Evidence - North Carolina Allows Admission of the Unthinkable: Hearsay Exceptions and Statements Made by Sexually Abused Children - State v. Smith

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NOTE

EVIDENCE—NORTH CAROLINA ALLOWS ADMISSION OF THE UNTHINKABLE: HEARSAY EXCEPTIONS AND STATEMENTS MADE BY SEXUALLY ABUSED CHILDREN—State v. Smith

INTRODUCTION

The American public has slowly faced the grim fact that the nightmare of sexual child abuse is a reality. The problem has existed throughout history but now, more than ever, cases of sexual child abuse are being reported. This dramatic increase in the

1. Mass child sexual abuse cases in California, Minnesota, and a number of other states have been highly publicized. Such cases provoke and illustrate the raised consciousness of Americans with the issue of sexual exploitation of children. Reese, A Child-Abuse Case Implodes, NEWSWEEK, Jan. 27, 1986 at 26; Lamar, Disturbing End of a Nightmare, TIME, Feb. 25, 1985, at 22; and Hager, King, Namuth, Sherman & Walters, The Youngest Witnesses, NEWSWEEK, Feb. 18, 1985, at 72.

2. Prior to 1962, reports of child abuse were nonexistent, at least in the medical literature. Before that time nothing appeared in the areas of medical or scientific knowledge that would lead one to believe that it was possible for such a large group of adults to abuse children. In 1946, a radiologist named John Caffey produced a study for the American Journal of Roentgenology that suggested that abnormal bone fractures in children might be the result of intentional physical abuse. This suggestion so alarmed the editors of the journal that Caffey's final article, "Multiple Fractures in Long Bones of Infants Suffering from Chronic Subdural Hematoma," did not contain references to intentional abuse. Caffey, Multiple Fractures in Long Bones of Infants Suffering from Chronic Subdural Hematoma, 56 AM. J. ROENTGENOLOGY 163 (1946).

In 1962 Dr. C. Henry Kempe stunned the medical world with his article, "The Battered Child Syndrome." Kempe, Silverman, Steele, Droegemuille & Silver, The Battered Child Syndrome, 181 J.A.M.A. 17 (1962). This article marked the beginning of the acceptance by physicians that the phenomenon of child abuse did exist. Approximately fifteen years later the medical profession and social workers discovered that the same dynamics that produced the battered child syndrome also produced sexually abused child syndrome.

number of cases reported has important implications for our legal system as the law tries to effectively deal with those responsible for the abuse. However, conviction of offenders is extremely difficult. Some of the difficulty involved is inherent in the crime itself. Many times both physical and testimonial evidence of a sexual abuse of young children has increased dramatically in recent years. Statistics show that there has been a 200% increase in the reporting of sexual abuse since 1976. By 1980, there were 25,000 reported cases annually. A substantial number of cases are never reported; estimates of the actual incidence vary from 100,000 to 500,000 per year.” Id. at 27, 697 P.2d at 841, (quoting Yun, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 COLUM. L. REV. 1745 n.1 (1983)). Although it is estimated that approximately 400,000 children are sexually abused annually, only about 29% of these crimes are ever reported. NAT’L CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, CHILD SEXUAL ABUSE: INCEST ASSAULT AND SEXUAL EXPLOITATION, (1981).

Unfortunately, North Carolina is not immune to this trend. Since statistics have been compiled, the number of child sexual abuse cases reported has continued to rise steadily. For the fiscal year 1983-84, 673 substantiated cases of sexual child abuse were reported. For 1984-85, 962 were reported and for 1985-86, 1036 cases were reported. These figures reflect cases were investigations by social service departments revealed evidence that confirmed child sexual abuse by a parent or caretaker (caretakers included daycare workers). These statistics do not account for the number of children sexually abused by strangers. (Information obtained from Central Registry, Child Protective Services, N.C. Division of Social Services, Department of Human Resources, Raleigh, North Carolina.) Child Protective Services estimates that for every case of sexually abuse reported, three cases are not. (Information obtained from Child Protective Services).

4. The benefits of criminal prosecution in sexual abuse cases include “protecting society, serving as a symbol to society and the child of the total unacceptability of the behavior, and providing an authoritative incentive or leverage to insure treatment of the offender and family.” KOCEN & BULKLEY, Analysis of Criminal Child Sex Offense Statutes in CHILD SEXUAL ABUSE AND THE LAW 1 (J. Bulkley 2d ed. 1982) (citing K. MACFARLANE, Foreward, in CHILD SEXUAL ABUSE: LEGAL ISSUES AND APPROACHES i-ii, (National Legal Resources Center for Child Advocacy and Protection, American Bar Association, Sept. 1980)).

5. Most sexual abuse crimes are nonviolent in nature, See FLAMMANG, Interviewing Child Victims of Sex Offenders, in THE SEXUAL VICTIMOLOGY OF YOUTH 175, 177 (L. Schultz ed. 1980); MACFARLANE, Sexual Abuse of Children, in THE VICTIMIZATION OF WOMEN 81, 87 (1978), and occur within the home, in secrecy, between a minor child and a trusted family member or acquaintance of the child. See STEVENS & BERLINER, Special Techniques for Child Witnesses, in THE SEXUAL VICTIMOLOGY OF YOUTH 246, (L. Schultz ed. 1980). These facts make the detection of sex abuse, as well as the conviction of sex abuse, difficult. The above articles are cited in Yun, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 COLUM. L. REV. 1745 nn.2-3 (1983).

6. Because the crimes committed are predominately nonviolent in nature,
HEARSAY & SEXUALLY ABUSED CHILDREN

abuse incident is unavailable. Usually, no one but the offender and the child witness the crime. The victim may retract his or her story before or during trial or be found incompetent to testify. Even if the child is allowed to testify that child’s credibility may be questionable. Hearsay evidence is often the best evidence the state

there is often no physical evidence of abuse. Children usually will not resist because they do not realize the act is wrong or they may be threatened physically if they do resist. Most sex crimes involving children consist of petting, exhibitionism, fondling, and oral copulation—all activities not involving forceful physical contact. Physicians may be unable to provide any clear medical evidence as to whether the child was sexually molested.


8. Because of the guilt of the assailant, the ambivalence towards him or her, and the disruption to the family that a child victim’s disclosure of sexual abuse evokes, “whatever a child says about sexual abuse, she is likely to reverse it.” Summit, The Child Sexual Abuse Accommodation Syndrome, 7 Child Abuse & Neglect 177, 188 (1983). See also Love v. State, 64 Wis. 2d 432, 441, 219 N.W. 2d 294, 299 (1974) and State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983).

9. Competency to testify is evaluated by most courts on a case by case basis. For reviews of supporting case law, see Siegel & Hurley, The Role of the Child’s Preference in Custody Proceedings, 11 Fam. L.Q. 1, 42-57 (1977) and Stofford, The Child as a Witness, 37 Wash. L. Rev. 303 (1962). The essential considerations in the determination are the child’s veracity, intelligence, memory, and verbal capacity. Age is also a factor, but not necessarily determinative. Melton, Bulkley, Wulman, Competency of Children as Witnesses, in Child Sexual Abuse and the Law 125 (J. Bulkley 2d ed. 1982).

In North Carolina,

[t]here is no age below which one is incompetent, as a matter of law, to testify. The test of competency is the capacity of the proposed witness to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth of the matters as to which it is called upon to decide. This is a matter which rests in the sound discretion of the trial judge in the light of his examination and observation of the particular witness.

State v. Jones, 310 N.C. 716, 722, 314 S.E.2d 529, 533 (1984) (quoting State v. Turner, 268 N.C. 225, 230, 150 S.E.2d 406, 410 (1966)). See also State v. Fearing, 315 N.C. 167, 337 S.E.2d 551 (1985) where the North Carolina Supreme Court found that the trial court erred in adopting a stipulation that a four-and-one-half-year-old victim was incompetent to testify without the court personally examining the child or observing the child being examined by counsel on voir dire.

10. Despite the child’s tendency to be truthful, testimony of a child at trial often yields “poor and unconvincing evidence.” Yun, supra note 5, at 1751. Studies show that the stress of testifying in a sex abuse case adversely affects the child victim’s perception and memory. Id. This is especially true if the victim must face the accused in court.

The child’s testimony may also be adversely affected by the long lapse of
has to convict a person guilty of sexually exploiting children.12 And yet, the hearsay evidence needed to prosecute the offender is often not within a hearsay exception and is excluded at trial.13 In State v. Smith,14 the North Carolina Supreme Court faced the issue of deciding how North Carolina would treat hearsay statements made by sexually abused children under the new North Carolina Rules of Evidence.15

In balancing the court's responsibility to protect children from sexual abuse and the constitutional right of a defendant to confront witnesses,16 the court gave liberal interpretation to two hearsay exceptions and provided a detailed interpretation of a third.

11. N.C. GEN. STAT. § 8C-1 Rule 801(c) (1986) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

12. Because of the serious problems associated with courtroom testimony of the child victim in a sex abuse case, the out-of-court statements of the victim often become crucial to establishing the guilt of the defendant. Furthermore, when a child witness is found incompetent to testify, hearsay testimony becomes extremely important. See, e.g., State v. Gregory, 78 N.C. App. 565, 338 S.E.2d 110 (1985), disc. review denied, 316 N.C. 382, 342 S.E.2d 901 (1986) where a physician's testimony, including hearsay statements made by the three-and-a-half-year-old victim as to the identity of the perpetrator, was admissible. The grandmother's testimony as to certain statements by the victim was also admissible. The victim was found incompetent to testify.

13. "Hearsay is not admissible except as provided by statute or by these rules." N.C. GEN. STAT. § 8C-1 Rule 802 (1986).


15. On July 1, 1984, the North Carolina Rules of Evidence Chapter 8C of the North Carolina General Statutes went into effect. The North Carolina Rules were modeled after the Federal Rules and are similar in most respects.

The court found that Rule 803(2), the excited utterance exception to the hearsay rule, covers statements made by child victims of sexual exploitation even though the utterance came several days after the actual sexual assault occurred. The court also found that hearsay exception Rule 803(4), statements for purposes of medical diagnosis or treatment, covers statements made by child victims to persons who are not medical personnel, so long as the statements are for the purpose of obtaining treatment. Under Rule 803(24), the catchall exception, the court found that hearsay was not admissible unless certain requirements were met. The court went on to provide trial judges with a framework of the Rule 803(24)'s requirements. The holdings and logic of Smith will aid

17. N.C. GEN. STAT. § 8C-1 Rule 803(2) states that, "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: ... Excited Utterance.—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."

18. 315 N.C. at 90, 337 S.E.2d at 843.

19. N.C. GEN. STAT. § 8C-1 Rule 803(4) states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: ... Statements for Purposes of Medical Diagnosis or Treatment.—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

20. 315 N.C. at 85, 337 S.E.2d at 840.

21. N. C. GEN. STAT. § 8C-1 Rule 803(24) states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: ... 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 (A) the statement is offered as evidence of a material fact; (B) 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 (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

22. 315 N.C. at 91-92, 337 S.E.2d at 844.

23. The court's analysis followed the statutory language of Rule 803(24). The requirements listed included: (1) proper notice must be given; (2) the hearsay is
in convicting those guilty of child molestation by expanding the medical diagnosis and excited utterance exceptions and providing guidance for when the Rule 803(24) catchall exception applies.

This Note will discuss how the court's decision to expand the traditional hearsay exceptions under Rule 803 ranks in effectiveness with other methods which allow into evidence hearsay statements not specifically covered by another exception; (3) the statement must be trustworthy; (4) the statement must be material; (5) the statement must be more probative on the issue than any other evidence which the proponent can procure through reasonable efforts; and (6) the interests of justice will be best served by admission of the statement. 315 N.C. at 92-99, 337 S.E.2d at 844-48.

24. Other methods used to admit a child's out-of-court statements of sexual abuse include: (1) creating a new hearsay exception, WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1987); KAN. STAT. ANN. § 60-460(dd) (Supp. 1986); and (2) use of videotaped interviews and depositions which insulate the child victim from the trauma of open courtroom testimony. This approach, to a varying degree, has been adopted in a few states. Generally, however, state deposition procedures preserve the defendant's full right to confront and cross-examine the witnesses against him. See, e.g., FLA. STAT. ANN. § 92.53 (West Supp. 1986); MONT. CODE ANN. § 46-15-401 (1985); N.M. CHILDREN'S CT. R. 10-217 (1986) (implementing N.M. STAT. ANN. § 30-9-17 (1984)).


ments of a child victim. While Smith does not provide admission of all critical hearsay statements made by sexually abused children, the decision goes a long way in allowing North Carolina courts to admit the unthinkable.

THE CASE

The defendant, Sylvester Smith, Sr., was indicted in six separate indictments alleging first degree rape, first degree sexual offense and indecent liberties with two minors, Gloria Ogundej, age four, and Janell Smith, age five. At trial, the state's evidence showed that one night during the weekend of March 2, 1984, the defendant entered the bedroom where Gloria and Janell were sleeping and engaged in sexual relations with both children. Gloria testified that Sylvester came into the bedroom, slipped her pants down, took his clothes off and touched her in her "project" with his "worm." Gloria denied at trial that the defendant touched her anywhere else. When asked where the "worm" was she pointed to her vaginal area; and when asked to point to her "project," she also pointed to her vaginal area. Gloria also identified the "worm" and "project" on anatomically correct dolls.

Janell testified that one night Sylvester told her that he was going to beat her "half to death" and that he then pushed her.


25. 315 N.C. at 98, 337 S.E.2d at 848.

26. Defendant—Appellant's Brief at 2, State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985). Gloria was the daughter of Ann Ogundeji, with whom the defendant had been living, Janell was Gloria's cousin, the daughter of Ann's sister, Catherine. Janell was staying with Ann, Gloria, Sylvester Sr. and Sylvester Smith, Jr., in a mobile home. State v. Smith, 315 N.C. at 79, 337 S.E.2d at 837.

27. 315 N.C. at 79, 337 S.E.2d at 836-37.

28. At trial each victim was sequestered during the other's testimony. Id. at 80, 337 S.E.2d at 837.

29. Id. at 79, 337 S.E.2d at 837.

30. Id. at 79-80, 337 S.E.2d at 837. Gloria had told her grandmother, Mrs. Fannie Mae Davis, that the defendant, Sylvester Smith, had put his hand in her anal area. Id. at 81, 337 S.E.2d at 837. Gloria had also told a Rape Task Force volunteer that Sylvester had "put his finger in her 'butt.'" Id. at 80, 337 S.E.2d at 837.

31. Id. at 80, 337 S.E.2d at 837.
down on the bed and stuck his "thing in my project." 32 When asked to point out her "project," Janell pointed to her vaginal area. She further testified that after he did this he "stick [sic] his hand in my 'butt.'" She pointed to the anal area when asked to show where her "butt" was located. 33

The state also offered testimony of two Rape Task Force volunteers, Ms. Minerva Glidden and Ms. Elena Peterson. Ms. Glidden had worked with Gloria and Ms. Peterson with Janell. Ms. Glidden, a registered nurse, 34 and Rape Task Force volunteer, first met Gloria on March 5, 1984 in the emergency room of the New Hanover Memorial Hospital. Over the defendant's request for a limiting instruction on corroboration, 35 Ms. Glidden was allowed to testify that in her conversations with Gloria, Gloria told her that Sylvester put his finger in her "project," pointing to her vaginal area, and that he had also put his "finger in her butt," indicating her anus. She also told Ms. Glidden that Sylvester had gotten on top of her and put his "peeter-weeter in her project," and indicated that a "peeter-weeter" was a penis. 36 Ms. Peterson testified that she had first met and spoken with Janell on March 7, 1984, two days after Janell's initial admission to the hospital. Over the defendant's general objection, Ms. Peterson was allowed to testify that Janell told her that Sylvester "put his thing in her project" and "stuck his finger in her butt," and that if she told anybody he

32. Id.
33. Id.
34. Ms. Glidden was not acting in her capacity as a registered nurse when she interviewed Gloria. She was acting merely as a Rape Task Force volunteer.
35. Corroboration is the opposite of impeachment. It is "the process of persuading the trier of the facts that a witness is credible." In most jurisdictions evidence in support of a witness's credibility will not be allowed into evidence unless the witness has been directly impeached. However, in North Carolina "the necessity of impeachment as a prerequisite to corroboration is more theoretical than real," in fact, "many cases ignore the requirement of impeachment altogether." 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE §§ 49-50 (2d rev. ed. 1982 & 1986 Supp).

The term "corroboration" is also used in situations in which evidence is not admitted solely for its bearing on credibility. . . . When a witness testifies directly to a certain fact, circumstantial evidence tending to prove the same fact is often said to be in 'corroboration' of the witness, particularly when the circumstantial evidence, standing alone, would not be sufficient to justify a finding of the fact. At times, when two witnesses testify directly to the same fact, the testimony of the second is said to 'corroborate' that of the first. Id. at § 49.
36. 315 N.C. at 80, 337 S.E.2d at 837.
would "beat her half to death."  

The state also offered the testimony of Mrs. Fannie Mae Davis, grandmother of Gloria and Janell. Mrs. Davis testified that on March 3, 1984, she stopped by her daughter's home, that Gloria led her into the bedroom and told her "what Sylvester done [sic] to me." Gloria related to her grandmother that Sylvester had pressed his "peeter" in her "project" and put his finger in her "butt." Mrs. Davis also testified that Gloria told her that Sylvester had "threatened her if she tell it, [sic] he would beat her half to death." Gloria also said Sylvester told her to go in the bathroom and wash the blood off herself. Mrs. Davis told her daughter, Ann, what Gloria had said about Sylvester and told Ann to take the child to the hospital. Ann testified that she and Gloria hitchhiked in the rain to the hospital. Mrs. Davis and her husband met Janell when she returned home from school that afternoon. Janell told Mrs. Davis that Sylvester had done the same things to her and threatened to "beat her half to death" if she told anyone. Janell's mother, Catherine, then took Janell to the hospital. Both girls were examined at the hospital on March 5, 1984. Physical evidence revealed trauma to both of the children's vaginal areas. The defendant, Sylvester Smith, took the stand and denied ever sexually molesting either girl in any way.

37. Id.
38. All other evidence indicated that Mrs. Davis' visit referred to here was actually on March 5, 1984, a Monday. Apparently the grandmother confused the dates.
39. 315 N.C. at 81, 337 S.E.2d at 837.
41. 315 N.C. at 80-81, 337 S.E.2d at 837.
42. Id. at 81, 337 S.E.2d at 837.
43. Brief for the Defendant—Appellant at 3.
44. 315 N.C. at 81, 337 S.E.2d at 837.
45. The examining physician testified at trial as to his observation and examination of the children. The doctor gave his opinion that the bruising around Gloria's vaginal opening was caused by a male penis and that Janell's injuries could have been caused by a finger or a penis. 315 N.C. at 81, 337 S.E.2d at 838.
46. The defense presented testimony from the defendant that on the night of March 2, 1984, he and Ann had an argument, and she slept with the children and he slept on the couch. The defendant testified that on March 3, 1984, the girls slept in their bedroom and he and Ann slept together. The defendant further testified that on March 4, 1984, his brother spent the night with them in the mobile home, and that his brother slept in the girl's bedroom, that the girls slept in the living room, and that he and Ann slept together in their bedroom. Ann
The jury returned verdicts of guilty of first degree rape, first degree sexual offense, and indecent liberties as to Gloria Ogundeji and verdicts of guilty of first degree sexual offense and taking indecent liberties as to Janell Smith. The trial court allowed the defendant's motions to arrest judgment in the convictions of indecent liberties as to both children. The court sentenced the defendant to two mandatory life sentences to run concurrently for his convictions of first degree rape and first degree sexual offense of Gloria Ogundeji. Further, the court imposed a mandatory life sentence for the conviction of first degree sexual offense as to Janell Smith. This sentence was to run consecutively with the other life sentence. From those judgments the defendant appealed to the North Carolina Supreme Court, contending that the trial court erred in allowing Minerva Glidden, Elena Peterson and Fannie Mae Davis to testify as to certain statements made to them by the child victims. The defendant argued that the statements were inadmissible hearsay and were improperly admitted as substantive evidence.

The North Carolina Supreme Court found no error as to the convictions of first degree rape of Gloria Ogundeji and first degree sexual offense of Janell Smith, but found that the defendant was entitled to a new trial on the charge of first degree sexual offense as to Gloria Ogundeji. The court held that the testimony of Mrs. Davis clearly came within the Rule 803(4) hearsay exception, statements for purposes of medical diagnosis or treatment. The court reasoned that Mrs. Davis' conversation with the children had resulted in medical attention for both girls. However, the court found that the testimony given by Ms. Glidden and Ms. Peterson did not fit this exception because the children's statements were made to persons acting in the capacity of Rape Task Force volunteers at a time after the victims had already reached the hospital and received medical treatment. The court also found that Mrs. Davis' testimony concerning what the children told her was admis-

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Ogundeji testified for the defense but rebutted defendant's testimony. Ann further testified that defendant had threatened both her and Gloria's life if they testified against him at trial. Brief for the Defendant—Appellant at 4.

47. Id. at 2.
48. Id. at 7-24.
49. 315 N.C. at 102, 337 S.E.2d at 850.
50. Id. at 83-4, 337 S.E.2d at 839.
51. Id. at 86, 337 S.E.2d at 840.
sible under the Rule 803(2) excited utterance exception. The state did not argue that the statements made to Ms. Glidden and Ms. Peterson were admissible under the excited utterance exception. The court’s final consideration was the state’s contention that the testimony of Ms. Glidden and Ms. Peterson was admissible under the Rule 803(24) residual or catchall exception. The court found the statements improperly admitted. The record did not indicate whether the trial judge analyzed the appropriateness of admitting the testimony in light of the specific requirements set out in Rule 803(24).

BACKGROUND

In an attempt to simplify the use and interpretation of the law of evidence in North Carolina, the General Assembly adopted the new North Carolina Rules of Evidence in 1984. Adoption of the Rules was prompted by the concern that North Carolina evidence law had become unwieldy. Developing over the years through a number of narrow statutes, a large volume of case law and several conflicting judicial decisions, North Carolina evidence law was confusing and difficult to master. The new Rules were to bring order

52. Id. at 90, 337 S.E.2d at 843.
53. Id.
54. Id. at 98, 337 S.E.2d at 848.
55. Id. at 91, 337 S.E.2d at 843.
to this chaos. 59

The North Carolina Rules of Evidence establish six rules to govern the admissibility of hearsay. Rule 801 defines hearsay, 60 statement, 61 and declarant, 62 and specifies that an admission of a party-opponent is an exception to the hearsay rule. 63 Rule 802 states the hearsay rule: "Hearsay is not admissible except as provided by statute or by these rules." 64 Rule 803 lists exceptions to the hearsay rule regardless of the availability of the declarant. 65 Rule 804 lists hearsay exceptions that only apply if the declarant is unavailable. 66 Rule 805 allows the admission of hearsay within hearsay if each part of the combined hearsay statements conforms

59. The drafters of the North Carolina Rules of Evidence chose to model the Rules after the federal counterparts because the Federal Rules are familiar to practitioners in North Carolina, the Federal Rules contained generally accepted rules and are typically the basis of instruction in law school evidence classes, and because the Federal Rules have proven thorough and manageable. Committee Report, supra note 57, at iv. The North Carolina Rules did not, however, bring great substantive change to the law of evidence. 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 2, at 2 n.6 (Supp. 1986).

60. See supra note 11.

61. Under N.C. GEN. STAT. § 8C-1 Rule 801(a), "statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."

62. N.C. GEN. STAT. § 8C-1 Rule 801(b) defines a declarant as "a person who makes a statement."

63. N.C. GEN. STAT. § 8C-1 Rule 803(d) specifies that:
A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of such party during the course and in furtherance of the conspiracy.

64. This rule is in accord with North Carolina practice prior to adoption of the rules. See N.C. GEN. STAT. § 8C-1 Rule 802 commentary (1986).

65. North Carolina Rule 803 actually only lists twenty-three exceptions to the hearsay rule. Federal Rule of Evidence 803 lists twenty-four exceptions to the hearsay rule. North Carolina did not adopt the exception in FED. R. EVID. 803(22) (judgment of previous conviction). This exception is reserved for future codification. N.C. GEN. STAT. § 8C-1 Rule 802(22) (1986).

66. N.C. GEN. STAT. § 8C-1 Rule 804, provides a definition of unavailability and then lists five hearsay exceptions where the declarant is required to be unavailable.
with an exception to the hearsay rules.\textsuperscript{67} Rule 806 allows the credibility of the declarant to be attacked or supported by any evidence that would be admissible had the declarant been present and testified as a witness at trial.\textsuperscript{68}

Rule 803 contains twenty-three hearsay exceptions where the availability of the declarant is immaterial. Rule 803 is basically identical to its federal counterpart.\textsuperscript{69} The underlying theory for allowing these exceptions to the hearsay rule is that the exceptions possess "circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available."\textsuperscript{70} Three exceptions listed in Rule 803 are the excited utterance, statements for purposes of medical diagnosis or treatment, and the catchall exception.\textsuperscript{71}

Rule 803(2), the excited utterance exception, was recognized by North Carolina common law.\textsuperscript{72} The basis for the exception is that the spontaneity of a statement decreases the likelihood of fabrication.\textsuperscript{73} Rule 803(2) specifies that in order to be an "excited

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\item \textsuperscript{67} N.C. GEN. STAT. § 8C-1 Rule 805 is consistent with North Carolina practice prior to the enactment of the North Carolina Rules of Evidence. See, e.g., State v. Connelly, 295 N.C. 327, 245 S.E.2d 663 (1978); N.C. GEN. STAT. § 8C-1 Rule 805 commentary (1986).
\item \textsuperscript{68} The philosophy behind allowing the impeachment or support of the declarant of a hearsay statement is based on the idea that the declarant is in effect a witness and that in fairness should be subject to impeachment and support as though he had in fact testified. N.C. GEN. STAT. § 8C-1 Rule 806 commentary (1986).
\item \textsuperscript{69} See supra note 65.
\item \textsuperscript{70} N.C. GEN. STAT. § 8C-1 Rule 803 commentary (1986).
\item \textsuperscript{71} Discussion in this Note will be limited to these three hearsay exceptions in N.C. GEN. STAT. § 8C-1 Rule 803 because they were the only three hearsay exceptions addressed in Smith.
\item \textsuperscript{72} 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 164 (2d rev. ed. 1982 & Supp. 1986). While North Carolina common law recognized an exception for an excited utterance it did not recognize an exception for present sense impressions.
\item \textsuperscript{73} N.C. GEN. STAT. § 8C-1 Rule 803 commentary (1986). ("circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication"). Although labeled "spontaneous utterance" in North Carolina case law, the Rule 803(2) exception is substantially the same as the common law exception. N.C. GEN. STAT. § 8C-1 Rule 803(2). However, the common law exception appears not to be limited solely to excited utterances. See, e.g., State v. Spivey, 151 N.C. 676, 680-81, 65 S.E. 995, 996-97 (1909) (statements of bystanders must be "strictly contemporaneous to be admissible"); see also 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 164 (2d rev. ed. 1982 & Supp. 1986).
\end{itemize}
utterance" a statement must relate to the startling event or condition and must have been made while the declarant was under the stress of excitement caused by the event or condition. As the comment to the rule points out, the standard of measurement for when an excited utterance can be made is the duration of the state of excitement. No fixed time periods exist by which to measure the duration of excitement—rather, the character of the transaction or event will largely determine the significance of the time lapse. However, "[t]he modern trend is to consider whether the delay in making the statement provided an opportunity to manufacture or fabricate the statement."

Many jurisdictions have addressed the admissibility of hearsay statements made by young sexually abused children under the Rule 803(2) excited utterance exception. In Wisconsin, for example, the appellate courts have developed a special species of the excited utterance exception which allows into evidence statements made by sexually abused children. In State v. Padilla, the Wisconsin Court of Appeals allowed the victim's mother to testify about statements the child victim made to her three days after a sexual assault. The court noted that the stress and spontaneity upon which the excited utterance exception is based is often pre-

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75. N.C. Gen. Stat. § 8C-1 Rule 803 commentary.
76. Id.
77. Bulkley, Evidentiary Theories for Admitting a Child's Out-of-Court Statement of Sexual Abuse at Trial, in CHILD SEXUAL ABUSE AND THE LAW 153, 155 (J. Bulkley 2d ed.).
78. State v. Padilla, 110 Wis.2d 414, 329 N.W.2d 263 (Wis. Ct. App. 1982). See, e.g., State v. Gollon, 115 Wis.2d 592, 340 N.W.2d 912 (Wis. Ct. App. 1983) (mother and neighbor allowed to testify to statements of six-year-old victim made one and two days after assault when victim was too afraid to testify at trial); State ex rel. Harris v. Schmidt, 69 Wis.2d 668, 230 N.W.2d 890 (1975) (five-year-old stepson of defendant told his mother the next day; told defendant's probation officer fifteen days later); Love v. State, 64 Wis.2d 432, 219 N.W.2d 294 (1974) (three-and-a-half-year-old told her mother the next morning after mother noticed blood); Bertrang v. State, 50 Wis.2d 702, 184 N.W.2d 867 (1971) (nine-year-old daughter of defendant told her mother the next day); Bridges v. State, 247 Wis. 350, 19 N.W.2d 529, reh'g denied, 247 Wis. 350, 19 N.W.2d 862 (1945) (seven-year-old told her mother one hour after assault). In all of these cases, the Wisconsin Supreme Court allowed the adults' hearsay testimony to be received as substantive evidence. State v. Smith, 315 N.C. 76, 87 n.3, 337 S.E.2d 833, 841 n.3 (1985).
79. 110 Wis. 2d 414, 329 N.W.2d 263 (Wis. Ct. App. 1982).
sent for longer periods of time in young children than in adults.\textsuperscript{80} The court stressed that "[c]ontemporaneity is not a condition precedent to a finding of an excited utterance."\textsuperscript{81} Rather, the court found that "spontaneity and stress" are the crucial factors.\textsuperscript{82} Another jurisdiction which has dealt with this issue is Colorado. The Colorado Court of Appeals, in \textit{People v. Ortega},\textsuperscript{83} noted that in cases involving sexually abused young children, the element of trustworthiness underscoring the excited utterance exception is primarily found in the "lack of capacity to fabricate rather than the lack of time to fabricate."\textsuperscript{84} A federal case which has considered the issue is \textit{United States v. Iron Shell}.\textsuperscript{85} There the Eighth Circuit Court of Appeals held that the trial court did not abuse its discretion in extending the excited utterance exception to allow into evidence a statement of a nine-year-old sexually abused child to a police officer that was given up to an hour and fifteen minutes after the assault.\textsuperscript{86} The court found that "considering the surprise of the assault, its shocking nature and the age of the declarant," it was not unreasonable for the trial court to find that the child was in a state of continuous excitement from the time of the assault.\textsuperscript{87} Additionally, other courts have noted that other factors may cause a delay between the sexual assault and the child's coming forward and making a statement. "In allowing a wider length of time, 

\textsuperscript{80} Id. at 421, 329 N.W.2d at 267. See also Annot., Time Element as Affecting Admissibility of Statement of Complaint Made by Victim of Sex Crime as Res Gestae, Spontaneous Exclamation, or Excited Utterance, 89 A.L.R.3d 102 (1979).

\textsuperscript{81} Id.

\textsuperscript{82} Id.

\textsuperscript{83} 672 P.2d 215, 218 (Colo. App. 1983).

\textsuperscript{84} Id.

\textsuperscript{85} 633 F.2d 77 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981).

\textsuperscript{86} The officer described the child as being "nervous and scared" and speaking in "short bursts." \textit{United States v. Iron Shell}, 633 F.2d 77, 86 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981).

\textsuperscript{87} Id. See also \textit{Haggins v. Warden, Ft. Pillow State Farm}, 715 F.2d 1050 (6th Cir. 1983), cert. denied, 464 U.S. 1071 (1984) (four-year-old's statement to nurses and police an hour to an hour and a half after sexual assault). \textit{People v. Stewart}, 39 Colo. App. 142, 568 P.2d 65 (1977) (six-year-old victim of sexual assault did not relate her story to her rescuers, but waited to tell the police, (first authority figures) two hours later; court cited Federal Rule of Evidence 803(2) and upheld admissibility); \textit{United States v. Nick}, 604 F.2d 1199 (9th Cir. 1979) (three-year-old victim of babysitter's sexual assault described event to his mother when she picked him up from the babysitter's house after the assault; description properly admitted under Federal Rule 803(24)).
courts have indicated that a young child may not make an immediate complaint because of threats, fear of reprisals, admonishments of secrecy, or other pressures not to disclose, . . .” particularly where the child had a close relationship with the offender. 88

These courts have recognized the flaws in mechanically applying the excited utterance exception to situations involving sexually abused children. 89 They have attempted to compensate for the special circumstances involving sexually abused children 90 by reshaping the traditional excited utterance exception. However, these approaches have been criticized 91 and more comprehensive approaches have been urged. 92

Another exception has also been utilized as a means to allow into evidence hearsay statements made by sexually abused children. This exception, the Rule 803(4) medical diagnosis exception, excepts from the hearsay rule statements made for purposes of medical diagnosis which describe: (1) medical history; (2) past or present symptoms, pain, or sensations; or (3) the inception or general character of the cause or external source of injury. 93 The theory behind allowing these statements into evidence as exceptions


89. See cases at supra note 87 and Lancaster v. People, 200 Colo. 448, 450, 615 P.2d 720, 723 (1980) (utterance of minor child need not be contemporaneous with event in order to be admissible as it is unlikely to be premeditated) and People v. Miller, 58 Ill. App. 3d 156, 161, 373 N.E.2d 1077, 1080 (1978) (court noted that alleged sexual assault constituted a “sufficiently startling occurrence and that the child victim spoke spontaneously and without fabrication within minutes of the event”).

90. See cases at supra note 87; Lancaster, 200 Colo. 448, 615 P.2d 720; Miller, 58 Ill. App. 3d 156, 373 N.E.2d 1077.

91. Yun, supra note 5; Skoler, New Hearsay Exceptions for a Child's Statement of Sexual Abuse, 18 J. MAR. 1 (1984), and Bulkley, supra note 77, at 153.

92. Yun, supra note 5 and Skoler, supra note 91, at 40. See supra note 24 and infra notes 195-196 and accompanying text.

93. N.C. GEN. STAT. § 8C-1 Rule 803(4) (1986). At common law in North Carolina, statements concerning past, as opposed to present, conditions were not admissible for substantive purposes. See, e.g., Lush v. McDaniel, 35 N.C. (13 Ired.) 485 (1852). Such statements were considered to be untrustworthy. Id. However, Rule 803(4) clearly extends to statements of past conditions and medical history made for purposes of diagnosis or treatment. As the Advisory Committee’s Note clearly indicates, the same guarantee of trustworthiness extends to statements of past conditions and medical history made for purposes of diagnosis or treatment. N.C. GEN. STAT. § 8C-1 Rule 803(4) commentary.
to the hearsay rule is that such statements are inherently trustworthy and reliable because the patient has an interest in clearly and accurately relaying to medical personnel the cause for the patient's condition. The Advisory Committee made clear the liberal intent of Rule 803(4). Rule 803(4) extends to statements as to causation, reasonably pertinent to medical diagnosis and treatment, but statements as to fault would not ordinarily qualify under the exception. According to the Advisory Committee the statement need not have been made to a physician: "Statements to hospital attendants, ambulance drivers, or even members of the family might be included."

Like the excited utterance exception, the exception for statements made for medical diagnosis or treatment has been utilized as a means of allowing into evidence hearsay statements of sexually abused children. Commentators have criticized courts for what has been called "tortured" interpretations of the traditional hearsay exceptions under Rule 803 to accommodate hearsay statements by child victims. The expansive reading of Rule 803(4) as used in child abuse cases is illustrated by Goldade v. Wyoming. In Goldade a mother was convicted of physically abusing her daughter solely on the basis of statements made by the child to a doctor and a nurse. Both the doctor and nurse were allowed to testify that the child identified the mother as the perpetrator. In affirming the lower court, the Supreme Court of Wyoming held that in the context of child abuse, Rule 803(4) was properly applied to allow into evidence hearsay statements identifying the perpetrator. One commentator has noted "[w]hile admissible evidence under traditional doctrine included only the fact that complaint was made, the trend is to allow the details of the offense and

95. N.C. GEN. STAT. § 8C-1 Rule 803(4) commentary (1986).
96. Id.
97. Id.
98. Id.
99. Id.
100. Skoler, supra note 91, at 7.
102. Id.
103. Id. at 725. The Wyoming Supreme Court noted that "the function of the court must be to pursue the transcendent goal of addressing the most pernicious social ailment which afflicts our society, family abuse and more specifically, child abuse." Id.
104. Id. at 728.
the identity of the offender, a result which appears wholly justifiable. However, expanding the coverage of Rule 803(4), like expanding the coverage of the other traditional hearsay exceptions under Rule 803, has been criticized as not being flexible enough to allow into evidence crucial hearsay statements made by child victims of abuse.

Rule 803(24), titled "Other Exceptions," allows into evidence statements that are not specifically covered by any of the other exceptions under Rule 803 if those statements have equivalent circumstantial guarantees of trustworthiness. Even under this exception several requirements must be met before a hearsay statement will be allowed into evidence. The court must determine, first, whether the statement is offered as evidence of a material fact; second, whether 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; third, that the general purpose of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence; and finally, whether the proponent has given proper written notice to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement. Of all the exceptions listed in Rule 803, 803(24) may be the most significant hearsay exception in terms of interpretation and application because of its flexible "catchall" na-

106. See supra note 91.
107. N.C. Gen. Stat. § 8C-1 Rule 803(24) (1986). Both of North Carolina's residual provisions, Rule 803(24) and 804(5), are almost identical to their federal counterparts. See Fed. R. Evid 803(24) and 804(5). North Carolina's Rule 804(24) differs from Federal Rule 803(24) only in that the last sentence of the federal rule does not require written notice. Rule 803(24) also requires that notice be given sufficiently in advance of offering the statement while Federal Rule 803(24) requires the notice to be given sufficiently in advance of the trial or hearing. Practically, little if any difference exists between giving notice sufficiently in advance of offering the statement and sufficient in advance of the trial or hearing. Thus, the only real difference in the North Carolina Rule 803(24) and the Federal Rule 803(24) is that North Carolina requires written notice. Basically, requiring written notice merely places an additional administrative duty on North Carolina attorneys.
108. The written notice must contain a statement by the proponent of his intent to offer the statement and the particulars of it, including the name and address of the declarant.
Like the more traditional hearsay exceptions the residual or catchall exception has been used to admit a child’s out-of-court statements of sexual abuse. The nature of the catchall exception itself provides the courts greater flexibility in admitting hearsay evidence. However, most residual exceptions are still “exceptions in search of a rule.”

With the new North Carolina Rules of Evidence effective July 1, 1984 and the continued nightmare of child sexual abuse increasing, it was only a matter of time until a case involving the two would reach the North Carolina appellate courts. By early spring 1985 such a case, *State v. Smith*, reached the the North Carolina Supreme Court and gave it the opportunity to determine when, under the recently adopted Rules of Evidence, North Carolina would admit into evidence hearsay statements made by a sexually abused child.  

110. The same “catchall” provision appears at the ends of both Rule 803 and 804. Despite its straightforward language, the provision has been the source of some controversy within the federal courts. See Crumpler & Widenhouse, *supra* note 56, at 78. At common law North Carolina did not provide a catchall exception to the hearsay rule. Yet the North Carolina courts often admitted hearsay evidence under the general principle of “res gestae.” 1 H. Brandis, *Brandis on North Carolina Evidence* § 158 (2d rev. ed. 1982 & Supp. 1986). “Res gestae” literally means “things done.” Because of the confusion that resulted in using res gestae to admit hearsay evidence, both courts and commentators advocated not applying the principle as basis for a hearsay exception. See, e.g., United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944) (Res gestae “has been accountable for so much confusion that it had best be denied any place whatever in legal terminology”). Under the new North Carolina Rules of Evidence, res gestae no longer exists as a basis for a hearsay exception. N.C. GEN. STAT. § 8C-1 Rule 803 commentary. While evidence previously admitted under the concept of res gestae may not fall within a specific hearsay exception or the catchall exception, the res gestae formula should not be relied on by the courts. *Id.* The adoption of a catchall provision over the use of res gestae does not “contemplate an unfettered exercise of judicial discretion.” *Id.* The legislative history of Federal Rule of Evidence 803(24) reveals that the exception was to be invoked “very rarely, and only in exceptional circumstances.” S. Rep. No. 1277, 93d Cong., 2d Sess. 20, *reprinted in 1974 U.S. Code Cong. & Ad. News 7051, 7066. See also Lewis, *The Residual Exceptions to the Federal Hearsay Rule: Shuffling the Wild Cards*, 15 Rutgers L.J. 101 (1983); Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. Rev. 867 (1982). But see Imwinkelgried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 San. Diego. L. Rev. 239 (1978) (urging a more liberal construction).

abused child.

ANALYSIS

Since the effective date of the North Carolina Rules of Evidence was July 1, 1984, only a limited number of cases under the new rules have found their way to the appellate courts. Thus, interpretation of the rules has been limited. While much of the common law of evidence in North Carolina was grafted into the evidence rules, and while codification of the law did not substantially change the common law rules, judicial application and interpretation of the new Rules of Evidence are still needed to effectively implement them.

The *Smith* case does not attempt to weave prior North Carolina common law principles of evidence into the evidence rules. *Smith* does not do so much to change the existing law of evidence, but begins on a clean slate and gives a fresh interpretation of the statutory language in the new Rules of Evidence. *Smith* was the first real chance a North Carolina appellate court had to address issues concerning interpretation of three of the statutory hearsay rules. The significance of the decision is the detailed analysis and interpretation it provides of the new Rules of Evidence, rather than the alteration of the common law principles existing prior to codification.

In *Smith* the North Carolina Supreme Court liberally interpreted hearsay exceptions Rule 803(2), excited utterance, and Rule 803(4), statements for purposes of medical diagnosis or treatment, and provided a detailed interpretation of the Rule 803(24), catchall exception. The court held the excited utterance exception covered statements made by the child victims, although several days had passed since the actual sexual assault occurred. The court also found the hearsay exception for statements made for medical diagnosis covered statements made by the child victims to persons who are not medical personnel as long as the statements are for the purpose of obtaining treatment. Finally, the court provided trial judges a framework to apply when deciding whether a statement is

114. N.C. GEN. STAT. § 8C-1 commentary (1986).
115. 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 2, at 2 n.6 (Supp. 1986).
116. 315 N.C. at 90, 337 S.E.2d at 843.
117. Id. at 85, 337 S.E.2d at 840.
admissible under the Rule 803(24) catchall exception.\textsuperscript{118} The court began its evaluation of the hearsay evidence by considering Rule 803(2), the excited utterance exception. In concluding that the children's statements to their grandmother some three days after the assault were properly admitted under this exception the court reasoned that "spontaneity and stress" are the crucial factors when determining admissibility under 803(2), and not "contemporaneity."\textsuperscript{119} To come within Rule 803(2) there must be: (1) a sufficiently startling experience suspending reflective thought, and (2) a spontaneous reaction, not one resulting from reflection or fabrication.\textsuperscript{120} The court noted that these two requirements necessitate subjective standards and although the requirement of spontaneity is often measured in terms of the lapse of time between the startling event and the statement, the trend now is to consider whether the delay in making the statement gave the declarant an opportunity to manufacture or fabricate the statement.\textsuperscript{121}

The court recognized "that a broad and a liberal interpretation is to be given to what constitutes an "excited utterance" when applied to young children."\textsuperscript{122} The court noted that stress and spontaneity often linger for longer periods of time in young children than in adults.\textsuperscript{123} The court pointed out that: (1) a child is apt to repress the incident, (2) often a child is unlikely to report this kind of incident to anyone but the mother or some other parental figure, and (3) the characteristics of young children work to produce declarations free of conscious fabrication for a longer period after the incident than with adults.\textsuperscript{124} The court found other reasons for allowing a greater length of time for child excited utterances. The court indicated that a young child may not make immediate complaint because of pressures not to disclose, particularly where, as here, the child had a close relationship with the offender.\textsuperscript{125}

Although the evidence in this case indicated that the assault

\begin{itemize}
  \item \textsuperscript{118} Id. at 92-98, 337 S.E.2d at 844-848.
  \item \textsuperscript{119} Id. at 88, 337 S.E.2d at 842.
  \item \textsuperscript{120} E. Cleary, McCormick on Evidence § 297 (3d ed. 1984).
  \item \textsuperscript{121} 315 N.C. at 86-87, 337 S.E.2d at 841.
  \item \textsuperscript{122} Id. at 87, 337 S.E.2d at 841.
  \item \textsuperscript{123} Annot., Time Element as Affecting Admissibility of Statement of Complaint Made by Victim of Sex Crime as Res Gestae, Spontaneous Exclamation, or Excited Utterance, 89 A.L.R.3d 102 (1979).
  \item \textsuperscript{124} 315 N.C. at 88, 337 S.E.2d at 841.
  \item \textsuperscript{125} Id. at 89, 337 S.E.2d at 842.
\end{itemize}
took place some two to three days before the statements were made, the court found the statements met the requirements of spontaneity and stress. The grandmother testified that the children were "afraid," and "scared" when relating the incident. In revealing the information to her grandmother, Gloria said, "I have something to tell you . . . I want you to come in the room. I am scared . . . I want to tell you what Sylvester done [sic] to me." The court found that under these circumstances the grandmother's testimony concerning what the girls had told her was admissible as an excited utterance.

The court next evaluated the hearsay statements made by Gloria and Janell in light of the Rule 803(4) medical diagnosis exception. In concluding that the children's statements to their grandmother, but not to the two Rape Task Force volunteers, were admissible under Rule 803(4), the court held that statements by child victims to persons who are not medical personnel are still admissible so long as the statements are for the purpose of obtaining treatment. The court also held that it was proper to allow into evidence, under 803(4), those portions of the hearsay testimony identifying the defendant as the perpetrator.

The defendant argued that the children's statements were not admissible under the Rule 803(4) hearsay exception because none of the witnesses held licenses to practice medicine or psychology and therefore could not provide medical diagnosis or treatment. The court declined to follow defendant's argument and instead followed the commentary to Rule 803(4). The commentary to the rule explains that "[u]nder the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included." The court noted that the reasoning behind the Rule 803(4) exception was the inherent trustworthiness of a statement made by a patient seeking medical attention. While the children did not specifically request medical attention, the court recognized "that young children cannot independently seek out medical attention, but must rely on their caretakers to do so."

126. Id. at 88, 337 S.E.2d at 842.
127. Id. at 90, 337 S.E.2d at 843.
128. Id. at 84-85, 337 S.E.2d at 840.
129. Id. at 85, 337 S.E.2d at 840.
130. Id. at 84, 337 S.E.2d at 839.
131. Id.
132. Id. at 84, 337 S.E.2d at 840.
hearsay statements to their grandmother resulted in their getting medical attention. The court therefore concluded that the grandmother's testimony as to the statements was admissible. However, the court found the hearsay testimony of the Rape Task Force volunteers inadmissible because statements made to them by the children were made after the children had already reached the hospital and received medical treatment.

The defendant also argued that it was improper to admit into evidence under Rule 803(4) portions of hearsay evidence identifying him as the perpetrator. The court alluded to the point that some courts have found the identity of the perpetrator irrelevant under the Rule 803(4) medical diagnosis exception. The court recognized that the inherent reliability of the statement could be diminished if the declarant is under the impression that he is being asked the identity of the perpetrator. However, the court stated that the trustworthiness remains intact if the motivation for the statement was to disclose information to aid in medical diagnosis or treatment. The court pointed out that "evidence under the traditional doctrine included only the fact that complaint was made, the trend [now] is to allow the details of the offenses and the identity of the offender." The court concluded that Mrs. Davis was properly allowed to testify that Gloria identified Sylvester as her assailant.

After holding that the testimony of the two Rape Task Force volunteers was inadmissible under the Rule 803(4) medical diagnosis exception, the court proceeded to determine whether the testimony was admissible under the Rule 803(24) catchall exception. In holding that the testimony did not meet the admissibility requirements of Rule 803(24), the court laid a framework for trial judges to apply when determining whether a hearsay statement is admissible under Rule 803(24). The trial judge in Smith did not specify the reason for his refusal to limit the testimony to corroboration. If he allowed the testimony of Ms. Gladden and Ms. Peterson in evidence under 803(24), he did not indicate this in the record. Therefore, no findings or any other support indicated that the trial

133. Id. at 85, 337 S.E.2d at 840.
134. Id. at 86, 337 S.E.2d at 840.
135. Id. at 85, 337 S.E.2d at 840.
136. Id.
137. Id.
138. Id.
139. Id. at 90-98, 337 S.E.2d at 843-48.
judge analyzed the admissibility of the hearsay statements under the requirements set out in Rule 803(24). The supreme court indicated that the Rule 803(24) catchall exception was not meant to give unbridled judicial discretion on questions of admissibility where the hearsay is not covered by another exception, but that the exception was to be "carefully scrutinized by the trial judge within the framework of the rule's requirements."\(^{140}\)

The court laid out the six-part inquiry required of trial judges to determine the admissibility of hearsay under Rule 803(24). The first inquiry the trial judge must make is whether proper notice has been given. This preliminary requirement must be satisfied before the court can even consider the hearsay statement. Notice must be: (1) in writing; (2) provided to the adverse party sufficiently in advance of offering it to allow him to prepare to meet it; (3) contain a statement of the proponent's intention to offer the hearsay testimony, the particulars of the hearsay testimony, and the name and address of the declarant.\(^{141}\) The trial judge must make this initial determination as to whether proper notice was given and must include that determination in the record.\(^{142}\)

Once the trial judge determines that the proper notice has been given, he must determine whether the statement is not specifically covered by any of the other twenty-three exceptions listed in Rule 803. If the judge determines that the hearsay falls into one of the other exceptions, Rule 803(24) does not apply. Smith requires that whatever the determination, the trial judge must enter his conclusion in the record, but detailed findings of fact as to whether other exceptions apply are not required.\(^{143}\)

The third requirement is that the statement be trustworthy. If the hearsay statement does not fit into one of the twenty-three other exceptions it may still possess "circumstantial guarantees of trustworthiness" equal to that required by the other exceptions.\(^{144}\) The court noted the struggle with the meaning of the requirement.\(^{145}\) Among the factors the court listed to consider when determining "trustworthiness" are: (1) assurance of personal knowledge of the declarant of the underlying event;\(^{146}\) (2) the declarant's mo-

140. Id. at 92, 337 S.E.2d at 844.
141. N.C. GEN. STAT. § 8C-1 Rule 803(24) (1986).
142. 315 N.C. at 92, 337 S.E.2d at 844.
143. Id. at 93, 337 S.E.2d at 844.
144. Id. at 93, 337 S.E.2d at 844-45.
145. Id. at 93, 337 S.E.2d at 845.
146. Id. at 93-94, 337 S.E.2d at 845 (citing United States v. Barlow, 693 F.2d
tivation to speak the truth or otherwise;"147 (3) whether the declarant ever recanted the testimony;148 and (4) the practical availability of the declarant at trial for meaningful cross-examination.149 However, the court pointed out that "[n]one of these factors, alone or in combination, may conclusively establish or discount the statement's 'circumstantial guarantees of trustworthiness,'" and that the judge should "focus upon the factors that bear on the declarant at the time of making the out-of-court statement and should keep in mind that the peculiar factual context within which the statement was made will determine its trustworthiness."150 The court further stated that the trial judge, in making his determination as to trustworthiness, must include both his conclusion and reasoning in the record. The determination of trustworthiness appears to require much more of judges than is required under the other portions of Rule 803(24). "Findings of fact and conclusions of law as to the trustworthiness requirement must appear in the record."151

The fourth requirement is that the statement be material. This requirement of materiality is the same as the requirement of relevancy set out in Rules 401 and 402. Although a statement is not covered by any of the other enumerated exceptions and has circumstantial guarantees of trustworthiness, the trial judge may not admit the evidence unless he determines that it is offered as evidence of a material fact. Findings of fact as to materiality need not be made, but the trial judge must state in the record that the evidence was offered as evidence of a material fact, if he so concludes. Likewise, if the trial judge concludes that the evidence offered is not material, he should enter this conclusion in the record.

954, 962 (6th Cir. 1982), cert. denied, 461 U.S. 945 (1983) and United States v. Carlson, 547 F.2d 1346, 1354 (8th Cir. 1975) (applying Federal Rule 804(b)(5)), cert. denied, 431 U.S. 914 (1977)).
147. Id. at 93, 337 S.E.2d at 845. (citing Huff v. White Motor Corp., 609 F.2d 286, 292 (7th Cir. 1979)).
148. Id. (citing United States v. Barlow, 693 F.2d 954, 962 (6th Cir. 1982), cert. denied, 461 U.S. 945 (1983)).
149. Id. at 94, 337 S.E.2d at 845 (citing M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803.24 (1981); United States v. McPartlin, 595 F.2d 1321, 1350 (7th Cir. 1978) (dictum), cert. denied, 444 U.S. 833 (1979); and 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 472 (1980) ("the 'trustworthiness' of statements offered under Rule 803(24) is slightly less a matter of concern where the declarant in fact testifies and is subject to cross-examination").
150. Smith, 315 N.C. at 94, 337 S.E.2d at 845.
151. Id. (emphasis added).
and the inquiry should end.\textsuperscript{152}

The fifth requirement under Rule 803(24) is that the hearsay statement must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts."\textsuperscript{153} The court termed this requirement "necessity."\textsuperscript{154} This "necessity" requirement imposes the obligation of a dual inquiry. First, were the proponent's efforts to procure more probative evidence diligent? Second, is the statement more probative on the point than other evidence that the proponent could reasonably procure?\textsuperscript{155}

The court noted that the degree of necessity is decreased when the declarant is available at trial. Testimony by the declarant is usually, but not always,\textsuperscript{156} the most probative evidence on point. The problem with Rule 803(24), as the court pointed out, is that it allows hearsay evidence to be admitted "even though the declarant is available as a witness."\textsuperscript{157} Because the declarant may be available to testify and this is usually the most probative evidence on point, the court strongly suggested that the trial judge "take care in documenting for the record his basis for finding that this 'necessity' requirement is met."\textsuperscript{158} The record must reflect findings of fact and conclusions of law supporting the trial judge's determination.\textsuperscript{159}

Under the last of the six requirements the trial court must determine whether "the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence."\textsuperscript{160} The court referred to Rule 102 which states that, "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Once the trial judge considers whether admission of the hearsay would best serve the purposes of justice, the court requires

\begin{enumerate}
\item[152.] Id. at 94-95, 337 S.E.2d at 845.
\item[153.] N.C. GEN. STAT. § 8C-1 Rule 803(24) (1986).
\item[154.] 315 N.C. at 96, 337 S.E.2d at 846.
\item[155.] Id. at 96, 337 S.E.2d at 846.
\item[156.] As in this case, the testimony of a child witness is not necessarily the most probative evidence.
\item[157.] N.C. GEN. STAT. § 8C-1 Rule 803(24) (1986).
\item[158.] 315 N.C. at 96, 337 S.E.2d at 846.
\item[159.] Id.
\item[160.] N.C. GEN. STAT. § 8C-1 Rule 803(24) (1986).
\end{enumerate}
the judge to state his conclusion, and while detailed findings of fact are not required, the trial judge must include his analysis in the record.\textsuperscript{161}

In summary, the court restated the importance of trial judges following this framework when analyzing whether hearsay statements are admissible under Rule 803(24). For the trial judge's own benefit, such a detailed analysis requires the judge to give careful consideration to the hearsay before allowing it into evidence under Rule 803(24). Detailed analysis is also necessary for meaningful appellate review. However, the court chose only to apply its holding concerning the six-part inquiry under Rule 803(24) to trials of cases which began after the certification date of the \textit{Smith} opinion.\textsuperscript{162}

Concerning the hearsay testimony of the two Rape Task Force volunteers the court determined that it was reversible error to allow into evidence testimony by Ms. Glidden to the effect that Gloria told her that Sylvester "put his finger in her 'butt.'"\textsuperscript{163} This evidence was in direct conflict with Gloria's testimony at trial. At trial Gloria testified the only place Sylvester touched her was her vagina. Although Mrs. Davis, the grandmother, later testified that Gloria had told her that Sylvester had placed his hand in her "butt," the court found Ms. Glidden's testimony to be highly prejudicial, requiring reversal of defendant's conviction for first degree sexual offense as to Gloria, and remanding that charge for a new trial.\textsuperscript{164}

In deciding \textit{Smith}, the North Carolina Supreme Court attempted to provide protection for children who suffer from sexual abuse. The principles announced in the decision will potentially lead to the conviction of those responsible for sexually abusing children. The liberal interpretation of the excited utterance and medical diagnosis exceptions will allow into evidence hearsay which technically could be excluded under strict interpretation of the exceptions. Admissions of such hearsay increases the chances of criminal conviction by helping to build a case against the defendant. Bringing a defendant to trial can, in turn, lead to a number of sanctions: the defendant may be found guilty and imprisoned thus removing the defendant from the child, or the defendant

\begin{itemize}
\item \textsuperscript{161} 315 N.C. at 96, 337 S.E.2d at 847.
\item \textsuperscript{162} \textit{Id.} at 98, 337 S.E.2d at 847.
\item \textsuperscript{163} \textit{Id.} at 99, 337 S.E.2d at 848.
\item \textsuperscript{164} \textit{Id.}
\end{itemize}
may be committed and receive mental health treatment. Even if
the defendant is not convicted, the outcome may still be beneficial:
the defendant may seek mental health treatment on his or her own
initiative, the child may be removed from the defendant on a
showing of neglect or abuse, or a family member may be made
aware of the hazards to the child and make special efforts to pro-
tect the child. By allowing into evidence hearsay statements made
by sexually abused children, more of the people responsible for
sexual child abuse can be brought to trial and convicted. The ulti-
mate result of successful prosecutions is that more children will be
protected.

In addressing the specific effects Smith has upon the interper-
tation of the hearsay exceptions in the context of child sexual
abuse, the case first provides expansive coverage for the Rule
803(2) excited utterance exception. The coverage reaches state-
ments made by child victims although several days may have
passed since the actual sexual assault. By making "stress and
spontaneity" the crucial factors determining admissibility under
Rule 803(2), the case gives flexibility in determining what is an
"excited utterance." No longer is the time lapse between the event
and the statement determinative. By following the trend and
considering whether the delay in making the statement gave the
declarant an opportunity to manufacture or fabricate the state-
ment, Smith will allow into evidence a greater number of hear-
say statements removed from the event which caused the excite-
ment. This approach is especially meaningful in the context of
child sexual abuse cases because "stress and spontaneity" are often
present for longer periods of time in young children than in
adults, and the characteristics of young children work to produce
declarations free of conscious fabrication for a longer period after

165. Reference here is made to social services' ability to remove the child
from the defendant upon establishing that the child was abused or neglected.
This includes "protective services" as defined under N.C. GEN. STAT. § 7A-542
(1986), "secure and non-secure custody" under N.C. GEN. STAT. § 7A-574 (1986),
and "termination of parental rights" under N.C. GEN. STAT. § 7A-289.23 (1986).
166. 315 N.C. at 90, 337 S.E.2d at 843.
167. Id. at 88, 337 S.E.2d at 842.
168. Id.
169. Id. at 86-87, 337 S.E.2d at 841.
170. Annot., Time Element as Affecting Admissibility of Statement of Com-
plaint Made by Victim of Sex Crime as Res Gestae, Spontaneous Exclamation,
or Excited Utterance, 89 A.L.R.3d 102 (1979).
the incident than with adults.\textsuperscript{171} By recognizing the special characteristics of children, \textit{Smith} allows added leniency in cases where the declarant is a child.

The case can also be interpreted to allow leniency in cases where the declarant is an adult. Because the court held that stress and spontaneity are the crucial factors that the trial court should consider in determining admissibility under Rule 803(2), even adult hearsay that would traditionally be inadmissible, now may be admissible. Although stress and spontaneity may not be present for as long a period in adults as it is in children, certainly stress and spontaneity can extend the time frame in which adults may make an "excited utterance." For example, an adult victim may suppress an incident and only relay what happened when given an opportunity to seek help. Such a scenario may exist in a situation where a rape victim knows the assailant or when a battered wife is afraid to admit that her husband is abusing her. The time lapse between the actual assault and the statement can be significant. If only the time lapse is considered, the hearsay may be inadmissible. However, if the focus is on stress and spontaneity the hearsay may be admissible.

Second, \textit{Smith} gives a liberal interpretation of the Rule 803(4) medical diagnosis exception. The coverage of this exception reaches statements made by sexually abused victims to persons who are not medical personnel as long as the statements are for the purpose of obtaining treatment.\textsuperscript{172} These statements are admissible even when they identify the perpetrator.\textsuperscript{173} In following the commentary to the rule,\textsuperscript{174} \textit{Smith} emphasizes that the main concern is that the statement be made for the purpose of obtaining medical treatment. The statement need not be made to medical personnel to be admissible.

\textit{Smith's} interpretation of Rule 803(4) is significant for a child declarant. The effect is that numerous hearsay statements may be admissible after the fact as long as the statements were intended to lead to medical diagnosis or treatment. Because most children cannot independently seek out medical attention and must rely on their caretakers\textsuperscript{178} to do so, some form of hearsay will usually be

\begin{itemize}
\item \textsuperscript{171} 315 N.C. at 88, 337 S.E.2d at 841.
\item \textsuperscript{172} \textit{Id.} at 85, 337 S.E.2d at 840.
\item \textsuperscript{173} \textit{Id.}
\item \textsuperscript{174} N.C. GEN. STAT. § 8C-1 Rule 803 commentary (1986).
\item \textsuperscript{175} See infra note 186.
\end{itemize}
admissible when that child relates the experience to his or her caretaker and medical attention is sought as a result of the conversation.

Furthermore, *Smith* allows into evidence those portions of a child's hearsay statements which identify the perpetrator.\(^{176}\) The only limitation to this exception is that the identification must be a part of statements made for the purpose of medical diagnosis or treatment. This approach breaks with the traditional doctrine. Under the traditional view only the fact that the complaint was made was admissible. *Smith*, however, follows the modern trend which allows into evidence both the details of the offense and the identity of the offender.\(^{177}\) This approach is significant in child sexual abuse cases where the only identification the state may have is an out-of-court statement made by a child victim whose testimony is questionable. Allowing into evidence hearsay statements identifying the defendant as the person responsible for the act can bolster the state's case and increase the chances of a conviction.

Finally, *Smith* gives a detailed framework within which trial judges may apply the Rule 803(24) catchall exception.\(^{178}\) At common law, North Carolina did not provide a catchall exception to the hearsay rule. Hearsay evidence was admitted under the general principle of res gestae.\(^{179}\) *Smith* is the first case to interpret in detail Rule 803(24).\(^{180}\) The case plainly sets forth the process a trial judge must go through to determine whether a hearsay statement is admissible under Rule 803(24), what findings of fact must be made, what reasons must be specified, and what conclusions must be stated. The effect of *Smith* is that all trial judges should know exactly what is expected and required of them when ruling on admissibility under Rule 803(24). Therefore, the likelihood of judicial misinterpretation of the admissibility requirements of Rule 803(24) are minimized. No trial judge should fail because of lack of understanding to determine admissibility of evidence under Rule 803(24) in accord with the rule's full requirements.

While *Smith* does give liberal interpretation concerning the admissibility of certain hearsay statements, the case does not give

\(^{176}\) 315 N.C. at 85, 337 S.E.2d at 840.

\(^{177}\) Id.

\(^{178}\) See supra notes 139-164 and accompanying text.


\(^{180}\) See also State v. Tripplett, 316 N.C. 1, 340 S.E.2d 736 (1986) (giving a detailed interpretation of Rule 804(b)(5)).
carte blanche for the admission of any and all hearsay statements made by sexually abused children. Smith does not threaten a defendant's constitutional right to a fair trial or to confront witnesses against him or her.\textsuperscript{181} The hearsay exceptions still require that certain guarantees of trustworthiness be present before a hearsay statement will be allowed into evidence. The excited utterance exception still requires: "(1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication."\textsuperscript{182} The Rule 803(4) hearsay exception for medical diagnosis requires that the statements must have been made for the purpose of obtaining medical treatment.\textsuperscript{183}

Furthermore, Smith's detailed analysis of the Rule 803(24) catchall exception, certainly does not give child hearsay in sexual abuse cases a free ticket into court. The stringent requirements of admissibility under Rule 803(24) will prevent otherwise trustworthy testimony from being received into evidence. Specific notice requirements must be met. The stumbling block for admissibility under Rule 803(24) is the condition that the statement be more probative on the issue than any other evidence which the proponent can procure through reasonable efforts. Usually testimony by the declarant has the most probative value. If a child victim testifies, the testimony may be considered the most probative and exclude testimony by others concerning hearsay statements of the child declarant. Meeting all six requirements of Rule 803(24) as defined in Smith will not be easy. The requirements are strict, and although Rule 803(24) is the catchall exception, judges are cautioned about the frequency of the rule's use. In fact, Smith's interpretation of Rule 803(24) will make it harder to introduce into evidence child hearsay statements inadmissible under any of the other Rule 803 exceptions. Not only must the six legal criteria of the rule be met, but judges may not want to be burdened with the administrative tasks under the rule, particularly making the detailed findings of fact and specific conclusions of law.

The court in Smith did not avoid any issues, but the case raises questions of how the holding will be applied to cases involving hearsay statements made by adults. Smith's interpretation of the excited utterance exception was specifically tailored to situa-

\textsuperscript{181} See supra note 16.
\textsuperscript{182} 315 N.C. at 86, 337 S.E.2d at 841.
\textsuperscript{183} Id. at 84, 337 S.E.2d at 839.
tions involving child declarants. The court specifically noted how spontaneity and stress are “often present for a longer period of time in young children than in adults.” While this is true, spontaneity and stress are still the critical factors that may be applied to a situation involving an adult; the only difference being that a child declarant will usually be allowed a greater lapse of time between the event and the statement. The standard for determining what is, or is not, an “excited utterance” is subjective. Thus, in any case, whether it involves an adult or a child declarant, admissibility will vary.

Smith’s interpretation of Rule 803(4), the medical diagnosis exception is likewise applicable to adults, as well as children. The idea that the statement made for purposes of medical treatment can be made to anyone is not limited to a child declarant. The only significant advantage a child might have is his or her dependency upon a caretaker. This dependency might prompt hearsay statements, thus making such statements more abundant. Statements from an adult may be limited because of an adult’s ability to seek medical treatment many times without assistance. The idea that hearsay statements identifying the perpetrator can be admissible under Rule 803(4) is also applicable to adults, as long as the statement was made for the purpose of medical diagnosis or treatment. This holding can have important ramifications, especially in a rape case and even civil litigation involving personal injury, by making it easier to prove the identity of either the assailant or the negligent party.

Likewise, Smith’s interpretation of the statutory requirements of the catchall or residual exception applies across the board, not just to child abuse cases. Any time a proponent seeks to offer into evidence a hearsay statement under the Rule 803(24) exception, all six requirements of the rule must be met. The court in Smith did more than simply track statutory language of the language of Rule 803(24). The court went further and imposed upon the trial courts administrative duties that were not imposed on them before Smith. Smith’s strict guidelines which set out the trial courts’ new administrative duties are helpful and necessary. First, they prompt

184. Id. at 87, 337 S.E.2d at 841.
185. Id. at 86-87, 337 S.E.2d at 841.
186. The court in Smith did not define caretaker. However, one could assume that a caretaker would be anyone responsible for or having custody of a child such as a parent, babysitter, teacher, daycare operation, a grandparent or other relative.
the judge to really ponder whether or not the evidence should be admitted under the residual exception. By going through the process step by step the judge may think twice before admitting any evidence he thinks is marginally trustworthy simply because of Rule 803(24)'s catchall nature. Second, the guidelines described in Smith are necessary for effective appellate review when admission of the hearsay statement is challenged after the trial. A reviewing court cannot possibly make an informed decision concerning the admissibility of the evidence if the trial judge does not properly document his ruling. Finally, because of the very nature of a child sexual abuse case, a judge may take extra care to meet the Rule 803(24) requirements so that certain hearsay will be allowed in evidence to help convict the person responsible for the abuse.

Although deciding the admissibility of evidence under Rule 803(24) requires some time and careful consideration, the frequency that trial judges would be required to decide on Rule 803(24) admissibility is not that great because hearsay usually falls into one of the numerated exceptions. In situations where the judge is required to make such a determination, very few hearsay statements could withstand the rigors of the Smith analysis. The analysis has six steps: if even one reflects a deficiency, the analysis ends and the evidence is inadmissible.

In Smith, the North Carolina Supreme Court expanded traditional hearsay exceptions to allow into evidence hearsay statements made by sexually abused children. This approach of expanding the traditional hearsay exceptions has been used in other jurisdictions. This expansion facilitates the goal of protecting children from sexual abuse by maximizing the amount of hearsay that may be used to successfully prosecute assailants. Smith's approach facilitates the ultimate goal of protecting children from sexual abuse and mistreatment. While other methods may grant more protection, the North Carolina Supreme Court provided the maximum amount of protection possible under the present rules of evidence. The solution in Smith is a the correct result under the

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187. See, e.g., United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980) (appeals court held that trial court did not abuse its discretion in stretching the excited utterance exception to the hearsay rule to allow in statement of a nine-year-old female victim of sexual abuse to a police officer); Jackson v. State, 31 Md. App. 332, 356 A.2d 299 (1976) (in trial for sexual assault on a five-year-old, testimony of mother that shortly after the event, the child told her details of the assault, was admissible under excited utterance exception to hearsay rule).

188. See infra notes 195-96 and accompanying text.
law of North Carolina.

Smith’s expansion of the traditional hearsay exceptions has been criticized. This expansion has been characterized as inadequate because it fails to allow into evidence certain hearsay statements that should be admissible. Critics also claim that this expansion distorts these traditional exceptions. However, the court is not a mini-legislature and, while Smith’s approach may be inadequate to insure admissibility, the decision does provide a greater degree of flexibility in allowing the introduction of hearsay statements by a child declarant. Courts should give special consideration and treatment to child declarants in sexual abuse cases. Application and interpretation of Smith will not lead to distortions of the traditional hearsay rules. Special considerations can also be given to child declarants and their hearsay statements without wreaking havoc with the statutory rules as applied to an adult declarant.

Admission of child hearsay statements under the residual exception has received more favorable reviews. The residual exception has been noted as being more responsive to the need to admit such evidence. The admission of child hearsay statements under the residual or catchall exception may be the only way to get into evidence a hearsay statement that clearly will not fall into another exception. If, under Smith, the statement meets the six-part test, the statement is admissible. While the test is difficult to meet, the potential for admission exists, and Smith’s interpretation of Rule 803(24) spells out exactly the requirements.

The North Carolina Supreme Court should be commended for its judicial initiative in broadly interpreting two hearsay exceptions and providing guidance for a third in a manner which affords protection to children who suffer from sexual abuse. The other approaches suggested to insure admission of child hearsay involve legislative intervention. One legislative approach is simply to create a new hearsay exception for a child’s statements concerning sexual abuse. The second approach involves using videotaped in-

189. Yun, supra note 5 and Skoler, supra note 91.
190. Yun, supra note 5, at 1753-63; Skoler, supra note 91, at 7-8.
191. Yun, supra note 5, at 1759; Skoler, supra note 91, at 7-8.
192. Both Rules 803(24) and 804(5) have been used to admit hearsay statements of sexually abused children.
193. Yun, supra note 5, at 1761.
194. Id.
195. See, e.g., WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1987), and KAN.
hearings and depositions which insulate the child from the trauma of being in open court at the trial. The taped proceeding allows cross-examination of the child witness, but not direct confrontation. Since the court in Smith had only the Rule 803 hearsay exceptions within which to work, the court did the best it could to provide protection to sexually abused children by allowing into evidence hearsay statements that could potentially lead to the conviction of those responsible for such abuse.

**Conclusion**

The holdings and logic of Smith will aid in the conviction of those guilty of child molestation by expanding the hearsay exceptions for excited utterances and medical diagnosis, and by providing guidance for when the Rule 803(24) catchall exception applies. Smith accommodates situations involving child declarants and maximizes under Rule 803(2) and (4), the use of potentially damaging hearsay evidence needed to convict the assailants responsible for the abuse. Smith's analysis of the Rule 803(24) catchall exception now makes clear and definite what is required of trial judges when they are faced with deciding admissibility of a hearsay statement under Rule 803(24).

Admittedly, Smith does not insure admissibility of all critical hearsay statements made by child victims of sexual abuse. Legislative intervention in North Carolina is needed if a dramatic change is to be made in the treatment of hearsay by a sexually abused child. While legislative intervention is desirable, courts must deal with the present legislation. By working within the confines of the North Carolina Rules of Evidence, Smith's approach of expanding the traditional hearsay exceptions under Rule 803 provides greater flexibility in allowing introduction of hearsay evidence of a child declarant. The approach in Smith cannot be criticized merely because it seeks to expand traditional hearsay exceptions.

The most significant practical implication of Smith will be the decision's strict guidelines that trial judges must follow when ruling on admissibility under Rule 803(24). The trial judges must document their reasoning in detail. While this may place an increased administrative burden on trial judges, this detail is necessary to

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insure that trial judges actually make the analysis and document their rulings for effective appellate review.

Smith raises the question of how the holdings in the case will be applied to cases involving hearsay statements made by adults. The reasoning of the decision is sound and the language clear. Smith sets out the circumstances and characteristics of a child declarant that warrant special attention and consideration. The holdings in Smith are equally applicable to adult declarants, but child declarants will receive more leniency in determining admissibility of hearsay.

Smith goes far in giving child victims of sexual assaults the protection they need and deserve. While the decision does not provide the protection that legislative intervention could provide, the North Carolina Supreme Court in Smith should be commended for its judicial initiative in broadly interpreting two hearsay exceptions and providing guidance on a third. The holding in Smith will help to protect children who suffer the fate of sexual abuse and help end the nightmare that is real.

Benita A. Lloyd