University of Arkansas at Little Rock Law Review

Volume 14 | Issue 3 Article 8

1992

Constitutional Law—Confrontation Clause—Arkansas Child Hearsay Exception Regarding Sexual Offenses, Abuse, or Incest Is Unconstitutional. George v. State, 306 Ark. 360, 813 S.W.2d 792 (1991).

Mark D. Wolf

Follow this and additional works at: http://lawrepository.ualr.edu/lawreview

Part of the Constitutional Law Commons, and the Criminal Procedure Commons

Recommended Citation

Mark D. Wolf, *Constitutional Law—Confrontation Clause—Arkansas Child Hearsay Exception Regarding Sexual Offenses, Abuse, or Incest Is Unconstitutional. George v. State, 306 Ark. 360, 813 S.W.2d 792 (1991).*, 14 U. Ark. Little Rock L. Rev. 579 (1992).
Available at: http://lawrepository.ualr.edu/lawreview/vol14/iss3/8

This Note is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

CONSTITUTIONAL LAW—CONFRONTATION CLAUSE—ARKANSAS CHILD HEARSAY EXCEPTION REGARDING SEXUAL OFFENSES, ABUSE, OR INCEST IS UNCONSTITUTIONAL. *George v. State*, 306 Ark. 360, 813 S.W.2d 792 (1991).

On November 2, 1989, Mrs. Paul Oliver was awakened by her two and a half year old daughter who was having a nightmare.[1] The daughter said she had dreamed of being bitten by dinosaurs the way her day care teacher had bitten her.[2] The daughter stated, "He bites me on my tee tee," pointing to her genital area as she relayed her fears to her mother.[3] The following morning the child repeated her nightmare to her father. Later that day, Mrs. Oliver took her daughter to the Arkansas Department of Human Services (ADHS), where a social worker interviewed the child using an "anatomically correct doll."[4] Although the daughter identified parts of the body and played with the genital area of the doll, she did not speak to the social worker.[5]

In her statements to her mother, the child referred to the day care teacher as "Papaw George."[6] Sixty-eight year old Arthur L. George (George) and his wife operated a private day care center in Texarkana, Arkansas, where the child had been enrolled from approximately September 1988 to September 1989.[7]

Under the Arkansas Criminal Code, George was charged with first degree sexual abuse because he had allegedly engaged in sexual conduct with someone under the age of fourteen.[8] On September 4, 1990, a hearing was held to determine the trustworthiness of the victim's statements to her mother, father, and social worker.[9] The applicable Arkansas Rule of Evidence was Rule 803(25) which provides a hearsay exception permitting the introduction of statements made by child vic-

1. George v. State, 306 Ark. 360, 362, 813 S.W.2d 792, 793 (1991).
2. *Id.* at 362-63, 813 S.W.2d at 793-94.
3. *Id.* at 363, 813 S.W.2d at 794.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 362, 813 S.W.2d at 793.
8. *Id.* at 363, 813 S.W.2d at 794. The criminal statute at issue, ARK. CODE ANN. § 5-14-108 (Michie 1987), provides that a person commits first degree sexual abuse if he engages in sexual contact by forcible compulsion or with a person who is unable to consent because of physical helplessness.
9. 306 Ark. at 363, 813 S.W.2d at 794.

tims of sexual abuse.[10] Based on the testimony of the child, the parents, and the ADHS social worker, the trial court found that the victim's statements were trustworthy.[11] The trial court further determined that George's right to confront witnesses against him at the preliminary hearing was not denied because the child had testified and had been cross-examined.[12]

Beginning September 10, 1990, the case was tried before a jury.[13] The child testified, but her testimony was confusing and at times contradictory.[14] On cross-examination, she was largely unresponsive to defense counsel.[15] After hearing her testify, the trial court determined

---

10. *Id.* The hearsay exception 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 Section 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 Section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable Rule of Evidence.

1985 Ark. Acts 405 § 1 (codified as amended at ARK. R. EVID. 803(25)).

11. 306 Ark. at 363-64, 813 S.W.2d at 794.

12. *Id.* at 364, 813 S.W.2d at 794. This right of confrontation is embodied in the Sixth Amendment. U.S. CONST. amend. VI. *See infra* notes 27-29 and accompanying text.

13. 306 Ark. at 364, 813 S.W.2d at 794.

14. *Id.*

15. *Id.*

that the child was incompetent and instructed the jury to disregard her testimony.[16] However, the court admitted the child's hearsay statements as related by her mother and father.[17] The jury convicted George of first degree sexual abuse and sentenced him to ten years.[18]

The Arkansas Supreme Court affirmed the lower court's decision.[19] Based on the United States Supreme Court decision in *Idaho v. Wright*,[20] however, the court struck down Rule 803(25) as an unconstitutional violation of a defendant's Sixth Amendment right to confrontation.[21] Nevertheless, the court determined that the child's incompetence to testify at trial did not per se invalidate the reliability of her statements to her parents.[22] The court concluded that the victim's statements to her mother, which she made upon awakening from a nightmare, qualified as an excited utterance under Rule 803(2) of the Arkansas Rules of Evidence.[23] Applying factors stated in *Wright*, the court determined that the victim's statements to her parents were trustworthy and that George's Sixth Amendment confrontation rights had not been violated.[24] *George v. State*, 306 Ark. 360, 813 S.W.2d 792 (1991).

Most historians have traced the origins of the Confrontation Clause to the trial of Sir Walter Raleigh in 1603.[25] Other historians, however, are of the opinion that there was never a recognized right to confrontation at common law.[26] The Bill of Rights expressly adopts the right to confront adverse witnesses.[27] The Sixth Amendment provides

16. *Id.*
17. *Id.*
18. *Id.* at 362, 813 S.W.2d at 793.
19. *Id.* at 371, 813 S.W.2d at 798.
20. 110 S. Ct. 3139 (1990).
21. 306 Ark. at 367, 813 S.W.2d at 796.
22. *Id.* at 366-67, 813 S.W.2d at 796.
23. *Id.* The excited utterance hearsay exception involves statements relating to startling events or conditions while the declarant remains under the stress of excitement caused by the condition or event. ARK. R. EVID. 803(2). The court concluded that the statements were made at a very late hour following a nightmare that truly terrified the child. 306 Ark. at 366-67, 813 S.W.2d at 796.
24. 306 Ark. at 367, 813 S.W.2d at 796.
25. California v. Green, 399 U.S. 149, 157 n.10 (1970). Raleigh was tried, convicted for treason, and subsequently executed. His conviction rested solely on what is now described as inadmissible hearsay. *Id.*
26. *See* 5 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1397, at 158 (Chadbourne rev. 1974).
27. U.S. CONST. amend. VI. It appears that the House of Representatives adopted the clause without debate. S. Douglas Borisky, Note, *Reconciling the Conflict Between the Coconspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amend-*

that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[28] This fundamental right is applied to the states through the Due Process Clause of the Fourteenth Amendment.[29]

As early as 1895, the United States Supreme Court dealt directly with the Confrontation Clause.[30] Thereafter, issues associated with the Clause remained dormant for nearly a century. In 1970, two decisions of the United States Supreme Court became milestones in the early development of the Sixth Amendment right to confrontation, *California v. Green*[31] and *Dutton v. Evans*.[32] In *Green* cross-examination, oath of the witness, face-to-face confrontation, and the observation of the witness' demeanor were emphasized as the essential elements of the Confrontation Clause.[33] In *Dutton* reliability was established as the common denominator between the exceptions to the hearsay rule and the Confrontation Clause.[34]

The general approach for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause was enunciated in *Ohio v. Roberts*.[35] The *Roberts* court noted that the clause "operates in two separate ways to restrict the range of admissible hearsay."[36] The first

---

ment, 85 COLUM. L. REV. 1294, 1301 n.42 (1985) (citing 1 ANNALS OF CONG. 15-16, 756, 767 (Joseph Gales ed., 1789)).

28. U.S. CONST. amend. VI.

29. Pointer v. Texas, 380 U.S. 400, 406 (1965).

30. Mattox v. United States, 156 U.S. 237 (1895). The Court held the prior transcribed testimony of a witness admissible although the witness was unavailable for trial due to his death. *Id.* at 250.

31. 399 U.S. 149 (1970).

32. 400 U.S. 74 (1970) (plurality opinion).

33. *Green*, 399 U.S. at 158-60. The witness's prior inconsistent statements, made at a preliminary hearing, were held admissible because the witness testified at trial subject to full examination. *Id.* at 166-67.

34. *Dutton*, 400 U.S. at 89. Georgia law provided an expansive reading of the coconspirator exception and the Court concluded that the Confrontation Clause was not violated by the use of the out-of-court statement against the defendant. *Id.* at 88. For an Eighth Circuit Court of Appeals case discussing the differences between the Confrontation Clause and the hearsay rules, see United States v. Carlson, 547 F.2d 1346, 1356-57 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

35. 448 U.S. 56 (1980). Roberts was convicted of forgery and possession of stolen credit cards. He claimed that the credit cards belonged to his daughter. The daughter testified at the preliminary hearing, but despite five subpoenas failed to appear for trial and could not be located. At trial, the court held the admission of the testimony constitutionally permissible. *Id.* at 77.

36. 448 U.S. at 65. *See* Graham C. Lilly, *Notes on the Confrontation Clause and* Ohio v. Roberts, 36 U. FLA. L. REV. 207 (1984).

involves the face-to-face requirement, providing that the prosecution must either produce the declarant or demonstrate his unavailability.[37] The second requires that if the declarant is unavailable, the statement may still be admitted if it bears "adequate indicia of reliability."[38] Reliability can be inferred if the evidence falls within a "firmly-rooted" hearsay exception or if there is a showing of "particularized guarantees of trustworthiness."[39]

The Court did not define "firmly-rooted." It did state, however, that the solid foundations of certain hearsay exceptions allow admission of nearly any conforming evidence while still affording constitutional protection.[40] Only those exceptions which comply with this general standard can be properly termed "firmly-rooted."[41] Examples of exceptions the courts have classified as "firmly-rooted" include adoptive admissions,[42] former testimony,[43] declarations against interest,[44] and excited utterances.[45]

After *Roberts*, the Court continued to balance the guarantee of a "functional right that promotes reliability" with the need for hearsay evidence.[46] The Court recognized that literal interpretation of the Con-

---

37. 448 U.S. at 65. The Sixth Amendment establishes this rule of necessity. *Id. See* Mancusi v. Stubbs, 408 U.S. 204 (1972). In *Mancusi* the former testimony bore sufficient "indicia of reliability" to comply with the Confrontation Clause because defense counsel availed himself of the opportunity to cross-examine the witness at the prior trial. *Id.* at 216. For an Eighth Circuit Court of Appeals decision espousing the importance of the face-to-face requirement, see United States v. Benefield, 593 F.2d 815 (8th Cir. 1979). In *Benefield* the court indicated that recollection and veracity were influenced in a real but undefined manner by the face-to-face challenge. *Id.* at 821.

38. *Roberts*, 448 U.S. at 66.

39. *Id.* The *Roberts* discussion implies that these are alternative methods of establishing sufficient reliability by which hearsay can satisfy the Confrontation Clause. *Id. See* Lee v. Illinois, 476 U.S. 530 (1986); Chambers v. Mississippi, 410 U.S. 284 (1973). The Court stated that several exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thus compensate for the lack of the oath and opportunity for cross-examination. 410 U.S. at 298-99. *See also* Eleanor L. Owen, *The Confrontation Clause Applied to Minor Victims of Sexual Abuse*, 42 VAND. L. REV. 1511, 1521 n.24 (1989).

40. 448 U.S. at 66.

41. Stanley A. Goldman, *Not So "Firmly Rooted": Exceptions To the Confrontation Clause*, 66 N.C.L. REV. 1, 7 (1987).

42. FED. R. EVID. 801(d)(2). *See* State v. Marshall, 335 N.W.2d 612, 617 (Wis. 1983).

43. FED. R. EVID. 804(b)(1). *See* State v. Bauer, 325 N.W.2d 857, 863 (Wis. 1982).

44. FED. R. EVID. 804(b)(3). *See* State v. Buelow, 363 N.W.2d 255, 263 (Wis. Ct. App. 1984).

45. FED. R. EVID. 803(1). *See* Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050, 1058 (6th Cir. 1983).

46. *Lee*, 476 U.S. at 540. In *Lee* the Court reversed the conviction because the trial court's

frontation Clause could bar the use of any out-of-court statement when the declarant is unavailable, but the Court rejected this view as "unintended and too extreme."[47] Subsequently, this balancing test took on a whole new meaning when the Court acknowledged the necessity of protecting sexually abused child witnesses in 1982.[48]

In *Coy v. Iowa*[49] the United States Supreme Court held that the Confrontation Clause assures the defendant the right of face-to-face confrontation with his accuser and the right of cross-examination.[50] The majority found no applicable exceptions to the face-to-face requirement, regardless of the costs to the victim.[51] In her concurring opinion, Justice O'Connor suggested that face-to-face confrontation could be subject to exceptions when necessary to further an important public policy.[52] Her opinion essentially opened the door for future exceptions to the face-to-face requirement.[53]

More recently, in *Idaho v. Wright*,[54] the Court indicated that the right to confrontation is not absolute and does not prohibit admission of hearsay statements.[55] This is true even though the admission of certain hearsay statements may indeed violate the literal terms of the clause.[56]

---

admission of hearsay violated the defendant's right to confrontation. *Id. See* Daniel Shaviro, *The Supreme Court's Bifurcated Interpretation of the Confrontation Clause*, 17 HASTINGS CONST. L.Q. 383, 384 (1990).

47. Bourjailly v. United States, 483 U.S. 171, 182 (1987) (quoting *Roberts*, 448 U.S. at 63).

48. Glove Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). The Court recognized that the state's interest in protecting an abused child witness might, in certain cases, justify an exception to the Confrontation Clause requirement of the United States Constitution. *Id.* at 608-09. *See generally* Owen, *supra* note 39.

49. 487 U.S. 1012 (1988). The Court in *Coy* held the use of a screen to separate the alleged abuser from the child witness violated the accused's right to confront his accuser. *Id.* at 1022.

50. *Id.* at 1020. *See also* Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987). For more information regarding the *Coy* decision, see Jaye P. Meyer, Note, *Protecting the Child Sexual Abuse Victim From Courtroom Trauma After* Coy v. Iowa, 67 N.C.L. REV. 711 (1989); Ellen Forman, Note, *To Keep the Balancing True: The Case of* Coy v. Iowa, 40 HASTINGS L.J. 437 (1989).

51. 487 U.S. at 1020. The majority stated that "face-to-face presence may . . . confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Id. But see* Maryland v. Craig, 110 S. Ct. 3157 (1990); *infra* note 56.

52. 487 U.S. at 1022.

53. Mary A. Rittenshaus, 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).

54. 110 S. Ct. 3139 (1990). Wright was convicted of lewd conduct with her two minor daughters. Hearsay evidence regarding statements made to a pediatrician by the younger minor were admitted by the trial court. *Id.* at 3144.

55. *Id.* at 3145.

56. *Id.* In another case decided the same day as *Wright*, the Court held that the clause permitted certain hearsay statements against a defendant despite the defendant's inability to con-

The requirement of unavailability was not raised in *Wright*. Moreover, the majority did not discuss that unavailability would normally be required in a sexual abuse case.[57] This dicta supports the opinion of some commentators who contend that the unavailability requirement has virtually been eliminated.[58] Essentially, the *Wright* decision can be viewed as an attempt to solidify the constantly changing standards that the Court will employ when issues surrounding the Confrontation Clause arise.[59]

The Court in *Wright* concluded that child witness statements made to third parties regarding sexual offenses would not normally fall within a firmly-rooted hearsay exception and that more particularized guarantees of trustworthiness must be shown.[60] The Court held that the hearsay statements of the victim were not reliable because they lacked certain guarantees of trustworthiness required for admission under the Confrontation Clause.[61]

The United States Supreme Court analogized child hearsay statements to other firmly-rooted hearsay exceptions in holding that only those circumstances surrounding the actual making of the statement are relevant to the determination of trustworthiness.[62] Any circumstances which develop through hindsight render the utility of cross-ex-

---

front the declarant at trial. Maryland v. Craig, 110 S. Ct. 3157 (1990). The Court indicated that although the Confrontation Clause did not prohibit the use of a one-way, closed circuit television to separate the child from the accuser, the necessity for such use must be determined on a case-by-case basis. *Id.* at 3169. For authoritative discussions of *Craig*, see 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); Rittershaus, *supra* note 53.

57. *Wright*, 110 S. Ct. at 3147. The majority cited United States v. Inadi, 474 U.S. 387 (1986), a coconspirator case where the general requirement of unavailability did not apply. 110 S. Ct. at 3146.

58. Owen, *supra* note 39, at 1519-20.

59. Mark J. Miller, Note, *Double Exposure: The Residual Exception to the Rule Against Hearsay and the Confrontation Clause After* Idaho v. Wright *and* State v. Giles, 27 IDAHO L. REV. 99, 115 (1991). For excellent discussions of the *Wright* decision, 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).

60. *Wright*, 110 S. Ct. at 3148.

61. *Id.* at 3150. The Court concluded that the only affirmative factors supporting the child's statement of abuse were the lack of a motive to fabricate and the use of terminology unexpected of a child her age. *Id.* at 3152.

62. *Id.* at 3149.

amination marginal and should not be considered.[63] Firmly-rooted hearsay exceptions, whose reliability is based upon the circumstances surrounding their making, include the dying declarations exception which is based on the premise that the declarant is highly unlikely to lie at the point of impending death.[64] The excited utterance hearsay exception is also firmly-rooted, based on the belief that the declarant is unlikely to fabricate while in a state of excitement, and, thus, there is little possibility of confabulation.[65]

The *Wright* Court identified four factors which are necessarily related to the reliability of child hearsay statements in sexual abuse cases.[66] Utilizing various state and federal court cases to locate these factors, the Court identified them as spontaneity and consistent repetition,[67] mental state of the declarant,[68] use of terminology unexpected of a child of similar age,[69] and lack of a motive to fabricate.[70] Although the Court declined to endorse a mechanical test,[71] it agreed that the aforementioned factors are applicable in determining the "particularized guarantees of trustworthiness" under the Confrontation Clause.[72] The recurrent theme of each of these considerations is whether the child declarant was particularly likely to be telling the truth at the time of the statement.[73]

Indicia of reliability result from the statement's inherent trustworthiness and may not be found by referring to other evidence at trial.[74] The presence of corroborating evidence more appropriately indicates

63. *Id.* (citing Huff v. White Motor Corp., 609 F.2d 286, 292 (7th Cir. 1979)) (adversarial cross-examination would not increase the statement's reliability).

64. *Wright*, 110 S. Ct. at 3149.

65. *Id. See, e.g.*, 6 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1745-64 (Chadbourne rev. 1974).

66. 110 S. Ct. at 3150. Before *Coy* and *Craig*, there were two primary questions that were left unanswered by the United States Supreme Court. First was the matter of whether there was an exception to the requirement of direct physical contact between the accused and the child witness. The second question surrounded the circumstances which would justify an exception. The *Craig* court answered "yes" to the first question. 110 S. Ct. at 3166. The *Wright* court outlined the answer to the second question. 110 S. Ct. at 3150.

67. 110 S. Ct. at 3150 (citing State v. Robinson, 735 P.2d 801, 811 (Ariz. 1987)).

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

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

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

71. *Wright*, 110 S. Ct. at 3150. The majority in *Wright* also refused to create a preconceived and "artificial litmus test" regarding the procedures that the child interviewers must follow. *Id.* at 3148.

72. *Id.* at 3150.

73. *Id.*

74. *Id.* at 3149-50 (citing State v. Ryan, 691 P.2d 197, 204 (Wash. 1984)).

that any error in admitting the statement might be harmless.[75] The Court in *Wright* stated that "[t]here is a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement."[76] For example, medical evidence of abuse used to corroborate a child's allegations of sexual abuse should not be used to determine the reliability of the child's allegations regarding the identity of the abuser.[77]

Subsequent cases have interpreted *Wright* as demanding stringent requirements regarding the admission of hearsay statements. A Sixth Circuit case denied the admission of the victim's statements regarding the identity of her attacker.[78] The court held that the State of Kentucky failed to demonstrate the statement's reliability given the strictures imposed by *Wright*.[79] The court added that *Wright* requires "more than part-time reliability."[80] A Missouri court determined that its child hearsay exception provided for even more particularized guarantees of trustworthiness than *Wright*.[81] In contrast, the Utah Supreme Court issued a strong mandate in upholding the constitutionality of its child hearsay exception in light of *Wright*.[82] Utah's exception requires an "interest of justice" reliability determination.[83] The court succinctly stated that corroborating evidence can never be considered in making such determination.[84]

The Arkansas child hearsay exception regarding sexual offenses, abuse, or incest was adopted by the Arkansas General Assembly during its regular session in 1985.[85] The Arkansas Legislature noted strong policy arguments in support of this legislation.[86] It determined that child abuse in Arkansas was of such concern that it was up to the legis-

---

75. *Wright*, 110 S. Ct. at 3151.

76. *Id.*

77. *Id. See* Lee v. Illinois, 476 U.S. 530, 546 (1986) (the notion of selective reliability); Dutton v. Evans, 400 U.S. 74, 90 (1970). *See also* 4 DAVID W. LOUISELL AND CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 418, at 143 (1980).

78. Sherley v. Seabold, 929 F.2d 272 (6th Cir. 1991).

79. *Id.* at 275.

80. *Id.*

81. State v. Gill, 806 S.W.2d 48, 53 (Mo. Ct. App. 1991) (regarding MO. ANN. STAT. § 491.075 (Vernon 1985)).

82. State v. Matsamas, 808 P.2d 1048, 1054 (Utah 1991) (regarding UTAH CODE ANN. § 76-5-411 (1990)).

83. *Id.*

84. *Id.*

85. 1985 Ark. Acts 405 § 2. *See* ARK. R. EVID. 803(25), *supra* note 10.

86. 1985 Ark. Acts 405 § 2.

lature to take corrective action.[87] In 1987, Rule 803(25) withstood constitutional challenges which claimed that the rule deprived a defendant of the right to cross-examine and therefore violated the Confrontation Clause.[88]

Other state legislatures have enacted specific hearsay exceptions for statements of child sexual abuse victims which are similar to the Arkansas exception.[89] However, the Arizona Supreme Court struck down its exception as a violation of the state's separation of powers doctrine.[90] The Arkansas exception has withstood a separation of powers attack.[91]

In *George v. State*[92] the Arkansas Supreme Court struck down Rule 803(25) as unconstitutional because it violated the defendant's Sixth Amendment right to confrontation.[93] In reaching its holding, the court relied heavily on the *Wright* decision which was factually similar to *George*.[94] The court reasoned that to determine reliability, the hearsay exception allowed consideration of corroborative evidentiary factors unrelated to the circumstances surrounding the making of the child's statement.[95] Such factors were deemed to be irrelevant and impermissible by the Court in *Wright*.[96] Furthermore, the exception did not require consideration of several factors specifically outlined in *Wright* to determine trustworthiness:[97] consistent repetition and spontaneity, the

---

87. *Id.* The emergency clause provides in part:

> [C]hild abuse continues at an alarming rate in this State . . . . [I]mmediate steps must be taken to deter child abusers, to expedite the prosecution of the same, and minimize the trauma and distress of child victims. . . . [A]n emergency is hereby declared to exist.

Id.

88. Johnson v. State, 292 Ark. 632, 732 S.W.2d 817 (1987), *aff'd*, 298 Ark. 617, 770 S.W.2d 128 (1989) (unavailability requirement for allowing the introduction of the child's out-of-court statement did not apply in a child abuse case where there was sufficient indicia of reliability of the victim's statements); Cogburn v. State, 292 Ark. 564, 732 S.W.2d 807 (1987).

89. ABRAHAM P. ORDOVER AND FAUST F. ROSSI, CASES AND MATERIAL ON EVIDENCE, PROTOTYPE EDITION, 625 (1991). Vermont and South Dakota have enacted such exceptions. *See* 1985 VT. LAWS 82 (codified at VT. STAT. ANN. tit. 12, § 804a; § 807 (1985)) and S.D. CODIFIED LAWS ANN. § 19-16-38 (1987).

90. State v. Robinson, 735 P.2d 801, 807 (Ariz. 1987).

91. St. Clair v. State, 301 Ark. 223, 783 S.W.2d 835 (1990) (The rule deals with a matter which court rules do not cover; therefore, the rule is not unconstitutional.).

92. 306 Ark. 360, 813 S.W.2d 792 (1991).

93. *Id.* at 367, 813 S.W.2d at 796.

94. *Id.* at 365, 813 S.W.2d at 795.

95. *George*, 306 Ark. at 367, 813 S.W.2d at 796.

96. *Wright*, 110 S. Ct. at 3150.

97. *George*, 306 Ark. at 367, 813 S.W.2d at 796.

declarant's mental state, use of terminology not expected of a child of that age, and a lack of any motive to fabricate.[98] The court followed *Wright* in determining that the factors must relate to the circumstances surrounding the hearsay declaration itself and not to mere proof of abuse.[99] The court considered Rule 803(25)[100] constitutionally inadequate on its face because the Rule included impermissible factors and excluded relevant *Wright* factors.[101]

Despite the unconstitutional language of Rule 803(25), the Arkansas Supreme Court applied the enumerated *Wright* factors and determined that the child's statements to her parents were trustworthy.[102] Although Rule 803(25) authorized the trial judge to consider impermissible corroborating evidence, there was nothing in the record to suggest that he did so.[103] Also, the victim's statements to her mother were determined to be "excited utterances," falling under the firmly-rooted hearsay exception of Rule 803(2).[104] The court recognized that hearsay statements of unavailable witnesses are admissible only when cross-examination would be of little help to the defense.[105] Thus, the court stated that admission of hearsay statements of an unavailable child witness, otherwise deemed to be trustworthy, did not violate the defendant's confrontation rights.[106]

Although *George* may discourage prosecutors from going forward with sexual abuse cases involving child witnesses, it is not the "death knell" for child abuse prosecutions in Arkansas. The courts may employ both Rules 803(24) and 804(b)(5) to admit the trustworthy hearsay statements of child sexual abuse victims.[107] Rule 803(24) would

---

98. *Id.*

99. *Id.* at 368, 813 S.W.2d at 796.

100. *See supra* note 10.

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

102. *Id.* at 367, 813 S.W.2d at 796.

103. *Id.* The court stated that a harmless error would have occurred if the trial court considered corroborative evidence. *Id.*

104. *Id. See supra* note 23.

105. *George*, 306 Ark. at 367, 813 S.W.2d at 796.

106. *Id.*

107. ARK. R. EVID. 803(24) and 804(b)(5). The hearsay exceptions provide, in pertinent part:

> Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the

apply when the child testifies because the declarant's availability is immaterial.[108] However, when the child is unavailable to testify, usually because the court has ruled the child incompetent, Rule 804(b)(5) applies.[109]

These rules of evidence are the so-called "residual" or "catch-all" hearsay exceptions.[110] They apply to statements which do not otherwise fall within a recognized hearsay exception, yet are sufficiently reliable to be admitted at trial.[111] Admission of hearsay statements via the "residual" exceptions does not, however, automatically pass constitutional scrutiny.[112] Although not deemed to be traditional firmly-rooted hearsay exceptions, the residual exceptions require equivalent guarantees of trustworthiness for admissibility.[113] Therefore, if the court determines the statement meets the *Wright* requirements, it may be admitted into evidence.[114]

In federal court, the Eight Circuit Court of Appeals has been willing to admit statements of sexually abused children under the residual exceptions to the hearsay rule.[115] State courts have also indicated an increased willingness to use these exceptions in child abuse cases.[116] The Wisconsin Supreme Court stated that "there is a compelling need for admission of hearsay arising from young sexual assault victims' inability or refusal to verbally express themselves in court when the child and the perpetrator are the sole witnesses to the crime."[117] The Ari-

---

statement into evidence.

Id.

108. ARK. R. EVID. 803(24).

109. ARK. R. EVID. 804(a)(4).

110. *See* EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 324.1, at 907-09 (3d ed. 1984).

111. *Wright*, 110 S. Ct. at 3147.

112. *Id.* at 3148.

113. *Id.* at 3147.

114. Tippitt v. State, 294 Ark. 342, 344, 742 S.W.2d 931-32 (1988) (quoting Hill v. Brown, 283 Ark. 185, 672 S.W.2d 330 (1984)) (Exceptions to the hearsay rule under ARK. R. EVID. 804(5) must have "circumstantial guarantees of trustworthiness equivalent to those supporting the common law exceptions.").

115. *See, e.g.*, United States v. St. John, 851 F.2d 1096 (8th Cir. 1988); United States v. Shaw, 824 F.2d 601 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1033 (1988); United States v. Dorian, 803 F.2d 1439 (8th Cir. 1986); United States v. Renville, 779 F.2d 430 (8th Cir. 1985); United States v. Cree, 778 F.2d 474 (8th Cir. 1985). *But see* United States v. Azure, 845 F.2d 1503 (8th Cir. 1988) (child's hearsay identification of attacker inadmissible under the residual exception).

116. *See, e.g.*, State v. Sorenson, 421 N.W.2d 77 (Wis. 1988); State v. Robinson, 735 P.2d 810 (Ariz. 1987).

117. *Sorenson*, 421 N.W.2d at 84. The court further stated that "use of the residual excep-

zona Supreme Court indicated that the flexibility provided by the residual exceptions allows society to deal effectively with child abuse, "an old problem that society and the law have been late in recognizing and meeting."[118]

A Colorado case, *W.C.L. v. People*,[119] illustrates the appeal of the residual exceptions in child sexual abuse cases. Colorado did not have a residual hearsay exception, and a three-year-old victim's statements were deemed inadmissible.[120] The frustration of the Colorado Supreme Court was evident. The majority stated that "[t]he facts of this case demonstrate the wisdom of including in our rules of evidence a residual hearsay exception."[121] The Colorado Legislature subsequently adopted a residual exception,[122] and a later case upheld its use under facts similar to those in *W.C.L.*[123]

Neither the Arkansas Supreme Court nor the Arkansas General Assembly are precluded from taking affirmative action as a result of *George*. In 1990, the court in *St. Clair*[124] acknowledged the legislature's power to adopt Rule 803(25) and upheld the Rule's constitutionality against a separation of powers challenge.[125] It follows that the Arkansas General Assembly has the ability to amend or redraft the child hearsay exception to conform to the *Wright* criteria. More recently, in *State v. Sypult*,[126] the Arkansas Supreme Court redefined its shared rule-making power with the General Assembly.[127] In *Sypult* the Arkansas Supreme Court asserted its supremacy over the legislature to the extent that a court-made rule's primary purpose and effectiveness is compromised by conflicting legislation.[128] Court-made rules include, among others, the Arkansas Rules of Civil Procedure and the Arkansas Rules of Evidence. Shortly after the *Sypult* decision, the Arkansas Supreme Court exercised its newly proclaimed power by issuing a per

---

tion is an appropriate method to admit these children's statements if they are otherwise proven sufficiently trustworthy." *Id.*

118. *Robinson*, 735 P.2d at 813.

119. 685 P.2d 176 (Colo. 1984).

120. *Id.* at 183.

121. *Id.* at 182.

122. COLO. R. EVID. 803(24) (Supp. 1991). *See* Edward W. Stern and Jennifer K. Stern, *The Residual Exception to the Hearsay Rule: A Reappraisal*, 13 COLO. LAW. 1818 (1984).

123. Oldsen v. People, 732 P.2d 1132, 1137 (Colo. 1986).

124. St. Clair v. State, 301 Ark. 223, 783 S.W.2d 835 (1990).

125. *Id.*, 783 S.W.2d at 836.

126. 304 Ark. 5, 800 S.W.2d 402 (1990).

127. *Id.*

128. *Id.* at 7, 800 S.W.2d at 404.

curiam order[129] amending an evidence rule regarding the physician and psychotherapist-patient privilege.[130] The court apparently has power to issue a similar per curiam order creating a new, constitutionally sound hearsay exception to replace Rule 803(25).

Mark D. Wolf

ADDENDUM

On November 11, 1991, Arthur L. George's petition for rehearing was denied.[131] The Arkansas Supreme Court issued a supplemental opinion, however, which modified its original holding.[132] The majority stated that only subparagraph (I)(1) of the child hearsay exception is unconstitutional.[133] That subparagraph allowed a court to determine a statement's trustworthiness by using "any other corroborative evidence of the act which is the subject of the statement."[134] The court further indicated that subparagraph (m), which includes "any other factor which the court at the time and under the circumstances deems relevant and appropriate," enables a trial court to appropriately consider the necessary *Wright* factors.[135]

In a sharply worded concurrence agreeing with the dissent in *Wright*,[136] Associate Justice Glaze expressed his hope that the *Wright* holding would be "quickly" and "mercifully" overruled by the United States Supreme Court.[137] The concurring opinion further stated that "it is a matter of common sense . . . that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other [physical] evidence."[138]

The dissent, arguing that the rehearing should be granted, noted the fallacies of the majority opinion.[139] First, said the dissent, the trial

129. Per Curiam is a "phrase used to distinguish an opinion of the whole court from an opinion written by any one judge." BLACK'S LAW DICTIONARY 1136 (6th Ed. 1990).

130. *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) (the order amended both ARK. R. CIV. P. 35 and ARK. R. EVID. 503).

131. George v. State, 306 Ark. 360, 374-A, 818 S.W.2d 951 (1991).

132. *Id.*

133. *Id.* at 374-D, 818 S.W.2d at 952.

134. *Id.*

135. *Id.*

136. 306 Ark. at 374-D, 818 S.W.2d at 952 (Glaze, J., concurring).

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

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

139. 306 Ark. at 374-E, 818 S.W.2d at 953 (Dudley, J., dissenting).

court *did* consider subparagraph (l), the admittedly unconstitutional provision.[140] Second, Rule 803(25) was never adopted by the Arkansas Supreme Court and only it can adopt the procedural rules of evidence.[141] Third, ignoring the adoption issue, both the precedent of the United States Supreme Court and the concept of federalism mandate that the hearsay rule be held unconstitutional.[142] Fourth, the rule requires only a "reasonable likelihood of trustworthiness," which is a lesser standard than required by the Confrontation Clause.[143] Finally, the dissent noted that George was convicted solely on the hearsay testimony which quoted a witness who was declared incompetent.[144] Moreover, the dissent made the argument that if a declarant is not competent to testify in court, his out-of-court statements to a third party cannot now be deemed competent so that they may be repeated in court.[145]

The supplemental *George* opinion exemplifies the ongoing struggle between the need for hearsay in child abuse cases and the defendant's right to confront these child witnesses. Recently, another member of the majority in *Wright* retired from the United States Supreme Court and a new Justice was appointed.[146] Considering the fact that *Wright* was a five to four decision, it can be anticipated that this issue is by no means resolved. The four to three decisions of the Supreme Court of Arkansas in *George* reflect the deep division of opinion on this issue. The careful wording of the supplemental opinion has probably avoided immediate reaction by the Arkansas Legislature to adopt the *Wright* factors rather than have the courts apply them through subparagraph (m). However, the underlying tone of the majority and dissenting opin-

---

140. *Id.* at 374-F, 818 S.W.2d at 954.

141. *Id.* at 374-M, 818 S.W.2d at 958.

142. *Id.*

143. *Id.*, 818 S.W.2d at 957-58.

144. *Id.*, 818 S.W.2d at 958. The dissent concluded that admitting the quoted hearsay statement of the social worker was such a misapplication of the nonhearsay rule that it deserved no comment. *Id.* at 374-G, 818 S.W.2d at 954.

145. *Id.* at 374-J, 818 S.W.2d at 956.

146. *Id.* at 374-D, n.1, 818 S.W.2d at 952-53, n.1. Justice Thurgood Marshall retired. Tony Mauro, *Marshall Is Missing—and Will Be Missed*, LEGAL, Vol. XIV, No. 21, October 14, 1991, at 6. Judge Clarence Thomas of the United States Court of Appeals for the D.C. Circuit was subsequently appointed. Terrence Moran, *Power, Gender, and The Thomas Debacle*, LEGAL, Vol. XIV, No. 22, October 21, 1991, at 24-25. In 1990, Justice William Brennan, another member of the *Wright* majority, retired and Judge David H. Souter of the United States Court of Appeals for the First Circuit was appointed. Paul Marcotte, *Brennan's Exit Marks End of Era*, 76 A.B.A. J., Sept. 1990, at 12-13.

ions reflects the continuing power struggle between the court and the legislature.

Editor's Note

Subsequent to the writing of the *George v. State* Note, the Arkansas Supreme Court once again had occasion to revisit Rule 803(25). In *Vann v. State*[147] the court struck down the entirety of Rule 803(25). Writing for the majority, Justice Dudley stated that the "reasonable likelihood of trustworthiness" standard employed by Rule 803(25) was insufficient to meet the requirements of the Confrontation Clause under the U.S. Supreme Court's holding in *Idaho v. Wright*.[148] In a per curiam order[149] delivered the same day as the *Vann* decision, the Arkansas Supreme Court adopted a *new* version of Rule 803(25).

In response to the *George* decisions, the Arkansas General Assembly has *also* adopted a new version of 803(25).[150] This legislation, Act 66 of 1992, became effective on March 20, 1992, and is more narrowly drawn than the version of Rule 803(25) promulgated by the court in its May 11th per curiam order.

Whle Act 66 itself was not at issue in the *Vann* case, the Act does contain on its face the same "reasonable likelihood of trustworthiness" standard found lacking by the *Vann* majority in Act 66's predecessor. It is, therefore, not entirely clear how the *Vann* decision and the court's per curiam order promulgating a new Rule 803(25) have impacted the viability of Act 66. As Justice Glaze observed in his concurrence in *Vann*, "[b]y their action, this court's majority members apparently believe Act 66 is not constitutionally sound. That being true, jurists should have this thought in mind regarding cases already tried, and now being tried, since Act 66's passage."[151]

Because the *Vann* decision did not expressly strike down Act 66, however, the thorny issue remains as to which Rule 803(25) controls, the narrowly drawn legislative version, or the more expansive court-promulgated rule.

147. 309 Ark. 303 (1992).

148. *Id.* at 307-08 (quoting Idaho v. Wright, 110 S. Ct. 3139, 3149 (1990)).

149. In Re: Addition to Arkansas Rules of Evidence (appended to Arkansas Advance Reports, Vol. 309, No. 6 (1992)).

150. Act of March 20, 1992, No. 66 (to be codified at ARK. CODE ANN. § 16-41-101) (Michie Supp. 1992).

151. *Vann*, 309 Ark. at 311.