University of Arkansas at Little Rock Law Review

Volume 15 | Issue 1 Article 6

1992

# Constitutional Law—Child Hearsay Exception in Sexual Abuse Cases—New Arkansas Supreme Court Rule Conflicts With New General Assembly Rule: Which Controls? Vann v. State.

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CONSTITUTIONAL LAW—CHILD HEARSAY EXCEPTION IN SEXUAL ABUSE CASES—NEW ARKANSAS SUPREME COURT RULE CONFLICTS WITH NEW GENERAL ASSEMBLY RULE: WHICH CONTROLS? *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992).

## I. FACTS

On Easter Sunday, March 30, 1991, a three-year-old girl was playfully coloring Easter eggs with her baby brother and mother at the breakfast table.[1] However, when Steve Vann, the child's uncle, entered the room, the child's face became blank and she said, "Mama, he made me bleed.[2] . . . He hurt me down here [pointing to her vaginal area]."[3] The mother looked inside the child's underwear and saw blood.[4] The mother then ran to a neighbor's house, called the police, and took the child to the hospital.[5] Upon her arrival at the emergency room of the hospital, the child made statements to a nurse.[6] The child also made statements to an investigative policeman shortly after her trip to the hospital the morning after the alleged rape occurred.[7]

On April 12, 1991, the State of Arkansas charged Steve Vann with raping his three-year-old niece.[8] On June 5, 1991, pursuant to the

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1. Brief and Abstract for Appellant at 10, Vann v. State, 309 Ark. 303, 831 S.W.2d 126 (1992)(CR No. 91-191).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 11.

6. *Id.* at 33-34. The child related to the nurse the same version of her story that she told to her mother. *Id.* at 34-36.

7. *Id.* at 15. The policeman was a criminal investigator with the Jonesboro Police Department assigned the special duty of investigating allegations of sexual abuse towards children. After the child verbalized to the policeman her version of what had occurred, the policeman had the child illustrate the incident by placing circles, on drawings of an adult male and a small female child, around the parts of the anatomy involved in the alleged abuse. *Id.* at 14-16.

8. Vann v. State, 309 Ark. 303, 304, 831 S.W.2d 126, 127 (1992). Vann was charged with rape under ARK. CODE ANN. § 5-14-103 (Michie 1987) which provides:

> (a) A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person:
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> (1) By forcible compulsion; or
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> (2) Who is incapable of consent because he is physically helpless; or
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> (3) Who is less than fourteen (14) years of age. It is an affirmative defense to prosecution under this subdivision that the actor was not more than two (2) years older than the victim.

child hearsay exception found in *Arkansas Rule of Evidence* 803(25) (hereinafter "Rule 803(25)"),[9] the State filed a Motion to Determine the Admissibility of a Statement of a Child Under Ten Years of Age Regarding an Act of Sexual Abuse.[10] Shortly before Vann's trial, a hearing was held to determine the trustworthiness of the child's statements about the alleged sexual abuse to her mother, to the nurse at the hospital, and to the investigative police officer.[11] During the court's ex-

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(b) Rape is a Class Y felony.

9. ARK. R. EVID. 803(25), codified at ARK. CODE ANN. § 16-41-101 (Rule 803(25)) (Michie 1987), provides:

(25)(A) A statement made by a child under ten (10) years of age concerning any act or offense against that child involving sexual offenses, child abuse, or incest is admissible in any criminal proceeding in a court of this state, provided:

1. The court finds, in a hearing conducted outside the presence of the jury, that the statement offered possesses a reasonable likelihood of trustworthiness using the following criteria:

a. the age of the child
b. the maturity of the child
c. the time of the statement
d. the content of the statement
e. the circumstances surrounding the giving of the statement
f. the nature of the offense involved
g. the duration of the offense involved
h. the relationship of the child to the offender
i. the reliability of the assertion
j. the reliability-credibility of the child witness before the judge
k. the relationship or status of the child to the one offering the statement
*l.* any other corroborative evidence of the act which is the subject of the statement
m. any other factor which the court at the time and under the circumstances deems relevant and appropriate.

2. The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

3. If a statement is admitted pursuant to this subdivision the court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factors.

4. This subdivision shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence.

10. Brief and Abstract for Appellant at 1.

11. *Id.* at 2. Before a child's statement(s) will be admitted at trial under Rule 803(25), the State must prove to the court, in a hearing conducted outside the presence of the jury, that any statement offered possesses a "reasonable likelihood of trustworthiness." *See* ARK. R. EVID.

amination of the child at the pre-trial hearing, the child gave conflicting testimony against Vann.[12] After reviewing all of the evidence on the State's motion under Rule 803(25), the trial court found that the child was not competent to testify.[13] However, the trial court did find that the child's statements to her mother, the nurse, and the policeman were trustworthy and ruled that the statements could be admitted as evidence in Vann's trial.[14] The case went to trial, and the child's statements were introduced through the testimony of her mother, the hospital nurse, and the investigative policeman.[15] On June 14, 1991,[16] the jury convicted Steve Vann of rape by sexual intercourse with a person under the age of fourteen and sentenced him to forty years in prison.[17]

In his appeal to the Arkansas Supreme Court, Vann argued only two points: "[t]he circuit court erred in allowing witnesses to present [the] hearsay statements made by [the child], [and the] court erred in not permitting defense counsel to impeach the testimony of [the mother] regarding the [child] victim's relationship with [Vann]."[18] In order to convict Vann of rape, the State had to prove that sexual intercourse occurred by " 'penetration, however slight, of [the victim's] vagina by [Vann's] penis.' "[19] In reviewing the record on appeal, the Ar-

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803(25)(A)(1), *supra* note 9.

12. Brief and Abstract for Appellant at 21-24. The child stated that Vann did not hurt her in any way and that she did not remember telling her mother anything on the morning when Vann walked into the breakfast room. The child did remember having blood in her panties and stated that Vann put the blood there; however, the child also stated "[m]y momma caused that to happen." The child stated that she did remember the drawings (male adult and female child), but shook her head back and forth [indicating "no"] in response to whether or not she drew circles on the picture. The child later responded that she put a circle on the drawings because she wanted to. *Id.*

13. *Vann*, 309 Ark. at 304, 831 S.W.2d at 127.

14. *Id.* Curiously, the trial court found the child's statements to the hospital nurse admissible under Rule 803(25) even though the court admitted its failure to investigate the actual facts and circumstances concerning the child's statements to this nurse as required by the rule. Brief and Abstract for Appellant at 26. *See* ARK. R. EVID. 803(25), *supra* note 9.

15. *Vann*, 309 Ark. at 304, 831 S.W.2d at 127.

16. Supplemental Abstract and Brief of Appellee at iii, Vann v. State, 309 Ark. 303, 831 S.W.2d 126 (1992) (No. CR 91-191).

17. *Vann*, 309 Ark. at 304, 831 S.W.2d at 127. Vann was convicted of rape under ARK. CODE ANN. § 5-14-103(a)(3) (Michie 1987). *Id.* at 309, 831 S.W.2d at 129. *See supra* note 8.

18. Brief and Abstract for Appellant at 3. The court stated that Vann's first point of error involved a federal constitutional right under the Confrontation Clause. *Vann*, 309 Ark. at 308, 831 S.W.2d at 129. The court did not address Vann's second point of error, finding it doubtful that the same factual situation would occur at retrial. *Id.* at 309-10, 831 S.W.2d at 130.

19. *Vann*, 309 Ark. at 309, 831 S.W.2d at 129. Under ARK. CODE ANN. § 5-14-101(9) (Michie 1987), "Sexual intercourse means penetration, however slight, of a vagina by a penis . . . ."

kansas Supreme Court concluded that the only direct evidence of penetration presented at trial was the policeman's hearsay testimony.[20] The court ruled that the policeman's hearsay testimony was only admissible under Rule 803(25) and, unlike the testimony of the victim's mother and the hospital nurse, did not satisfy the requirements of any other hearsay exception.[21]

The Arkansas Supreme Court reversed Vann's conviction, holding that Rule 803(25) was unconstitutional under the Confrontation Clause of the Sixth Amendment to the United States Constitution.[22] In reaching this conclusion, the court applied the reasoning of the United States Supreme Court in *Idaho v. Wright*[23] to determine that Arkansas' child hearsay exception[24] was unconstitutional.[25] The court held that "Rule 803(25) [denied Vann] his right of confrontation since it provide[d] that the hearsay statement of a child *is admissible*" after the trial court determines that the statement possesses a "*reasonable likelihood* of trustworthiness."[26] The court said that the proper standard of admissibility under "the Confrontation Clause requires that the statement bear such '*adequate indicia of reliability*' that '*the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.*' "[27] Be-

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20. *Vann*, 309 Ark. at 309, 831 S.W.2d at 130. All other evidence of this element of the offense was circumstantial. *Id.*

21. *Id.* at 308, 831 S.W.2d at 129. In addition to Rule 803(25), the trial court also admitted the mother's hearsay testimony under Rule 803(2) (excited utterance) and the nurse's under Rule 803(4) (statement for purposes of medical diagnosis or treatment). *Id.* Rule 803(2) defines an excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(4) permits the introduction into evidence of "[s]tatements made for purposes of medical diagnosis or treatment . . . and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

22. *Vann*, 309 Ark. at 304, 831 S.W.2d at 127. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. CONST. amend. VI (emphasis added).

23. 110 S. Ct. 3139 (1990).

24. Arkansas' child hearsay exception statute is codified at ARK. CODE ANN. § 16-41-101 (Rule 803(25)) (Michie 1987). *See supra* note 9.

25. *Vann*, 309 Ark. at 307, 831 S.W.2d at 128.

26. *Id.*

27. *Id.* at 307-08, 831 S.W.2d at 128-29.

cause Rule 803(25)'s admissibility standard did not meet the minimum standard required by the Confrontation Clause, the Arkansas Supreme Court determined that the policeman's hearsay testimony was erroneously introduced.[28] *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992).

## II. HISTORICAL DEVELOPMENT

Two separate issues are raised in the Arkansas Supreme Court's decision in *Vann*. The first issue pertains to the application of the Confrontation Clause to the admissibility of hearsay statements against a criminal defendant. This note traces the origins and development of the Confrontation Clause as interpreted by the United States Supreme Court. Next, the relationship of these principles as applied to the Arkansas child hearsay exception for sexual offenses, abuse, or incest is discussed. The second issue pertains to the interplay between the legislative and judicial branches in establishing court rules. Since both the Arkansas Supreme Court and the general assembly have enunciated a child hearsay exception, this note reviews the historical setting surrounding the promulgation of court rules in Arkansas.

### A. History of the Confrontation Clause as Interpreted by the United States Supreme Court

The origins of the Confrontation Clause date as far back in history as 1603.[29] The right to confront adverse witnesses is guaranteed by the Sixth Amendment to the United States Constitution.[30] The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[31] In 1980, the United States Supreme Court articulated a generalized approach for determining the admissibility of hearsay statements under the Confrontation Clause of the Sixth Amendment in *Ohio v.*

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28. *Id.* at 308, 831 S.W.2d at 129.

29. California v. Green, 399 U.S. 149, 157 n.10 (1970). In 1603, Sir Walter Raleigh was executed for treason. His conviction was based solely on what would be coined today as inadmissible hearsay. *Id.* A historical analysis of both the Confrontation Clause of the Sixth Amendment and Rule 803(25) is found in another recently published *University of Arkansas at Little Rock Law Journal* casenote. *See* Mark D. Wolf, Note, *Arkansas Child Hearsay Exception Regarding Sexual Offenses, Abuse, Or Incest is Unconstitutional*, 14 U. ARK. LITTLE ROCK L.J. 579 (1992).

30. U.S. CONST. amend. VI.

31. *Id. See supra* note 22. The Sixth Amendment's Confrontation Clause is made applicable to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 406 (1965).

*Roberts*.[32] The Court stated that the Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay: 1) in the usual case, the prosecution must produce the declarant for trial or demonstrate his unavailability to the court; and 2) in cases where the trial court finds the declarant unavailable, the State must prove that the statements bear sufficient "indicia of reliability."[33]

A literal interpretation of the Sixth Amendment appears to require that when a declarant is available for trial, the accused is guaranteed the right to confront the declarant face-to-face before any of the declarant's statements may be admitted.[34] However, the Court in *Roberts* found that such an interpretation would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme."[35] Under the holding in *Roberts*, when a declarant is unavailable for trial, his statement's "indicia of reliability" may be inferred without more if there is a showing of "particularized guarantees of trustworthiness," or if the hearsay statement falls within a firmly-rooted hearsay exception.[36] Although the Court did not define "firmly-rooted," it did reason that some hearsay exceptions have such intrinsic foundations for reliability that the introduction into evidence of statements pursuant to those exceptions would not violate an accused's constitutional right to confront and cross-examine witnesses against him at trial.[37] Thus, in some narrow circumstances, "competing interests, if

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32. 448 U.S. 56, 65-66 (1980). In *Roberts* the United States Supreme Court indicated that passages in an Ohio Supreme Court ruling suggested "that the opportunity to cross-examine at [a] preliminary hearing — even absent actual cross-examination — satisfie[d]" the defendant's right to confront witnesses under the Confrontation Clause. *Id.* at 70.

33. *Id.* at 65-66. *See* Graham C. Lilly, *Notes on the Confrontation Clause and* Ohio v. Roberts, 36 U. FLA. L. REV. 207 (1984). In a case decided after *Roberts*, United States v. Inadi, 475 U.S. 387 (1986), the Court held that the prosecution was not required, as a necessary antecedent to the introduction of hearsay testimony of a *co-conspirator*, to produce the declarant at trial or show that the declarant is unavailable. *Inadi*, 475 U.S. at 392.

34. *Roberts*, 448 U.S. at 62-63. *See supra* note 22.

35. 448 U.S. at 63. The Court has retreated from an across-the-board "unavailability" requirement. *See* White v. Illinois, 112 S. Ct. 736 (1992), *infra* notes 58-63 and accompanying text; Bourjaily v. United States, 483 U.S. 171 (1987), *infra* note 37; United States v. Inadi, 475 U.S. 387 (1986), *supra* note 33 and *infra* notes 64 and 70.

36. 448 U.S. at 66. *See also* Eleanor L. Owen, *The Confrontation Clause Applied to Minor Victims of Sexual Abuse*, 42 VAND. L. REV. 1511, 1521 n.75 (1989) (discussing exceptions that tend to insure reliability of hearsay statements in the absence of cross-examination and oath).

37. 448 U.S. at 66. In Bourjaily v. United States, 483 U.S. 171, 183 (1987), the Court held that hearsay statements of a co-conspirator (FED. R. EVID. 801(d)(2)(E)) are a firmly-rooted hearsay exception because they carry sufficient "indicia of reliability." Other firmly-rooted exceptions include "spontaneous declarations" (FED. R. EVID. 803(2)) and "statements made for purposes of medical diagnosis" (FED. R. EVID. 803(4)). White v. Illinois, 112 S. Ct. 736, 742 n.8

'closely examined,'[38] may warrant dispensing with confrontation at trial."[39]

In three subsequent decisions, *Coy v. Iowa*,[40] *Maryland v. Craig*,[41] and *Idaho v. Wright*,[42] the United States Supreme Court examined the

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(1992). *See* Stanley A. Goldman, *Not So "Firmly-Rooted": Exceptions To the Confrontation Clause*, 66 N.C. L. REV. 1, 7 (1987) (indicating that to be "firmly-rooted," hearsay exceptions must contain solid foundations allowing introduction of nearly any conforming evidence).

38. *Roberts*, 448 U. S. at 64 (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).

39. *Id.*

40. 487 U.S. 1012 (1988). The Court in *Coy* held that a screen between two child witnesses and a criminal defendant violated the defendant's constitutional right to confront them at trial. *Id.* at 1022. The Court found no applicable exceptions under the Confrontation Clause as to an accused's right to confront witnesses face-to-face, regardless of the costs to the victim. *Id.* at 1020. "We leave for another day, however, the question whether any exceptions exist." *Id.* at 1021. The Court found that although the face-to-face requirement might upset the truthful rape victim or an abused child, it might also uncover the false accuser or show that a child was coached. *Id.* at 1020. "It is a truism that constitutional protections have costs." *Id.* In a concurring opinion, two justices felt that an exception could be allowed if it furthered an important public policy after a case-specific finding of necessity. *Id.* at 1025 (O'Connor, J. concurring). *See also* Mary A. Rittershaus, Note, Maryland v. Craig: *Balancing the Interests of a Child Victim Against the Defendant's Right to Confront His Accuser*, 36 S.D. L. REV. 104, 112 (1991) (discussing O'Connor's concurrence which essentially opened the door for future exceptions to the face-to-face requirement). In Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), the Court recognized that "the protection of minor victims of sex crimes from further trauma and embarrassment" is a "compelling" government interest. *Id.* at 607. In *Globe* the Court found that the State's interest in the well-being of a minor victim justified depriving the press and public of their constitutional right to attend the criminal trial. *Id.* at 608-09. The trial court must first determine, on a case-by-case basis, that closure of the trial to the media and public is necessary to protect the child victim's welfare. *Id. See generally* Ellen Forman, Note, *To Keep the Balance True: The Case of* Coy v. Iowa, 40 HASTINGS L.J. 437 (1989); Jaye P. Meyer, Note, *Protecting the Child Sexual Abuse Victim From Courtroom Trauma After* Coy v. Iowa, 67 N.C. L. REV. 711 (1989).

41. 110 S. Ct. 3157 (1990). In *Craig* the Court held that the use of a one-way closed circuit television separating the child victim from the defendant did not violate the Confrontation Clause although its use must be determined on a case-by-case basis. *Id.* at 3169. Before allowing such a procedure to take place, the trial court must first determine that it is necessary to protect the welfare of the child witness who would be traumatized, not by the appearance in the courtroom, but by the presence of the defendant. *Id.* With this decision, the Court affirmed the admittance of statements of an "available" witness against the defendant under the Confrontation Clause even though the defendant was not allowed to confront his accusers in court. *Id. See* B. I. Pershkow, Note, Maryland v. Craig: *A Child Witness Need Not View the Defendant During Testimony In Child-Abuse Cases*, 65 TUL. L. REV. 935 (1991). Arkansas admits videotaped deposition testimony of sexually abused children under the age of 17 into evidence. *See* ARK. CODE ANN. § 16-44-203 (MICHIE 1987). *See also* C. Alan Gauldin, Note, McGuire v. State: *Arkansas Child Abuse Videotape Deposition Laws — Room for Improvement*, 41 ARK. L. REV. 155 (1988).

42. 110 S. Ct. 3139 (1990). In *Wright* the Court affirmed the Idaho Supreme Court's reversal of a conviction for sexual abuse of a three-year-old child. The child was declared unavailable as a witness, but the child's statements to a physician were admitted into evidence under the residual hearsay exception in violation of the defendant's right of confrontation. *Id.* at 3145. The Court noted that the issue of whether the prosecution must show that the child witness is unavail-

competing interests between a criminal defendant's right to confront witnesses under the Confrontation Clause and the State's desire to introduce hearsay testimony against him. In *Craig*, the Court concluded that in some cases the State's interest in an abused child victim's welfare might outweigh a defendant's right to face the child in court.[43] Similarly, the Court in *Wright* held that the right of an accused to confront all witnesses against him is not absolute since certain hearsay statements might be admitted regardless of the declarant's availability.[44] "[I]f the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial."[45]

In deciding whether or not a declarant's statements contain "particularized guarantees of trustworthiness," the trial court's determination of admissibility must be made without using corroborative evidence to support the hearsay statement.[46] The majority in *Wright* held that only those circumstances surrounding the making of the declarant's statement are relevant to the determination of trustworthiness.[47] The Court in *Wright* identified four factors which are relevant to the

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able for trial before the child declarant's statement(s) can be admitted was not raised. *Id.* at 3147.

43. *Craig*, 110 S. Ct. at 3167. One example where the child's welfare might outweigh a criminal defendant's right of confrontation is protecting a child from trauma associated with testifying in a child abuse case. *See generally* Eldonna M. Ruddock, Note, *Something More Than a Generalized Finding: The State's Interest in Protecting Child Sexual Abuse Victims in* Maryland v. Craig *Outmuscles the Confrontation Clause*, 8 COOLEY L. REV. 389 (1991); Marianne T. Bayardi, Note, *Balancing the Defendant's Confrontation Clause Rights with the State's Public Policy Goal of Protecting Child Witnesses from Undue Dramatization: Arizona Law in Light of* Maryland v. Craig *and* Coy v. Iowa, 32 ARIZ. L. REV. 1029 (1990).

44. *Wright*, 110 S. Ct. at 3145-46.

45. *Id.* at 3149. *See* Lisa M. Travis, Note, Idaho v. Wright: *A Confrontation Clause Escape Hatch for Defendants in Sexual Abuse Cases*, 17 OHIO N.U. L. REV. 693 (1991); H. Jean Delaney, Note, *Criminal Law: Admission of Child Sexual Abuse Victim's Hearsay Statements Violated Defendant's Confrontation Rights as Statements Lacked "Particularized Guarantees of Trustworthiness,"* 66 N.D. L. REV. 743 (1990).

46. *Wright*, 110 S. Ct. at 3150. The Court felt that the use of corroborative evidence in determining trustworthiness would admit "presumptively unreliable statement[s] by bootstrapping on the trustworthiness of other evidence at trial." *Id.* Before admitting such evidence, the court should instead find "that cross-examination of the declarant would be of marginal utility" because of the inherent trustworthiness of the statement. *Id. See* Mary B. Martin, Note, Idaho v. Wright: *The Confrontation Clause's Limitation On the Use of Corroborating Evidence In the Child Abuse Context*, 26 NEW ENG. L. REV. 225 (1991).

47. *Wright*, 110 S. Ct. at 3149. The Court noted that the "guarantees of trustworthiness" surrounding various hearsay exceptions are based on those circumstances "that existed at the time the statement was made and do not include those that may be added by using hindsight." *Id.* (quoting Huff v. White Motor Corp., 609 F.2d 286, 292 (7th Cir. 1979)).

question of reliability under the Confrontation Clause in child sexual abuse cases:[48] spontaneity and consistent repetition;[49] mental state of the declarant;[50] terminology unexpected of a child of similar age;[51] and lack of motive to fabricate.[52] The Court declined to adopt any "mechanical test" for determining trustworthiness, but stated that the "unifying principle" was that each of these four factors were relevant to the question of whether the child declarant was telling the truth when the statement was made.[53]

The dissent in *Wright*[54] believed the majority was incorrect in ruling that corroborative evidence could not be used to decide the trustworthiness of a child declarant's statements.[55] "It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence."[56] Likewise, the dissent stated that if no corroborative evidence supported the child's statements, that fact should also be considered when determining the statement's trustworthiness.[57]

In a more recent Supreme Court decision, *White v. Illinois*,[58] the Court held that a trial court does not have to make an initial finding of the declarant's "unavailability" before admitting into evidence state-

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48. *Id.* at 3150. The Court noted that these factors are simply illustrative and that "courts have considerable leeway in their consideration of appropriate factors" in determining trustworthiness. *Id.*

49. *Id.* (quoting State v. Robinson, 735 P.2d 801, 811 (Ariz. 1987)).

50. *Id.* (quoting Morgan v. Foretich, 846 F.2d 941, 948 (4th Cir. 1988)).

51. *Id.* (quoting State v. Sorenson, 421 N.W.2d 77, 85 (Wis. 1988)).

52. *Id.* (quoting State v. Kuone, 757 P.2d 289, 292-93 (Kan. 1988)).

53. *Id. See supra* notes 49-52 and accompanying text. The Court cited these cases only for the factors stated and not to approve of each case's result.

54. The dissent was written by Justice Kennedy and joined by Chief Justice Rehnquist and Justices White and Blackmun. *Id.* at 3153.

55. *Id.*

56. *Id.* For example, the dissent noted that if the child stated that the abuser tied his wrists or if the child had a scar on his abdomen, such physical evidence corroborating the child's statements, evidence which the child could not fabricate, would tend to lend credibility to the child's statements. *Id. But see* DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, 4 FEDERAL EVIDENCE § 418, at 143 (1980) (urging that medical evidence to corroborate allegations of child sexual abuse should not be used to determine the reliability of statements identifying the abuser).

57. *Wright*, 110 S. Ct. at 3153-54. The dissent pointed out the fallacy of the majority's reasoning in situations where the child's statements should be considered reliable under the circumstances of their making, but contain inaccuracies which would call into question their credibility. *Id.* at 3154. Under the majority's holding, the statements would still be considered reliable under Confrontation Clause requirements despite considerable doubt about their reliability due to the inaccuracies. *Id.*

58. 112 S. Ct. 736 (1992).

ments made under the "spontaneous declaration"[59] and "medical examination"[60] exceptions to the hearsay rule.[61] The Court noted that the general approach used in *Roberts*[62] might suggest that the Confrontation Clause requires that a declarant be produced at trial or be found unavailable before his hearsay statements can be admitted into evidence.[63] This suggestion was foreclosed, however, by the Court's decision in *United States v. Inadi*.[64] Today, *Roberts* stands for the proposition that an unavailability analysis under the Confrontation Clause is only necessary when the challenged hearsay statements were made in the course of a prior judicial proceeding.[65]

B. Application of the Confrontation Clause to Arkansas' Child Hearsay Exception (Ark. R. Evid. 803(25))

The origin of Arkansas' child hearsay exception began in 1985 when the Arkansas General Assembly approved legislation creating such an exception.[66] In adopting this piece of legislation, the general assembly noted that the increase in child abuse in Arkansas called for the legislature to take immediate corrective action.[67] In *Johnson v. State* Rule 803(25) was attacked on grounds that it violated a defendant's right of confrontation.[68] The Arkansas Supreme Court held that

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59. *See supra* note 21.

60. *See supra* note 21.

61. *White*, 112 S. Ct. at 739. *See supra* note 37 and accompanying text. In *White* the trial court was not asked, and therefore, did not make, a finding that the child victim of sexual abuse was unavailable to testify. *White*, 112 S. Ct. at 739. In affirming White's conviction, the Court noted that "while an unavailability rule would . . . do little to improve the accuracy of factfinding, it is likely to impose substantial additional burdens on the factfinding process. The prosecution would be required to repeatedly locate and keep continuously available each declarant, even when neither the prosecution nor the defense has any interest in calling the witness to the stand." *Id.* at 742.

62. 448 U.S. 56 (1980). *See supra* notes 32-39 and accompanying text.

63. *White*, 112 S. Ct. at 741.

64. 475 U.S. 387 (1986). In *Inadi* the Court stated that it rejected the notion that *Roberts* established a precedent that "no out-of-court statement would be admissible without a showing of unavailability." *Id.* at 392.

65. *White*, 112 S. Ct. at 741.

66. Act of Mar. 18, 1985, No. 405, § 1, 1985 Ark. Acts 752, 753-54 (currently codified at ARK. CODE ANN. § 16-41-101 (Michie 1987)).

67. Act of Mar. 18, 1985, No. 405, § 2, 1985 Ark. Acts 752, 754-55 (currently codified at ARK. CODE ANN. § 16-41-101 (Michie 1987)). Act 405 declared that an emergency existed and immediate steps were needed to deter child abusers and expedite their prosecution while minimizing the trauma and distress of child victims. *Id.*

68. 292 Ark. 632, 732 S.W.2d 817 (1987). Johnson was on trial for the rape of a nine-year-old boy. *Id.* at 635, 732 S.W.2d at 819. He argued on appeal that a declarant must first be found

as long as the statements at issue bore sufficient "indicia of reliability," the Confrontation Clause did not require a showing of "unavailability" of the child declarant under Rule 803(25).[69] Simply because a declarant's statements possess "indicia of reliability" does not mean that the prior statements may be substituted for the declarant's live testimony if he is available for trial.[70] However, when the declarant's prior statements do possess "sufficient indicia of reliability" and the declarant's testimony at trial might differ "substantially" from his earlier out-of-court statements, the unavailability requirement does not apply.[71]

In *Cogburn v. State*,[72] the Arkansas Supreme Court held that the defendant's right of confrontation was not violated when his seven-year-old daughter's hearsay statements concerning sexual intercourse were admitted into evidence under Rule 803(25) because the child testified and was cross-examined at trial.[73] Unlike Johnson, Cogburn did not argue on appeal that *Ohio v. Roberts*[74] required that a declarant must be "unavailable" before his out-of-court statement can be admitted at trial to comply with the Confrontation Clause.[75]

In *George v. State*,[76] the Arkansas Supreme Court declared Rule 803(25) unconstitutional because it violated the defendant's Sixth Amendment right to confront witnesses testifying against him.[77] In *Idaho v. Wright*[78] the United States Supreme Court held that a trial

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"unavailable" as a prerequisite to entering the declarant's hearsay testimony into evidence. *Id.* at 642, 732 S.W.2d at 822. The State pointed out that the declarant was available. *Id.*

69. *Id.* at 642-43, 732 S.W.2d at 823 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)). Johnson's conviction was reversed on other grounds.

70. *Id.* at 642-43, 732 S.W.2d at 822-23. In United States v. Inadi, 475 U.S. 387 (1986), the United States Supreme Court noted that the unavailability requirement set forth in *Roberts*, applied when the witness' testimony at trial would match his prior out-of-court statement. However, when the testimony can be expected to be substantially different in court, the unavailability requirement disappears. *Inadi*, 475 U.S. at 395-96, 400.

71. *Johnson*, 292 Ark. at 644, 732 S.W.2d at 823.

72. 292 Ark. 564, 732 S.W.2d 807 (1987). *Cogburn* was decided the same day as *Johnson*. *See supra* note 68.

73. 292 Ark. at 571, 732 S.W.2d at 811.

74. 448 U.S. 56 (1980). *See supra* notes 32-33 and accompanying text.

75. *Cogburn*, 292 Ark. at 572, 732 S.W.2d at 811. Another point Cogburn failed to appeal was that the court failed to instruct the jury in accordance with Rule 803(25). *Id. See* ARK. R. EVID. 803(25)(A)(3), *supra* note 9. Although that rule does not specify at what time during the trial the instruction should be given, the Arkansas Supreme Court instructed the trial court to give the instruction before the testimony is offered rather than at the end of the case. *Cogburn*, 292 Ark. at 572, 732 S.W.2d at 811.

76. 306 Ark. 360, 813 S.W.2d 792 (1991).

77. *Id.* at 367, 813 S.W.2d at 796. *See supra* note 22.

78. *Wright*, 110 S. Ct. at 3150. *See supra* note 22.

court should not determine a hearsay statement's reliability by using corroborating evidence unrelated to the circumstances surrounding the victim at the time the statements were made.[79] In *George,* the trial court could have used such corroborating evidence under subsection *(l)* of Rule 803(25) in determining the reliability of the child victim's statements to her parents.[80] Because Rule 803(25) allowed a judge to rely on corroborative evidence of the crime in deciding the trustworthiness of hearsay statements, the Arkansas Supreme Court held that Rule 803(25) was constitutionally defective on its face.[81]

On rehearing, the court modified its earlier ruling and declared that only subparagraph (A)(1)*(l)* of Rule 803(25) was unconstitutional.[82] The court also concluded that a trial judge could consider the four factors enunciated in *Wright*[83] under subparagraph (m), the catch-all provision of Rule of 803(25).[84] In his concurring opinion, Justice Glaze[85] agreed with the dissent in *Idaho v. Wright*,[86] that corroborating evidence *should* be used by a trial court in determining the trustworthiness of a child declarant's statements to third parties.[87] Justice Glaze stated, "[I]t is a matter of common sense for most people

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79. *George*, 806 Ark. at 367, 813 S.W.2d at 796. The corroborating factors cannot merely be related to proof of the crime, but must be related to circumstances surrounding the making of the out-of-court statement. *Wright,* 110 S. Ct. at 3149-50 (citing State v. Ryan, 691 P.2d 197, 204 (Wash. 1984)).

80. *George*, 306 Ark. at 367, 813 S.W.2d at 796. The court did not find from its examination of the record that the trial court used irrelevant corroborating evidence in determining the statement's reliability. *Id.* Applying the *Wright* factors on its own motion, the court concluded that the trial court correctly determined that the child's statements to her parents were trustworthy. *Id.* Thus, to the extent the trial court used corroborating evidence under subsection *(l)* of Rule 803(25), the court held it harmless error. *Id.* Therefore, the court upheld George's conviction. *Id.*

81. *George*, 306 Ark. at 368, 813 S.W.2d at 796.

82. George v. State, 306 Ark. 360, 374-D, 818 S.W.2d 951, 952 (1991). Rule 803(25)(A)(1)*(l)* states that a court can use "any other corroborative evidence of the act which is the subject of the statement" in order to find that a statement offered possesses a reasonable likelihood of trustworthiness. *See* ARK. R. EVID. 803(25)(A)*(l)*, supra note 9. In denying George's petition for rehearing, the majority concluded that the trial court had not considered any corroborative evidence of the crime in determining the trustworthiness of the child's statements to the parents. *George*, 306 Ark. at 374-B, 818 S.W.2d at 952.

83. *See supra* notes 48-52 and accompanying text.

84. *George*, 306 Ark. at 374-D, 818 S.W.2d at 952. Subparagraph (m) provides that "any other factor which the Court at the time and under the circumstances deems relevant and appropriate" may be used to determine the trustworthiness of a statement. *See* ARK. R. EVID. 803(25)(A)(1)(m), *supra* note 9.

85. Justices Hays and Corbin joined in the concurrence. *George*, 306 Ark. at 374-D, 818 S.W.2d at 952 (Glaze, J., concurring).

86. 110 S. Ct. 3139, 3153 (1990) (Kennedy, J., dissenting).

87. *George*, 306 Ark. at 374-D, 818 S.W.2d at 953.

that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence."[88]

In his dissent, Justice Dudley[89] opined that George's petition for rehearing should have been granted for several reasons. First, he stated that only the Arkansas Supreme Court could promulgate rules of evidence, and Rule 803(25) was never adopted by the court as a valid evidentiary rule.[90] Second, he believed that the standard for admissibility embodied in Rule 803(25) was too low because it only required a showing of "a reasonable likelihood of trustworthiness,"[91] compared to the requirement under the Confrontation Clause that the statements bear such "adequate indicia of reliability" that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility."[92] Since the Sixth Amendment standard is much higher than what was required by Rule 803(25), Justice Dudley believed that Rule 803(25) unconstitutionally infringed on George's Sixth Amendment right of confrontation.[93]

In order to correct the possible constitutional infirmity of Rule 803(25) in light of *Idaho v. Wright*[94] and *George v. State*,[95] the Arkansas General Assembly amended the rule with the passage of Act 66 of 1992.[96] Act 66 notwithstanding, on May 11, 1992, the Arkansas Su-

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88. *Id.*

89. Chief Justice Holt and Justice Newbern joined in the dissent. *Id.* at 374-E, 818 S.W.2d at 958 (Dudley, J., dissenting).

90. *Id.* at 374-G, 818 S.W.2d at 954 (Dudley, J., dissenting).

91. *Id.* at 374-I, 818 S.W.2d at 957-58 (Dudley, J., dissenting).

92. *Id.* at 374-J-K, 818 S.W.2d at 956 (Dudley, J., dissenting) (quoting Idaho v. Wright, 110 S. Ct. 3139, 3146, 3149 (1990)).

93. *Id.* at 374-M, 818 S.W.2d at 957-58. The dissent also argued three other points for granting rehearing: 1) the trial court had considered the constitutionally defective subparagraph (*l*) in determining the trustworthiness of the child's statements; 2) the court must follow the precedent of the United States Supreme Court and the concept of federalism when dealing with matters relating to the United States Constitution; and 3) George was convicted solely on a witness' hearsay testimony which quoted a declarant found to be incompetent. A compelling argument can be made that if a witness is not competent to testify in court, his hearsay statements to a third party cannot be made competent for later introduction at trial. *Id.* at 374-F to M, 818 S.W.2d at 954-58.

94. 110 S. Ct. 3139 (1990).

95. 306 Ark. 360, 813 S.W.2d 792, *reh'g denied*, 306 Ark. 360, 374-A, 818 S.W.2d 951 (1991).

96. Act of Mar. 20, 1992, No. 66 (to be codified as amended at ARK. CODE ANN. § 16-41-101 (Michie Supp. 1992)). The Act provides in pertinent part:

> Section 1. Rule 803(25) of Arkansas Code [§] 16-41-101 is hereby amended to read as follows:
>
> 25 A statement made by a child under ten (10) years of age concerning any act or offense against that child involving sexual offenses, child abuse, or incest is admissible

preme Court adopted three new exceptions to the child hearsay rule.[97]

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in any criminal proceeding in a court of this state, provided:

1. The court finds, in a hearing conducted outside the presence of the jury, that the statement offered possesses a reasonable likelihood of trustworthiness using the following criteria:

a. the spontaneity and consistency of repetition of the statement by the child;

b. the mental state of the child;

c. the child's use of terminology unexpected of a child of similar age;

d. the lack of motive by the child to fabricate the statement.

97. *In re* Addition to Arkansas Rules of Evidence, 309 Ark. app. (1992) (per curiam) (Hays, J. dissenting). The first exception may be cited as ARK. R. EVID. 803(25). The Rule reads as follows:

(25) Child Hearsay when declarant is available at trial and subject to cross-examination. A statement made by a child under the age of ten (10) years concerning any type of sexual offense, or attempted sexual offense, with, on, or against that child, which is inconsistent with the child's testimony and offered in a criminal proceeding, provided:

(A) The trial court conducts a hearing outside the presence of the jury and finds that the statement offered possesses a reasonable guarantee of trustworthiness considering the competency of the child both at the time of the out of court statement and at the time of the testimony.

(B) The proponent of the statement gives the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(C) This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence.

The second exception may be cited as Rule 804(b)(6), and is as follows:

(6) Child Hearsay in civil cases in which the Confrontation Clause of the Sixth Amendment of the Constitution of the United States is not applicable. A statement made by a child under the age of ten (10) years concerning any type of sexual offense, or attempted sexual offense, with, on, or against the child, provided:

(A) The trial court conducts a hearing outside the presence of the jury and finds that the statement offered possesses a reasonable guarantee of trustworthiness. The trial court may employ any factor it deems appropriate including, but not limited to those listed below, in deciding whether the statement is sufficiently trustworthy.

1. The spontaneity of the statement.
2. The lack of time to fabricate.
3. The consistency and repetition of the statement and whether the child has recanted the statement.
4. The mental state of the child.
5. The competency of the child to testify.
6. The child's use of terminology unexpected of a child of similar age.
7. The lack of a motive by the child to fabricate the statement.
8. The lack of bias by the child.
9. Whether it is an embarrassing event the child would not normally relate.
10. The credibility of the person testifying to the statement.
11. Suggestiveness created by leading questions.
12. Whether an adult with custody or control of the child may bear a grudge against the accused offender, and may attempt to coach the child into

The court adopted these new exceptions on the same day that it decided *Vann v. State*.[98] Interestingly, while declaring Rule 803(25) unconstitutional in *Vann*, the majority made no mention of Act 66 of 1992.[99]

## C. Interplay Between The Arkansas Supreme Court and General Assembly in Promulgating Court Rules

In the history of the American judicial system, the authority to

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making false charges.

13. Corroboration of the statement by other evidence.

14. Corroboration of the alleged offense by other evidence.

(B) The proponent of the statement gives the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(C) This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence.

The third exception may be cited as Rule 804(b)(7), and is as follows:

(7) Child Hearsay in criminal cases. A statement made by a child under the age of ten (10) years concerning any type of sexual offense against that child, where the Confrontation Clause of the Sixth Amendment of the United States is applicable, provided:

(A) The trial court conducts a hearing outside the presence of the jury, and, with the evidentiary presumption that the statement is unreliable and inadmissible, finds that the statement offered possesses sufficient guarantees of trustworthiness that the truthfulness of the child's statement is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. The trial court may employ any factor it deems appropriate including, but not limited to those listed below, in deciding whether the statement is sufficiently trustworthy.

1. The spontaneity of the statement.

2. The lack of time to fabricate.

3. The consistency and repetition of the statement and whether the child has recanted the statement.

4. The mental state of the child.

5. The competency of the child to testify.

6. The child's use of terminology unexpected of a child of similar age.

7. The lack of a motive by the child to fabricate the statement.

8. The lack of bias by the child.

9. Whether it is an embarrassing event the child would not normally relate.

10. The credibility of the person testifying to the statement.

11. Suggestiveness created by leading questions.

12. Whether an adult with custody or control of the child may bear a grudge against the accused offender, and may attempt to coach the child into making false charges.

(B) The proponent of the statement gives the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(C) This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence.

98. *See Vann*, 309 Ark. at 311, 831 S.W.2d at 131 (Glaze, J., concurring).

99. *Id.*

establish court rules has been placed in both the legislative and judicial branches of government.[100] Thus, it was inevitable that disputes would arise between these two branches in determining which branch had the authority to promulgate court rules.[101] The United States Supreme Court's promulgation of the Federal Rules of Civil Procedure in 1938 provided momentum for the shift of responsibility for making court rules from the legislative to the judicial branch.[102] Thereafter, many state legislatures transferred the responsibility for establishing court rules to their respective state supreme courts.[103]

The Arkansas Constitution confers upon the Arkansas Supreme Court "a general superintending control over all inferior courts of law and equity."[104] Nonetheless, the responsibility for establishing court rules in Arkansas has shifted back and forth between the legislature and the Arkansas Supreme Court.[105] Few rules governing court procedure existed in Arkansas in 1853.[106] The Arkansas General Assembly adopted both a criminal and civil code in 1868[107] to quell the ongoing criticism of the rigid forms of actions and pleadings imposed by common law.[108] Even though the legislature maintained responsibility during this period for establishing rules of procedure, it gave both the Arkansas Supreme Court and the circuit courts rule-making authority in order to "dispatch business."[109]

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100. Bruce L. Dean, Comment, *Rule-Making in Texas: Clarifying the Judiciary's Power To Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139, 145-46 (1988).

101. Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 624-25 (1957); *see also* Charles A. Riedl, *Ross Essay Contest: To What Extent May Courts Under the Rulemaking Power Prescribe Rules of Evidence?*, 26 A.B.A. J. 601 (1940).

102. Ralph C. Barnhart, *Pleading Reform in Arkansas*, 7 Ark. L. Rev. 1, 24-25 (1952).

103. Dean, *supra* note 100, at 148.

104. ARK. CONST. art. VII, § 4.

105. Silas A. Harris, *The Extent and Use of Rule Making Authority*, 22 J. AM JUDICATURE SOC'V 27, 28 (1938).

106. *See generally* 1853 Ark. Acts.

107. Barnhart, *supra* note 102, at 14.

108. Dean, *supra* note 100, at 146. *See also* JONATHAN M. LANDERS ET AL., CIVIL PROCEDURE 381 (2d ed. 1988). In 1869, Arkansas modeled its new civil code, revamping the pleadings and forms of actions, after that of Kentucky which used the New York Field Code as its model. *See* THOMAS D. CRAWFORD ANNOTATED CIVIL CODE OF ARKANSAS, p. v (1934). The new code of procedure was entitled *Code of Practice in Civil and Criminal Cases in Arkansas. See* ARKANSAS CIVIL CODE (1869).

109. Harris, *supra* note 105, at 28; *see also* POPE'S DIGEST OF ARK. STATUTES ch. 41 §§ 2777 & 2859 (1937). This power had been exercised by the courts before these statutes were enacted. Harris, *supra* note 105, at 32.

In *Sibbach v. Wilson & Co.*,[110] the United States Supreme Court held that state legislatures may constitutionally grant to courts the power to establish rules of practice and procedure.[111] The test the Court used to determine if a rule was "procedural" or "substantive" was whether or not the rule actually regulated procedure.[112] In *Roberts v. Love*[113] the Arkansas Supreme Court defined "substantive" law as "that which declares what acts are crimes and prescribes punishment therefor."[114] Conversely, "procedural" law is "that which provides or regulates the steps by which one who violates a criminal statute is punished."[115]

In Act 470 of 1971, the general assembly declared the Arkansas Supreme Court to be the proper authority for prescribing rules of pleading, practice, and procedure in criminal cases.[116] The general assembly empowered the court to take the necessary steps to facilitate the rules governing such proceedings throughout the courts in this state.[117] In accordance with Act 470, the Arkansas Supreme Court and the attorney general joined to create the Arkansas Criminal Code Revision Commission.[118] The Commission divided itself into two committees. The first committee revised the substantive criminal law, while the second committee revised the rules of criminal procedure.[119] In Act 280 of 1975 the Arkansas General Assembly formally adopted the Arkansas Criminal Code.[120] That same year, "pursuant to Act 470 of 1971

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110. 312 U.S. 1 (1941).

111. *Id.* at 9-10. Of course, the rules could not be inconsistent with other statutes or the Constitution of the United States. *Id.*

112. *Id.* at 14. The Court defined "procedure" as the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of the law. *Id.*

113. 231 Ark. 886, 333 S.W.2d 897 (1960).

114. *Id.* at 892-93, 333 S.W.2d at 901.

115. *Id.*

116. Act of Apr. 1, 1971, No. 470, § 1, 1971 Ark. Acts 1126, (currently codified at ARK. CODE ANN. §16-11-301 (Michie 1987)).

117. Act. 470 of 1971, § 6, 1971 Ark. Acts at 1127-28. The General Assembly declared that an emergency existed which required passage of this Act to facilitate reform in the judicial system to protect public health, peace, and safety. *Id. See also* Walter Cox & David Newbern, *New Civil Procedure: The Court That Came in From the Code*, 33 ARK. L. REV. 1 (1979). In Act 38 of 1973, the general assembly granted the Arkansas Supreme Court the ability to prescribe rules of procedure for civil cases throughout the state. Act of Jan. 31, 1973, No. 38, 1973 Ark. Acts 89 (currently codified at ARK. CODE ANN. §16-11-302 (Michie 1987)).

118. *In re* The Arkansas Criminal Code Revision Commission, 259 Ark. 863, 530 S.W.2d 672 (1975) (per curiam).

119. *Id.* at 863, 530 S.W.2d at 673.

120. *Id.* Act of Mar. 3, 1975, No. 280, 1975 Ark. Acts 500 (currently codified at ARK.

and in harmony with the court's constitutional superintending control over all trial courts," the Arkansas Supreme Court adopted and approved the proposed and amended rules of criminal procedure.[121]

In a 1977 decision, *Miller v. State*,[122] the Arkansas Supreme Court rejected the argument that it did not have the inherent authority to make rules of criminal procedure in the absence of an enabling statute.[123] The court stated that the enabling act passed by the legislature did not confer upon the court an express rule-making power, but merely recognized and was harmonious with the court's inherent power to make rules governing procedure in the trial courts of Arkansas.[124] In 1979, the Arkansas General Assembly clarified its authority to grant to the supreme court the power to make rules of practice and procedure for the trial courts of Arkansas.[125] The legislature also stated that granting this authority did not violate the separation of powers provision of the Arkansas Constitution.[126] In *Jennings v. State*[127] the Arkansas Supreme Court reiterated its ruling in *Miller* that the general assembly's delegation of authority to prescribe rules of criminal procedure was not unconstitutional.[128] The enabling act merely recognized the court's inherent authority to make rules and did not confer an express power.[129]

In an extended session of 1975, the Arkansas General Assembly adopted the *Uniform Rules of Evidence* for use in the courts of Arkansas.[130] In a 1986 decision, *Ricarte v. State*,[131] the Arkansas Supreme Court held that the *Uniform Rules of Evidence* were not validly

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CODE ANN. § 5-1-101 (Michie 1987)).

121. 259 Ark. at 864, 530 S.W.2d at 673. *See supra* notes 116-17 and accompanying text.

122. 262 Ark. 223, 555 S.W.2d 563 (1977).

123. *Id.* at 226, 555 S.W.2d at 564.

124. *Id.* Thus, it did not violate the separation of powers between the legislative and judicial branches. *Id.*

125. Act of Mar. 9, 1979, No. 333, § 5, 1979 Ark. Acts 622, 624 (currently codified at ARK. CODE ANN. § 16-11-301 (Michie 1987)).

126. Act 333 of 1979, § 5, 1979 Ark. Acts at 624. *See also* Act of Mar. 4, 1981, No. 312, § 2, 1981 Ark. Acts 534, 536 (currently codified at ARK. CODE ANN. § 16-11-301 (Michie 1987)). ARK. CONST. art. IV, § 2 provides: "No person, or collection of persons, being one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

127. 276 Ark. 217, 633 S.W.2d 363, *cert. denied*, 459 U.S. 862 (1982).

128. *Id.* at 218, 633 S.W.2d at 373-74.

129. *Id.*

130. Act of Feb. 10, 1976, No. 1143, § 1, 1975 Ark. Acts 2799 (currently codified at ARK. CODE ANN. § 16-41-101 (Michie 1987)).

131. 290 Ark. 100, 717 S.W.2d 488 (1986).

adopted by the legislature since the legislature was not lawfully in session at the time.[132] In order to prevent this ruling from causing chaos in the legal community, the court adopted the *Uniform Rules of Evidence* as the law in Arkansas in the same opinion.[133] In doing so, the court noted that it was not the first court to adopt the *Uniform Rules of Evidence* by judicial action.[134] In 1987, the Arkansas General Assembly promptly responded to the *Ricarte* decision by passing House Bill 1893 which re-enacted the invalidated Act 1143 of 1975 in its entirety.[135] The Governor signed the bill and it became Act 876 of 1987.[136]

After the general assembly originally adopted the *Uniform Rules of Evidence* in 1976 and before the Court in *Ricarte* ruled that adoption unconstitutional in 1986, the general assembly enacted the Arkansas child hearsay exception for sexual offenses against children under ten years of age.[137] In *St. Clair v. State*[138] the Arkansas Supreme Court held that the general assembly's adoption of a child hearsay exception "deals with a matter our [current] rules [of evidence] do not cover."[139] The court then held that the child hearsay exception promulgated by the legislature, Rule 803(25)(A), was constitutional.[140]

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132. *Id.* at 103, 717 S.W.2d at 489. At the time of their adoption in January of 1976, the legislature had unconstitutionally extended their session past the permitted 60 day period and had no authority to pass amendments. *See* ARK. CONST. art. XIX, § 22; Wells v. Riviere, 269 Ark. 156, 599 S.W.2d 375 (1980); Purcell v. Jones, 242 Ark. 168, 412 S.W.2d 284 (1967).

133. *Ricarte*, 290 Ark. at 104, 717 S.W.2d at 489. The court amended Rule 1102, thus changing the name to read the "*Arkansas Rules of Evidence.*" *See In re* Adoption of the Uniform Rules of Evidence, 290 Ark. 616, 717 S.W.2d 491 (1986). The rules became effective on October 13, 1986. *Id.* The court had previously adopted the *Arkansas Rules of Civil Procedure* and the *Arkansas Rules of Criminal Procedure* by judicial action. *Ricarte*, 290 Ark. at 105, 717 S.W.2d at 490.

134. *Ricarte*, 290 Ark. at 105, 717 S.W.2d at 490. The court noted that the United States Supreme Court had adopted the *Federal Rules of Evidence* pursuant to federal statutes which were similar to Arkansas' statutes. *Id. See* Reporter's Note, 409 U.S. 1132 (1972).

135. Act of Apr. 13, 1987, No. 876, 1987 Ark. Acts 2096 (codified at ARK. CODE ANN. § 16-41-101 (Michie 1987 & Supp. 1991)). Morton Gitelman, *How the Arkansas Supreme Court Raised the Dead*, 1987 ARK. L. NOTES 93, 94 (1987). Act 876 of 1987, § 3 (emergency clause) provides: "It is hereby found and determined by the General Assembly that because of the case *Ricarte v. State*, CR 86-31, a question has arisen over the validity of Act 1143 of the Extended Session of 1976; that this act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law on this issue."

136. Gitelman, *supra* note 135, at 94.

137. *See* Act of Mar. 18, 1985, No. 405, 1985 Ark. Acts 752 (original version codified at ARK. CODE ANN. § 16-41-101 (Rule 803(25)) (Michie 1987).

138. 301 Ark. 223, 783 S.W.2d 835 (1990).

139. *Id.* at 225, 783 S.W.2d at 836.

140. *Id.*

In *Curtis v. State*[141] the appellant argued that Arkansas' statute permitting videotaped testimony of child victims of a sexual offense to be admitted into evidence[142] was unconstitutional because it was procedural in nature and was promulgated by the general assembly rather than by the Arkansas Supreme Court.[143] In determining the scope of the court's rule-making authority, the majority stated:

> If the purpose of the rule is to permit a court to function efficiently, the rule-making power [of the court] is supreme unless its impact conflicts with a fixed public policy which has been legislatively or constitutionally adopted and has at its basis something other than court administration. . . . [U]ntil an area of practice or procedure is preempted by rules of court, we will give full effect to legislation.[144]

In *Lyons v. Forrest City Machine Works*[145] the Arkansas Supreme Court again stated that it would give full effect to legislation in an area of practice or procedure that the court had not preempted by rule.[146] Furthermore, the court stated it would defer to the general assembly when a court rule conflicts with a public policy adopted by legislative act or as part of the state constitution.[147] However, in *State v. Sypult*[148] the Arkansas Supreme Court backed away from its earlier

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141. 301 Ark. 208, 783 S.W.2d 47 (1990).

142. ARK. CODE ANN. § 16-44-203 (Michie 1987).

143. 301 Ark. at 209-10, 783 S.W.2d at 48. In *Curtis* the majority stated that the supreme court's rulemaking authority had three sources: "(1) inherent in the constitutional separation of powers, (2) express constitutional grant, or (3) enabling legislation." *Id.* at 210, 783 S.W.2d at 48.

144. *Id.* at 212, 783 S.W.2d at 49.

145. 301 Ark. 559, 785 S.W.2d 220 (1990).

146. *Id.* at 563, 785 S.W.2d at 222. At issue in *Lyons* was the general assembly's change of the wording in ARK. R. CIV. P. 4(i) (Time limit for service) from reading. "if service of summons is not made upon a defendant within 120 days after the filing of the compliant, the action *shall* be dismissed" to read "*may* be dismissed." *Id.* (emphasis added). The wording of the rule was changed in 1989. *See* Act of Mar. 8, 1989, No. 401, 1989 Ark. Acts 815 (codified at ARK. CODE ANN. § 16-58-134 (Michie 1987 & Supp. 1991)). The court ruled that since it had preempted the area of service of process, its version trumped the legislative version which gave the trial court discretion. *Lyons*, 301 Ark. at 563, 785 S.W.2d at 222. In an even earlier act, the state legislature believed that it could supersede rules made by the Arkansas Supreme Court. *See* Act of Mar. 28, 1981, No. 900, 1981 Ark. Acts 2119 (codified at ARK. CODE ANN. § 16-11-302 (Michie 1987)). The court, however, simply ignored the statute, later promulgating a per curiam order to supersede it. Morton Gitelman & John J. Watkins, *No Requiem for* Ricarte: *Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure*, 1991 ARK. L. NOTES 27, 29 (1991).

147. *Lyons*, 301 Ark. at 563, 785 S.W.2d at 222. *See also* May v. Bob Hankins Distr. Co., 301 Ark. 494, 785 S.W.2d 23 (1990) (stating that a rule of civil procedure supersedes a conflicting statute if both cannot "stand together").

148. 304 Ark. 5, 800 S.W.2d 402 (1990).

position of deference toward the general assembly.[149] Because legislation involving public policy matters would invariably conflict with court rules, the court declared a new policy of deferring to the general assembly *only* when "the conflicting court rule's primary purpose and effectiveness are not compromised; otherwise, our rules remain supreme."[150]

## III. REASONING OF THE COURT IN *VANN*

In *Vann v. State*[151] the Arkansas Supreme Court ruled that the Arkansas Child Hearsay Statute enacted by the general assembly[152] was unconstitutional because it violated the Confrontation Clause of the Sixth Amendment to the United States Constitution.[153] In so ruling, the court reversed Vann's rape conviction and remanded for a new trial.[154] The majority of the court followed the reasoning of the United States Supreme Court in *Idaho v. Wright*,[155] holding that the Confrontation Clause of the Sixth Amendment[156] requires that a hearsay statement may be admitted into evidence at trial "only" if it bears "adequate indicia of reliability."[157] The court stated:

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149. *Id.* at 7-9, 800 S.W.2d at 404-05. In *Sypult* the court held that ARK. CODE ANN. § 12-12-511(a) (Michie 1987 & Supp. 1989) conflicted with a pre-existing court rule. The statute would have, in effect, abrogated the physician and psychotherapist-patient privilege in matters involving child abuse, sexual abuse, or neglect of a child or the cause thereof. *Id.* at 6-8, 800 S.W.2d at 403-05.

150. *Id.* at 7, 800 S.W.2d at 404. Shortly after *Sypult* the court exhibited this authority by issuing an order amending both a rule of evidence and procedure. *In re* Proposed Changes To the Arkansas Rules of Civil Procedure And the Arkansas Rules of Evidence, 304 Ark. 742, 799 S.W.2d 811 (1990) (per curiam).

151. 309 Ark. 303, 831 S.W.2d 126 (1992).

152. *See supra* note 9.

153. *Vann*, 309 Ark. at 304, 831 S.W.2d at 127. *See supra* note 22; *see generally* Brian L. Schwalb, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" To Protect Both Children and Defendants*, 26 HARV. C.R.-C.L. L. REV. 185 (1991); Sharon Kennedy, Note, *The Confrontation Clause Limits On the Admissibility of Hearsay Evidence in Child Abuse Cases*, 59 UMKC L. REV. 1093 (1991); Jan Sanders, Note, *Protecting the Child Victim of Sexual Abuse While Preserving the Sixth Amendment Confrontation Rights of the Accused*, 35 ST. LOUIS U. L.J. 495 (1991).

154. 309 Ark. at 304, 831 S.W.2d at 127. The court's constitutional ruling applies only to an accused in a criminal trial and does not touch on the statute's validity in a civil case. *Id.*

155. 110 S. Ct. 3139 (1990).

156. *See supra* note 22.

157. *Vann*, 309 Ark. at 306, 831 S.W.2d at 127-28. Relying on *Wright*, the Arkansas Supreme Court also noted that hearsay statements not falling within a "firmly rooted hearsay exception" might meet Confrontation Clause standards of reliability if the out-of-court statement(s) are supported by a "showing of particularized guarantees of trustworthiness." *Id.* In *Wright* the United States Supreme Court identified four factors from various cases as illustrative of "guarantees of trustworthiness." *See supra* notes 48-52 and accompanying text.

> If the statement does not fall within a firmly rooted hearsay exception, such as the "excited utterance," it is *presumptively unreliable and inadmissible* for Confrontation Clause purposes. To fall within the admissible category, the evidence must show "*the declarant's truthfulness is so clear from the surrounding circumstances that the test for cross-examination would be of marginal utility.*"[158]

In ruling that Arkansas' child hearsay statute[159] was unconstitutional, the Arkansas Supreme Court in *Vann* compared the test for reliability imposed by Rule 803(25) with the test articulated by the United States Supreme Court in *Idaho v. Wright*.[160] As discussed in the *Wright* decision, the Confrontation Clause requires that a hearsay statement must contain "adequate indicia of reliability" showing that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility" before the statement can be admitted.[161] Conversely, Rule 803(25) provided that a child's statement was admissible after the trial court simply determined that the statement possessed a "reasonable likelihood of trustworthiness."[162] Thus, the Arkansas Supreme Court concluded that Rule 803(25) was unconstitutional and violated Vann's right of confrontation because it had a lower standard of admissibility than the minimum required under the Sixth Amendment to the United States Constitution.[163] The court also stated that the introduction into evidence of the child's statements to the mother and nurse under Rule 803(25) did not conflict with the Confrontation Clause because these statements were also admissible under other, "firmly-rooted" hearsay exceptions.[164] However, the court found that Rule 803(25), which was unconstitutional, provided the only possible basis for the admissibility of the policeman's hearsay testimony regarding the child's statements to him.[165]

In its appellate brief, the State acknowledged that the policeman's hearsay testimony may have been erroneously admitted but contended

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158. 309 Ark. at 306, 831 S.W.2d at 128 (quoting Idaho v. Wright, 110 S. Ct. 3139, 3149 (1990)).

159. *See supra* note 9.

160. 309 Ark. at 307-08, 831 S.W.2d at 128-29.

161. 309 Ark. at 307, 831 S.W.2d at 128 (quoting *Wright*, 110 S. Ct. at 3149).

162. 309 Ark. at 307, 831 S.W.2d at 128 (emphasis added). *See supra* note 9.

163. 309 Ark. at 307-08, 831 S.W.2d at 128-29.

164. *Id.* at 308, 831 S.W.2d at 129. The firmly-rooted exceptions were for excited utterances and statements made for purposes of medical treatment. *See supra* note 21.

165. 309 Ark. at 308, 831 S.W.2d at 129.

that the error was harmless because the "statements were supported by particularized guarantees of trustworthiness even without consideration of the corroborating evidence . . . ."[166] In addressing this argument, the Arkansas Supreme Court noted that Vann's appeal involved a federal, not a state, constitutional right.[167] The majority of the court applied the harmless error test articulated in *Chapman v. California*.[168] In *Chapman* the Court stated that "[t]he question [of whether or not harmless error has occurred] is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[169] The Court held that before a violation of a federal constitutional right can be held harmless, the reviewing court must find the error "harmless beyond a reasonable doubt."[170]

In Vann's case, the State had the burden of proving that sexual intercourse occurred between Vann and the child.[171] On appeal, the majority of the Arkansas Supreme Court found that the police officer's hearsay testimony about the child's statements was the only direct evidence that sexual intercourse had occurred and that all other evidence presented at trial was circumstantial.[172] Since the police officer's hearsay testimony about penetration was only admissible under Rule 803(25) and did not qualify under any other hearsay exception, Vann's constitutional right to confront adverse witnesses was violated.[173] Because the policeman's "testimony was the only direct evidence of penetration," it "might have contributed to the proof" of penetration at trial.[174] Thus, the court rejected the State's harmless error argument, concluding that the erroneously admitted hearsay testimony by the po-

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166. Supplemental Brief and Abstract for Appelle at 10, Vann v. State, 309 Ark. 303, 831 S.W.2d 126 (1992) (No. CR 91-191).

167. 309 Ark. at 308, 831 S.W.2d at 129.

168. 386 U.S. 18 (1967). In *Chapman* the United States Supreme Court reversed the California Supreme Court's decision to affirm a state criminal conviction even though the defendants' federal constitutional rights had been violated based upon adverse comments made by the prosecution in relation to their failure to testify. *Id.* at 26. The California court ruled that even though their federal constitutional rights were violated, the denial constituted "harmless error" under California constitutional provisions dealing with harmless error. *Id.* at 20. In reversing, the United States Supreme Court ruled that before an error involving the denial of a federal constitutional right can be held harmless in a state criminal case, the reviewing court must be satisfied "beyond a reasonable doubt" that the error did not contribute to the conviction. *Id.* at 24.

169. *Vann*, 309 Ark, at 309, 831 S.W.2d at 129 (quoting *Chapman*, 386 U.S. at 22, 23-24).

170. 309 Ark. at 309, 831 S.W.2d at 129.

171. *Id.*

172. *Id.* at 309, 831 S.W.2d at 130.

173. *Id.* at 308, 831 S.W.2d at 130.

174. *Id.* at 309, 831 S.W.2d at 130.

liceman was not "harmless beyond a reasonable doubt."[175]

In his concurring opinion, Justice Glaze, joined by Justice Hays, agreed with the majority that the child's statements to her mother and nurse might appropriately be introduced into evidence under the excited utterance and medical treatment hearsay exceptions.[176] The concurrence also stated that the child's statements to the police officer failed to qualify under any firmly-rooted hearsay exception or meet the reliability factors listed in *Idaho v. Wright*.[177] In their concurrence in the supplemental opinion in *George v. State*,[178] Justices Glaze and Hays had urged the United States Supreme Court to retreat from the position taken in *Wright* and allow trial courts to consider corroborative evidence when determining the trustworthiness of a child declarant's out-of-court statements under a child hearsay exception.[179] However, both justices conceded that it was unlikely that the Court would reconsider this point in the near future.[180] Although Justices Glaze and Hays agreed with the dissent in *Vann* that sufficient evidence existed in the record to uphold Vann's rape conviction, they believed that reversal was still appropriate because the error of allowing the child's statements to the policeman into evidence under Rule 803(25) was "prejudicial."[181] It is unclear from their opinion, however, which harmless error test they were applying in determining that the statements were prejudicial.[182]

Justice Brown dissented from the majority opinion in *Vann* for two reasons. First, he pointed out that the majority failed to clearly state why the police officer's hearsay testimony was prejudicial.[183] Second, he opined that the introduction of the police officer's hearsay testimony into evidence was harmless error.[184] Justice Brown believed that the child's statements to the police officer met the requirements for trust-

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175. *Id.*

176. *Id.* at 311, 831 S.W.2d at 130 (Glaze, J., concurring).

177. *Id. See supra* notes 48-52 and accompanying text.

178. 306 Ark. 360, 818 S.W.2d 951 (1991).

179. *Id.* at 374D-E, 818 S.W.2d at 953.

180. *Vann*, 309 Ark. at 310, 831 S.W.2d at 130 (Glaze, J., concurring). This concession was possibly the result of the Supreme Court's recent decision in White v. Illinois, 112 S. Ct. 736 (1992) in which it again approved of the "trustworthiness" factors enunciated in *Wright*. *See supra* notes 48-52 and accompanying text.

181. *Id.* at 311, 831 S.W.2d at 130-31 (Glaze, J., concurring).

182. *See id.*

183. *Id.* at 312, 831 S.W.2d at 131 (Brown, J., dissenting). The dissent argued that the majority simply drew conclusions. *Id.*

184. *Id.*

worthiness enunciated in *Wright*.[185] He reasoned that the child's statements were consistent with her previous statements to her mother and to the hospital nurse; the child had no motive to fabricate a story against Vann; and the child had no familiarity with terminology involving sexual matters.[186] He emphasized the reasoning of the Supreme Court in *Wright* that "the presence of corroborating evidence more appropriately indicates that any error in admitting the statement might be harmless, rather than that any basis exists for presuming the declarant to be trustworthy."[187] Justice Brown stated that since a considerable amount of evidence was properly introduced to prove penetration, even though it was circumstantial in nature, the error in admitting the policeman's hearsay testimony was harmless.[188]

In his dissent, Justice Brown also opined that the majority incorrectly relied on the United States Supreme Court's 1967 decision in *Chapman v. California*[189] since the Court had subsequently declined to apply that particular test for harmless error.[190] For example, in *State v. Larson*,[191] a case factually similar to *Vann*, the Court denied certiorari, allowing a harmless error ruling by the Minnesota Supreme Court to stand.[192] Although the Court's denial of certiorari does not indicate that it approved of the *Larson* decision, *Larson* does indicate that some courts are using a "harmless-error" standard other than that articulated by the Court in *Chapman*.[193] In *Larson* the Minnesota Supreme Court upheld a rape conviction where the hearsay testimony of a social worker and a police officer concerning an abused child's statements was erroneously admitted into evidence.[194] The court in *Larson* reasoned that the error was harmless beyond a reasonable doubt because the testimony was not prejudicial but only cumulative of the child's statements to a physician's assistant, a child protection specialist, and a clinical psychologist.[195]

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185. *Id.* *See supra* notes 48-52 and accompanying text.

186. *Vann*, 309 Ark. at 313, 831 S.W.2d at 132 (Brown, J., dissenting).

187. *Id.* at 314, 831 S.W.2d at 132 (quoting Idaho v. Wright, 110 S. Ct. 3139, 3150-51 (1990)). "In making a harmless-error analysis, corroborative evidence of the crime itself is appropriately considered." *Id.*

188. 309 Ark. at 315-16, 831 S.W.2d at 133 (Brown, J., dissenting).

189. 386 U.S. 18 (1967).

190. *Vann*, 309 Ark. at 312-13, 831 S.W.2d at 131 (Brown, J., dissenting).

191. 472 N.W.2d 120 (Minn. 1991), *cert. denied*, 112 S. Ct. 965 (1992).

192. *Vann*, 309 Ark. at 313, 831 S.W.2d at 131 (Brown, J., dissenting).

193. *See id.* at 312-13, 831 S.W.2d at 131 (Brown, J., dissenting).

194. *Id.* at 313, 831 S.W.2d at 132 (Brown, J., dissenting) (discussing *Larson*).

195. *Id.*

Instead of the "harmless beyond a reasonable doubt" standard enunciated in *Chapman*,[196] Justice Brown looked to the standard used in *Coy v. Iowa*.[197] In *Coy* the United States Supreme Court stated: "An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and *harmlessness must therefore be determined on the basis of the remaining evidence.*"[198] Thus, based on the totality of all the evidence produced at trial, Justice Brown would have affirmed Vann's conviction on the ground that the police officer's hearsay testimony was harmless because it was cumulative to other evidence properly introduced and because it was reliable under the factors enunciated in *Wright*.[199]

## IV. Analysis and Significance

The Arkansas Supreme Court's decision in *Vann* is significant for several reasons. Substantively, the court went much further than it had gone in the supplemental opinion in *George*[200] and invalidated Rule 803(25)[201] in its entirety because the Rule's reliability standard was lower than the minimum standard required by the Confrontation Clause of the Sixth Amendment to the United States Constitution.[202] On its face, Rule 803(25) denied Vann his right of confrontation since it provided that the hearsay statement of a child was admissible after the trial court determined that the statement possessed only a "*reasonable likelihood* of trustworthiness."[203] This standard was at odds with the Confrontation Clause which "requires that the statement bear such '*adequate indicia of reliability*' that '*the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.*' "[204] Because the policeman's hearsay testimony was only admissible under Rule 803(25), and be-

196. 386 U.S. 18 (1967).

197. 487 U.S. 1012 (1988). *See supra* note 40.

198. *Coy*, 487 U.S. at 1021-22 (emphasis added). *See also Vann*, 309 Ark. at 315, 831 S.W.2d at 133 (Brown, J., dissenting).

199. *Vann*, 309 Ark. at 315-16, 831 S.W.2d at 133 (Brown, J., dissenting).

200. 306 Ark. 360, 813 S.W.2d 792, *reh'g denied*, 306 Ark. 360, 374-A, 818 S.W.2d 951 (1991).

201. *See supra* note 9.

202. *Vann*, 309 Ark. at 307-08, 831 S.W.2d at 128-29.

203. *Id.* at 307, 831 S.W.2d at 128 (quoting *Wright*, 110 S. Ct. at 3149).

204. *Id.* at 307-08, 831 S.W.2d at 128-29.

cause Rule 803(25)'s admissibility standard did not meet the minimum standard required by the Confrontation Clause, the Arkansas Supreme Court held that Vann's right of confrontation was violated.[205]

Procedurally, the manner in which the court in *Vann* reached its decision was inconsistent with its policy of refusing to address issues that are not properly raised on appeal. In reversing Vann's conviction, the Arkansas Supreme Court went beyond the arguments made in the briefs. Vann argued on appeal that the circuit court erred in admitting the policeman's hearsay testimony about the child's statements because it used corroborative evidence in deciding the statement's reliability.[206] Using corroborative evidence in admitting an unavailable child victim's hearsay statements was found to violate a criminal defendant's right of confrontation in *Idaho v. Wright*.[207] At trial and in his appellate brief, Vann did not argue that Rule 803(25) was unconstitutional in its entirety.

On its own motion, however, the Arkansas Supreme Court looked beyond Vann's narrow argument, ruling that Rule 803(25) was altogether unconstitutional.[208] In doing so, the court departed from its well-settled and regularly-followed practice of refusing to entertain issues not argued at trial and preserved for appeal. Prior to *Vann*, the court had routinely held that when neither the abstract nor the record showed the point to have been argued to the trial court, the appellate court would not consider it on appeal.[209] In this case, the court's expansion of Vann's argument on appeal worked to his advantage. However, in the overwhelming majority of other cases, the Arkansas Supreme Court has been unwilling to expand, or even review, arguments not made at trial or listed as error in the appellant's brief. In scores of opinions, the Arkansas Supreme Court has stated that arguments may not be raised for the first time on appeal.[210]

Furthermore, it is interesting to note that in *George v. State*[211] the Arkansas Supreme Court, on its own motion, applied the factors enun-

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205. *Id.*

206. Brief and Abstract for Appellant at 46. *See supra* note 20 and accompanying text.

207. 110 S. Ct. 3139, 3150 (1990). *See supra* note 46.

208. *Vann*, 309 Ark. at 304, 831 S.W.2d at 127.

209. *See, e.g.*, Bryant v. State, 304 Ark. 514, 803 S.W.2d 546 (1991); Price v. State, 285 Ark. 148, 685 S.W.2d 506 (1985).

210. *E.g.*, Wicks v. State, 270 Ark. 781, 606 S.W.2d 366 (1980).

211. 306 Ark. 360, 813 S.W.2d 792, *reh'g denied*, 306 Ark. 360, 374-A 818 S.W.2d 951 (1991).

ciated in *Idaho v. Wright*[212] (which are not included in the Rule 803(25) criteria)[213] in concluding that the hearsay statements introduced at trial contained "sufficient guaranties of trustworthiness."[214] In reversing the conviction in *Vann*, however, the majority elected not to apply the *Wright* factors on its own when deciding that the police officer's testimony violated Vann's right of confrontation under Rule 803(25).[215]

The decision in *Vann* also raises the question, once again, of whether the legislative branch or the judicial branch of the government in Arkansas has the authority to promulgate evidentiary rules for the courts in this state. In his concurring opinion, Justice Glaze, joined by Justice Hays, stated that the general assembly should provide for the court's evidentiary rules.[216] They suggested that the majority's action indicates a belief that Act 66 is unconstitutional.[217]

In amending Rule 803(25) in Act 66, the legislature stated:

> It is determined by the General Assembly that the United States' Supreme Court's decision in *White v. Illinois*, No. 90-6113 (S. Ct. Jan. 15, 1992) [112 S. Ct. 736 (1992)] *foreclosed any rule* requiring that as a necessary antecedent to the introduction of hearsay testimony, the prosecution must either produce the declarant at trial or show that the declarant is unavailable.[218]

The general assembly's interpretation of the holding in *White v. Illinois*, however, might be erroneous. In *White*, the Court held that a trial court does not first have to make a finding of a declarant's "unavailability" before admitting into evidence statements made under the "spontaneous declaration"[219] and "medical examination"[220] exceptions to the hearsay rule.[221] The holding in *White* does not necessarily stand

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212. 110 S. Ct. 3139 (1990). *See supra* notes 48-52 and accompanying text.

213. *See supra* note 9.

214. *George*, 306 Ark. 360, 366, 813 S.W.2d 792, 796 (1991).

215. *See Vann*, 309 Ark. 303, 831 S.W.2d 126 (1992). The dissent pointed out that the majority failed to state why the police officer's testimony was error under Rule 803(25). "Was this because the circuit court failed to make a Rule 803(25) determination or because Rule 803(25) is constitutionally infirm or because the [police officer] engaged in improper questioning or for some other reason? The majority opinion leaves us in the dark." *Id.* at 315, 831 S.W.2d at 133 (Brown, J., dissenting).

216. *Id.* at 312, 831 S.W.2d at 131 (Glaze, J., concurring).

217. 309 Ark. at 311, 831 S.W.2d at 131 (Glaze, J. concurring).

218. Act 66 of 1992, § 5 (emergency clause) (emphasis added).

219. *See supra* note 21.

220. *See supra* note 21.

221. *White*, 112 S. Ct. at 739.

for the proposition that the "unavailability" requirement is dispensed with in *all* cases, as the general assembly stated in Act 66. The holding could just as easily be interpreted as applying only to hearsay statements admitted pursuant to the spontaneous declaration or medical examination exceptions to the hearsay rule. The question of whether a showing of "unavailability" is required in cases involving sexual offenses against children has not yet been addressed by the United States Supreme Court. Thus, the general assembly's interpretation of the holding in *White*, a function normally undertaken by the judicial branch, might be in error. If so, this error was specifically incorporated into the rule by the general assembly when it amended Rule 803(25) in Act 66.[222] Since the general assembly's interpretation of *White* arguably expands upon the actual holding in that case, and might be erroneous, the scales tip in favor of the Arkansas Supreme Court over the Arkansas General Assembly as the proper governmental branch to promulgate the rules of evidence.[223]

While the general assembly is not the proper governmental branch to interpret statutory and case law, it is the proper branch to promulgate "substantive" law. The question now arises whether evidentiary rules are substantive or procedural in nature. In *State v. Sypult*[224] the majority of the Arkansas Supreme Court stated that "deference to legislation involving rules of evidence and procedure will be given only to the extent the legislation is compatible with our established rules. When conflicts arise which compromise these rules, our rules remain supreme."[225] Before *Sypult* the Arkansas Supreme Court stated that it shared the rule-making power with the general assembly and that the court would defer to the general assembly when legislation involving matters of public policy conflicted with the court's rules.[226] In *Sypult* the majority concluded that its inherent authority to make rules of evidence preempt any evidentiary law enacted by the general assembly, even if that law was substantive.[227] The dissent believed this result exceeded the court's power.[228]

However, in his concurrence in *Sypult*, Justice Newbern stated

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222. *See* Act 66 of 1992, § 5 (emergency clause).
223. *See* State v. Sypult, 304 Ark. 5, 800 S.W.2d 402 (1990).
224. *Id.*
225. *Id.* at 9, 800 S.W.2d at 405.
226. Curtis v. State, 301 Ark. 208, 212, 783 S.W.2d 47, 49 (1990).
227. *Sypult*, 304 Ark. at 15, 800 S.W.2d at 409.
228. *Id.* at 15, 800 S.W.2d 409 (Glaze, J., dissenting).

that he viewed the court's decision in *Ricarte v. State*[229] as holding that the rules of evidence were rules of practice and procedure and were not substantive law.[230] In *Sypult* Justice Turner expanded on the evidentiary rules versus the public policy issue that the majority opinion addressed. He stated that "matters of public policy enacted as laws by the legislature involving *substantive rights* as distinguished from matters of procedure will always be controlling . . . ."[231] This statement preserves the constitutional separation of powers doctrine that courts are to interpret law and legislatures are to enact law. In *Vann* the Arkansas Supreme Court did not specifically overrule Act 66.[232] Because the three new hearsay exceptions promulgated by the court are evidentiary and not substantive in nature, the Arkansas Supreme Court's rules should preempt Act 66.

Finally, the decision in *Vann* reveals that members of the Arkansas Supreme Court disagree on the question of the proper standard to apply in evaluating issues of harmless constitutional error. The harmless error doctrine in American jurisprudence is thought to have begun with the case of *Bram v. United States*.[233] Under the holding in *Bram*, any constitutional errors committed in a criminal trial required automatic reversal.[234] In *Chapman v. California*,[235] however, the Court stated that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."[236] Therefore, the *Chapman* Court rejected the idea that violations of any federal constitutional right required automatic reversal.[237] The Court stated that appellate courts may affirm a conviction if the reviewing court believed the error was harmless beyond a reasonable doubt.[238]

Thus far, the United States Supreme Court has used four different approaches in determining harmless error. In some cases, the Court has

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229. 290 Ark. 100, 717 S.W.2d 488 (1986).

230. *Sypult*, 304 Ark. at 9, 800 S.W.2d at 405 (Newbern, J., concurring).

231. *Id.* at 13, 800 S.W.2d at 407 (Turner, J., concurring).

232. *See supra* note 96.

233. 168 U.S. 532 (1897). *See* Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973).

234. *See* 1 JOHN H. WIGMORE, EVIDENCE § 21 (3d ed. 1940).

235. 386 U.S. 18 (1967).

236. *Id.* at 22.

237. *Id.*

238. *Id.* at 24.

focused solely on the erroneously admitted evidence to decide whether it contributed to the conviction.[239] In others, the Court has examined the record to decide whether the unconstitutionally admitted evidence was "merely cumulative" of other overwhelming, untainted evidence.[240] In a third category of cases, the Court determined whether or not the accuracy and reliability of the trial were such that the constitutional infringement was of no consequence.[241] Lastly, the Court has decided the question of harmless error by determining whether overwhelming evidence of guilt existed absent the constitutional error.[242]

In *Vann* the majority of the court applied the "beyond a reasonable doubt"[243] harmless error standard established in *Chapman v. California*.[244] The Court in *Chapman* articulated the test as "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[245] The dissent in *Vann* selected the standard voiced in *Coy v. Iowa*[246] that "harmlessness must therefore be determined on the basis of the remaining evidence,"[247] which is essentially the same test that the Supreme Court applied in *Harrington v. California*.[248] This test has been criticized, however, on the ground that when an appellate court determines harmless error by reviewing the record in search of the "remaining untainted evidence" to conclude that the error did not contribute to the verdict, the court impermissibly sits as an "appellate jury."[249] This results in the denial of a defendant's right to trial by jury, thus usurping the real jury's function.[250]

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239. *E.g.*, Fahy v. Connecticut, 375 U.S. 85 (1963).

240. Harrington v. California, 395 U.S. 250 (1969).

241. *E.g.*, Rose v. Clark, 478 U.S. 570 (1986).

242. Milton v. Wainwright, 407 U.S. 371 (1972). Since the Court has not expressly adopted any one of these approaches, many possible dispositions are possible depending upon the approach taken. For a discussion of these approaches and their inherent problems see David M. Skoglind, Note, *Harmless Constitutional Error: An Analysis of Its Current Application*, 33 BAYLOR L. REV. 961 (1981).

243. *Vann*, 309 Ark. at 309, 831 S.W.2d at 129.

244. 386 U.S. 18 (1967).

245. *Chapman*, 386 U.S. at 23 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963).

246. 487 U.S. 1012 (1988).

247. *Id.* at 1021-22. *See also Vann*, 309 Ark. at 315, 831 S.W.2d at 133 (Brown, J., dissenting).

248. 395 U.S. 250 (1969). In *Harrington* the Court did not consider whether the error might have contributed to the verdict, but looked only at the quantity of the remaining evidence not introduced in error. *Id.* at 254.

249. Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 429 (1980).

250. *Id.* at 431. Criticism of the Court's expansive use of harmless error is increasing. *See* Roy Antley, Note, Rose v. Clark: *Unconstitutional Presumptions in Criminal Trials May Be*

Because multiple standards currently exist for determining harmless error, it is apparent that appellate courts will be divided on the proper standard to apply. Apparent also is the fact that attorneys in Arkansas cannot predict when the Arkansas Supreme Court will render decisions based upon issues not raised on appeal. By promulgating three new child hearsay exceptions, but at the same time declining to invalidate the general assembly's amended child hearsay exception, the Arkansas Supreme Court has left intact two versions of a child hearsay exception for use in sexual abuse cases. By not even mentioning Act 66, it might appear as if the Arkansas Supreme Court intends to be the sole governmental branch responsible for promulgating evidentiary rules. The confusion facing the legal community in Arkansas as to which child hearsay exception controls is obvious. How the legislature will respond to this problem is a different matter.

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*Harmless Error*, 25 HOUS. L. REV. 203 (1988).