
125. *Id.* at 320, 909 S.W.2d at 322 (Dudley, J., concurring).
126. *Id.* at 320-21, 909 S.W.2d at 322-23 (Dudley, J., concurring).
127. *Id.* at 320, 909 S.W.2d at 322 (Dudley, J., concurring).
128. *Id.* at 320-21, 909 S.W.2d at 322-23 (Dudley, J., concurring).

be familiar with the elements of multiple crimes, they should be provided the specific grounds which the defendant claims as insufficient.[129]

Justice Corbin, joined by Justice Glaze, disagreed with the majority interpretation of *Igwe* and thus, did not see a discrepancy with *Stricklin*.[130] Justice Corbin limited *Igwe* such that once a defendant makes a directed verdict motion in a bench trial, a renewal is not needed at the close of the trial to preserve the sufficiency of evidence issue for appeal.[131] Justice Corbin felt the majority exceeded *Igwe* to the point that a criminal defendant in a bench trial need not challenge the sufficiency of evidence issue at all in the trial court to preserve the issue for appeal.[132] Moreover, Justice Corbin shared Justice Dudley's concern that the majority's holding deprives the State of the right to a fair trial by not providing an opportunity to supply any missing evidence identified by the defendant.[133]

V. SIGNIFICANCE

It is not entirely clear whether *Strickland* means a bench trial defendant need not make a sufficiency of evidence challenge at all in the trial court to preserve the issue for appeal. From a defense perspective, the *Strickland* result is undoubtedly equitable because the State possesses the burden of proof in a criminal trial.[134] The argument proceeds that if the evidence is insufficient, the defense should not be required to point to the specific areas where the State went astray. Nevertheless, *Strickland* presents new pretrial planning considerations for the defense because a jury trial waiver would be more favorable should a conviction decision require a challenge to the State's evidence.

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129. *Id.* at 321, 909 S.W.2d at 322 (Dudley, J., concurring). Justice Dudley noted that "[a]s a practical matter, a criminal bench trial frequently involves multiple crimes." *Id.* (Dudley, J., concurring). Furthermore, Justice Dudley stated that the majority's ruling could cause a defense attorney to unintentionally mislead the trial court, as counsel did in *Strickland*. *Id.* at 321-22, 909 S.W.2d at 323 (Dudley, J., concurring). Specifically, Strickland's counsel moved for a directed verdict on the ground that the victim's testimony lacked credibility, and the trial court focused its sole attention on this issue in convicting Strickland. *Id.* (Dudley, J., concurring). Credibility, however, is not mentioned in Strickland's appeal. *Id.* at 322, 909 S.W.2d at 323 (Dudley, J., concurring). Instead, Strickland argued that the State failed to prove to the trial court that he touched the child for sexual gratification. *Id.* (Dudley, J., concurring).

130. *Strickland*, 322 Ark. at 323, 909 S.W.2d at 323 (Corbin, J., concurring).

131. *Id.* at 323, 909 S.W.2d at 324 (Corbin, J., concurring).

132. *Id.* (Corbin, J., concurring).

133. *Id.* (Corbin, J., concurring).

134. Dale A. Nance, *Civility and the Burden Of Proof*, 17 HARV. J.L. & PUB. POL'Y, 647, 656 (1994).

Alternatively, *Strickland* handicaps the State by allowing a conviction appeal and potential acquittal on technicalities that were never introduced to the trial court.[135] Furthermore, although the defense is afforded this luxury in a bench trial, the State is not given equal opportunity to appeal a bench trial acquittal because of double jeopardy safeguards.[136]

The justifications provided by the *Strickland* majority can be logically countered. The majority concluded that the clear language of Rule 36.21 precluded a contrary holding.[137] However, this is contradictory to the judicial obligation of statutory interpretation.[138] This is especially true when statutory language is ambiguous.[139] Rule 36.21(b) clearly enumerates its applicability to jury trials, but makes no reference to bench trials.[140] The court used a language construction cannon to reason that because the rule specifically referenced jury trials, it implicitly did not apply to bench trials.[141] Because no other criminal procedure rule applies to bench trials, however, it seems equally logical that the court could have interpreted the rule to equally apply to both jury and bench trials.

The *Strickland* majority also noted that while the contemporaneous objection rule is appropriate in jury trials as a matter of judicial economy,[142] the same is not true of bench trials. On further review, however, the *Strickland* decision may promote judicial inefficiency because a bench trial adjudication will be squandered if an appellate decision turns on an issue completely foreign to the trial court.[143]

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135. *Strickland*, 322 Ark. at 321-22, 909 S.W.2d at 323 (Dudley, J., concurring). Justice Dudley provided the following hypothetical:

> [A]s the rule now stands, the deputy prosecutor may have forgotten to ask the question about value [of a stolen item] and, at the trial, no one realized it, and then months later while examining the transcript, the defense attorney discovers the defect in one of the multiple counts. Under the present rule, the attorney could argue the defect for the first time on appeal. The defendant will then go free on that count because of a defect caused by our rule and an unjust result will have been reached.

Id. at 321, 909 S.W.2d at 323 (Dudley, J., concurring).

136. Anne Bowen Poulin, *Double Jeopardy and Judicial Accountability: When is an Acquittal not an Acquittal?*, 27 ARIZ. ST. L.J. 953, 954 (Fall 1995).

137. *Strickland*, 322 Ark. at 317, 909 S.W.2d at 320.

138. Eileen A. Scallen, *Interpreting The Federal Rules Of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283, 1284-87 (1995).

139. For an interesting discussion of statutory interpretation versus strict reliance on plain meaning, see Bradley C. Karkkainen, *Plain Meaning: Justice Scalia's Jurisprudence Of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401 (1994).

140. ARK. R. CRIM. P. 36.21(b).

141. *Strickland*, 322 Ark. at 317, 909 S.W.2d at 320-21.

142. *Id.*

143. *See id.* at 323-24, 909 S.W.2d at 324 (Corbin, J., concurring).

Strickland may have gone too far because the benefits of requiring a contemporaneous objection to preserve a bench trial appeal outweigh the minimal burden placed on a defendant to do so. Instead of quieting contemporary criticism regarding pro-defense legal safeguards, *Strickland* sounds the alarm *Caveat Querens* (let the plaintiff beware).

In conclusion, it is submitted that the Arkansas Supreme Court amend Rule 36.21(b) of the *Arkansas Rules of Criminal Procedure* to eliminate waiver of the contemporaneous objection rule in a criminal bench trial.[144] This amendment would require the defendant to notify the trial court of the particular reasons why the State's evidence is insufficient in order to preserve the issue for appeal. In addition to curing the equity concerns addressed by the concurring justices in *Strickland*,[145] this approach will add uniformity and predictability to a confusing area of Arkansas law.

Dale D. Smith

144. *Id.* at 322, 909 S.W.2d at 323 (Dudley, J., concurring).
145. *See id.* at 320-24, 909 S.W.2d at 322-24 (Dudley & Corbin, JJ., concurring).