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THE SUBVERSION OF THE HEARSAY RULE: THE RESIDUAL HEARSAY EXCEPTIONS, CIRCUMSTANTIAL GUARANTEES OF TRUSTWORTHINESS, AND GRAND JURY TESTIMONY

*Randolph N. Jonakait**

Under the Federal Rules of Evidence, hearsay is generally prohibited, being admitted only when it falls within a limited class of specific hearsay exceptions. Two general hearsay exceptions were, however, engrafted onto the list of specific ones to allow the courts to confront new and unforeseen hearsay problems. Lower courts have interpreted these "residual" or "catchall" exceptions differently.

This Article analyzes judicial interpretations of the residual exceptions in cases considering the admissibility of grand jury testimony. The author initially discusses the traditional hearsay approach and reviews the legislative history of the residual exceptions. He then analyzes Fourth Circuit cases considering the admissibility of grand jury testimony, maintaining that the corroboration approach to the residual exceptions foreshadows a greatly changed hearsay structure. The author proposes standards for interpreting the residual hearsay exceptions' equivalent circumstantial guarantee of trustworthiness requirement and concludes by applying it to the grand jury cases.

INTRODUCTION

WIGMORE CALLED THE rule against hearsay "that most characteristic rule of the Anglo-American law of evidence—a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world's method of procedure."¹ Esteemed or not, the hearsay rule is so central to the American evidentiary system that a basic change in the

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1. 5 J. WIGMORE, TREATISE ON EVIDENCE § 1364, at 28 (Chadbourn rev. ed. 1974).

treatment of hearsay would fundamentally alter our evidence law.²

The drafters of the Federal Rules of Evidence considered making drastic alterations to the common law approach to hearsay but decided instead that the Rules should incorporate the traditional framework. Under the Rules, hearsay is generally prohibited and is admitted only when it falls within a limited class of statements excepted from the hearsay prohibition.

The drafters, however, engrafted two general hearsay exceptions onto the list of specific ones.³ The lower courts have produced diverse interpretations of these "residual" or "catchall" exceptions,⁴ and the Supreme Court has not yet considered them.⁵ Proper interpretation of these controversial provisions is crucial to evidence law.⁶ Since the residual exceptions allow the courts to confront new and unforeseen hearsay problems,⁷ "[t]he future of hearsay is inextricably linked with the way that courts interpret the residual exceptions."⁸

This Article analyzes judicial interpretations of the residual exceptions in cases that have considered the admissibility of grand jury testimony under a residual provision. This analysis shows that a dominant approach to the residual hearsay exceptions foreshadows a greatly changed evidentiary system. This Article first explains the traditional approach to hearsay embodied in the Federal Rules of Evidence and reviews the legislative history of the catchall

2. "Some have argued that the hearsay rule, on balance, hinders rather than contributes to the practical resolution of legal disputes, but all would acknowledge the centrality of the hearsay rule to the American system of evidence law." R. LEMPERS & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 347 (2d ed. 1982).

3. FED. R. EVID. 803(24) and 804(b)(5).

4. After surveying decisions applying the catchall exceptions, the Litigation Section of the American Bar Association concluded that "[t]hese diverse decisions strongly suggest the need for greater uniformity in the application of the residual exceptions." Joseph, *Emerging Problems Under the Federal Rules of Evidence*, 1983 A.B.A. SEC. LIT. 290. See also R. LEMPERS & S. SALTZBURG, *supra* note 2, at 502 ("Although the appellate courts have addressed issues on a case by case basis, no circuit has laid down a coherent framework to guide trial judges in their exercise of discretion.").

5. "The Supreme Court has had opportunities to cast some light on the residual exceptions, but it has chosen not to do so." R. LEMPERS & S. SALTZBURG, *supra* note 2, at 504.

6. "Congress clearly intended that the residual exceptions be used cautiously. In fact, however, they have been the focal point of considerable judicial activism, a trend which has been met with varying degrees of enthusiasm. Joseph, *supra* note 4, at 279-80 (footnotes omitted).

7. Each residual exception "not only accommodates previously unencountered, unforeseen situations, but also helps courts identify circumstances in which the creation of a new exception might be justified." G. LILLY, *AN INTRODUCTION TO THE LAW OF EVIDENCE* § 78, at 273 (1978).

8. R. LEMPERS & S. SALTZBURG, *supra* note 2, at 504.

exceptions. It then discusses and analyzes the Fourth Circuit cases considering the admissibility of grand jury testimony under the residual exceptions.⁹ Examination of these cases demonstrates that the Fourth Circuit Courts interpreting the residual exceptions are not only stretching the boundaries of the specific exceptions, but are replacing the traditional hearsay structure with one explicitly rejected by the Rules' drafters.¹⁰ As a result, the fundamental hearsay framework adopted in the Federal Rules of Evidence is being subverted. The Article recommends an interpretation of the residual exceptions which allows for growth and development of the hearsay doctrine consistent with the Rules' structure. It concludes by applying this interpretation of the residual exceptions to the grand jury cases.

I. THE TRADITIONAL HEARSAY FRAMEWORK EMBODIED IN THE FEDERAL RULES OF EVIDENCE

To credit an assertion, the trier of fact must draw inferences about the asserter. The trier must first infer that he and the declarant share the same understanding of the assertion's words. The assertion must not be ambiguous. If it is, the trier must have a way of determining what the asserter meant. The trier must also conclude that the assertion was not an attempt to deceive—that the asserter sincerely believed what was said. If the trier decides that he understands the assertion and that it was sincere, he must determine

9. These rulings have been selected for a number of reasons. First, this has been an area of specific dispute. Professor Michael H. Graham has commented that "An area of particular controversy has emerged under Rule 804(b)(5) concerning the admissibility of grand jury testimony of a witness unavailable for any of the reasons specified in Rule 804(a)." M. GRAHAM, *EVIDENCE: TEXT, RULES, ILLUSTRATIONS AND PROBLEMS* 276-77 (1983). Second, courts have split over how to treat this problem. See, e.g., *McKethan v. United States*, 439 U.S. 936, 939 (1978) (Stewart, J., dissenting from denial of certiorari) (summarizing the split in interpretation between the Fourth and Fifth Circuits). Third, grand jury testimony provides a strong litmus for examining the proper interpretation of the residual exceptions, since the Federal Rules of Evidence strongly indicate that grand jury testimony is seldom to be admitted. See *FED. R. EVID.* 804(b)(1). Fourth, the Litigation Section of the American Bar Association has recently called for the Supreme Court to clarify when grand jury testimony can be admitted under a residual exception. Joseph, *supra* note 4, at 291 ("At some point the Supreme Court may find it desirable to indicate the scope of the residual exception in cases raising issues that appear to arise with some frequency—e.g., the admissibility of grand jury testimony of a witness not present and subject to cross-examination at trial."). See also Note, *Residual Hearsay Exceptions: Are They Really Trustworthy?*, 44 *BROOKLYN L. REV.* 1125, 1147 (1978) (urging trial court restraint in admitting evidence under the residual exceptions until the Supreme Court clarifies their proper interpretation).

10. "There is some reason to believe that certain appellate decisions have too quickly stretched the rules to protect trial court rulings that would have been difficult to justify under specific hearsay exceptions." Joseph, *supra* note 4, at 290-91.

whether that understandable, sincere statement mirrored reality. To do that, the trier must also infer that the assertion was neither the product of a faulty memory nor the result of a flawed perception. To credit an assertion, then, the trier must resolve these four issues: ambiguity, sincerity, perception, and memory.¹¹

When the assertion is made in court, the trier makes these assessments with information in addition to the words of the declarant. An oath is given to the witness and the trier of fact observes his demeanor. Cross-examination, however, is the most potent source of information about the assertion's worth. The declarant's adversary has a motive to explore ambiguities in the statement, to expose insincerity, reveal a flawed memory, or uncover a faulty perception.¹²

The rule against hearsay is inextricably linked with the belief that cross-examination can demonstrate the debilities of an assertion.¹³ When an assertion is hearsay, it is not subject to contemporaneous cross-examination in front of the trier of fact.¹⁴ Hearsay is barred because the trier is unable to properly evaluate the hearsay assertions.¹⁵

11. See Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974) (thorough discussion of inferential processes); see also R. LEMPERT & S. SALTZBURG, *supra* note 2, at 350-52 (brief but excellent discussion of inferences).

12. The right to cross-examine is of the greatest importance to the integrity of the factfinding process Blunt though it may be for the discovery of subconscious distortion, cross-examination is the principle [sic] legal instrument for testing the accuracy of a witness's perception, memory, and communication. By means of cross-examination the witness may be required to explain ambiguous, unclear, or inconsistent testimony; personality traits that influence cognitive functioning may be disclosed; the effect of the witness's mental set at the time of perception, possible suggestive influences, and numerous other factors which affect a witness's mental processes may be investigated Cross-examination . . . may disclose deliberate testimonial falsification.

Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 22. See also J. MAQUIRE, *EVIDENCE: COMMON SENSE AND COMMON LAW* 17-18 (1947) ("Cross-examination tests what legal commentators are prone to term human testimonial qualities—(1) willingness, and (2) ability, to tell or otherwise convey the truth about the subject matter of inquiry.").

13. "Emphasis on the basis of the hearsay rule today tends to center upon the condition of cross-examination The belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental." FED. R. EVID. Art. VIII advisory committee introductory note. Imperfections in perception, memory, narration and sincerity are often called the "hearsay dangers." See, e.g., Wellborn, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 TEX. L. REV. 49, 53 (1982).

14. FED. R. EVID. 801(c) contains the basic hearsay definition: "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."

15. The assumption underlying the hearsay rule is that cross-examination reveals these potential defects in a declarant's statements; accordingly, the lack of cross-examination is the fundamental reason for excluding hearsay evidence. Although

The hearsay prohibition is far from absolute; exceptions to the rule abound.¹⁶ Although no single reason explains all of the exceptions,¹⁷ the necessity and reliability of some hearsay justifies its admissibility despite the general bar.¹⁸

These exceptions have become rules in themselves.¹⁹ Under the traditional framework, the admission of hearsay is not left to the discretion of the trial court, even if the judge in a particular case believes that the hearsay is necessary or reliable.²⁰ Instead, the exceptions specifically define classes of hearsay that may be admitted.²¹ The hearsay proponent must convince the judge that the circumstances surrounding the making of the statement satisfy the elements of an exception; otherwise, the hearsay is barred.²²

Widespread criticism of the hearsay rule has prompted proposals for fundamental changes.²³ After considering various sugges-

other reasons for rejecting hearsay have been advanced (for example, that the declarant did not speak under oath and his demeanor could not be observed by the factfinder), there now is consensus that it is the untested nature of hearsay evidence that justifies its exclusion. This rationale, of course, is consistent with a major tenet of the adversary system: cross-examination is essential for ensuring accuracy and discovering truth.

G. LILLY, *supra* note 7, at 159-60; see also Graham, "Stickperson Hearsay": *A Simplified Approach to Understanding the Rule Against Hearsay*, 1982 U. ILL. L. REV. 887, 888 ("When the statement is hearsay, the trier of fact is not in a position to assess the proper weight to be accorded the out-of-court statement . . .").

16. The Federal Rules of Evidence contain 27 specific exceptions to the hearsay rule. FED. R. EVID. 803 and 804.

17. See R. LEMPERT & S. SALTZBURG, *supra* note 2, at 382.

18. Wigmore advanced the idea "that the great principle underlying the [hearsay] exceptions were [n]ecessity and [c]ircumstantial [g]uarantees of [t]rustworthiness. We have been using the first of those terms and have made only an unsubstantial change in substituting 'reliability' for the second." J. MAQUIRE, *supra* note 12, at 147; see also R. LEMPERT & S. SALTZBURG, *supra* note 2, at 355 ("The guiding principle behind most common law [hearsay] exceptions embod[ies] two criteria, *necessity* and *reliability*." (emphasis added).

19. See R. LEMPERT & S. SALTZBURG, *supra* note 2, at 382 ("The hearsay exceptions are really rules in themselves, rules which specify the situations in which hearsay statements are admissible for all relevant purposes.").

20. "In the American legal system hearsay is not routinely admitted, nor is the decision to admit hearsay left to the discretion of the judge." *Id.* at 355.

21. In summarizing the traditional reasons given for the hearsay exceptions, Judge Weinstein stated: "It should be emphasized that Wigmore's rationale—as well as that of most cases—makes admissible a class of hearsay rather than particular hearsay for which, in the circumstances of the cases, there is need and assurance of reliability." Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 337 (1961).

22. "A hearsay statement is inadmissible unless it falls within one of the exceptions to the rule barring the admission of hearsay." M. GRAHAM, *supra* note 9, at 73.

23. "The most common criticisms have been that the exclusion of hearsay evidence hampers the search for truth too often to be tolerated in a rational system of evidence law and that the proliferation of hearsay exceptions has created a system of unnecessary and unmanageable complexity." R. LEMPERT & S. SALTZBURG, *supra* note 2, at 497. Weinstein has stated that the hearsay rules "exclude evidence that has a higher probative value than evi-

tions, however, the drafters of the Federal Rules of Evidence retained the traditional approach.²⁴ Under the Rules, hearsay is

dence they admit. They fail to provide adequate procedural devices to minimize the possibility of misjudging the probative force of hearsay admitted." Weinstein, *supra* note 23, at 331.

24. The retention of the traditional framework is demonstrated in Rule 802: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FED. R. EVID. 802. Consequently, "the structure of the hearsay article of the Federal Rules is not substantially different from that of the common law hearsay doctrine." Wellborn, *supra* note 15, at 55.

Furthermore, the Advisory Committee specified that the traditional framework was being adopted. See FED. R. EVID. Art. VIII advisory committee introductory note ("The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which the evidence is not required to be excluded even though hearsay."). The Committee also refused to abandon "the system of class exceptions in favor of individual treatment in the setting of the particular case, accompanied by procedural safeguards . . ." *Id.*

The Committee noted that "[a]bolition of the hearsay rule would be the simplest solution," but concluded that it had "been unconvinced of the wisdom of abandoning the traditional requirement of some particular assurance of credibility as a condition precedent to admitting the hearsay declaration of an unavailable declarant." *Id.* The case-by-case approach had been, according to the Committee, "impressively advocated" by Judge Weinstein. *Id.* (citing Weinstein, *supra* note 23). Since the residual exceptions, viewed in isolation, seem to embody the principles of Weinstein's position, a more complete understanding of the rejected proposal is useful. In the article cited by the Committee, Weinstein contends that "it would seem desirable to abandon the class exception system and substitute individual treatment if such a practice were to be combined with advance notice to the opponent when hearsay was to be introduced. Hearsay would then be admissible when it met the usual standard of any line of proof." Weinstein, *supra* note 23, at 338. Hearsay would be admissible not when its surrounding circumstances satisfied the elements of a hearsay exception; instead, in each case, the trial judge would determine admissibility by weighing the probative force of the hearsay against the possibility of prejudice. *Id.* at 338. Weinstein contended that the traditional exceptions could give guidance for this assessment. "The circumstantial proof of credibility which gave rise to the class exception may continue to be utilized in the particular case in assessing probative force." *Id.* at 339.

Weinstein's position was no doubt thoroughly considered by the Advisory Committee since he was a member of it. 10 J. MOORE & H. BENDIX, MOORE'S FEDERAL PRACTICE § 15 (3d ed. 1985) (listing the Advisory Committee members). The Committee's rejection indicates that the Federal Rules of Evidence were not intended to authorize the admission of hearsay whenever the trial judge believed it or determined that the probative value of the hearsay outweighed its prejudicial effect.

The Rules' history also shows an acceptance of the traditional common law hearsay framework. The preliminary draft of the Rules proposed a framework that was a sharp departure from the traditional scheme, being much like Weinstein's proposal. It contained only two exceptions, each admitting hearsay not because it fell within a specifically defined exception, but because the trial judge determined that the hearsay was reliable. The text of the first proposed rule read: "A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available." FED. R. EVID. 8-03(a) (Prelim. Draft), 46 F.R.D. 161, 345 (1969). The second exception read: "[a] statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer strong assurances of accuracy and the declarant is unavailable as a witness." *Id.* at 377.

The traditional exceptions only served as "illustrations" of the type of hearsay that satis-

generally prohibited unless it falls within a defined exception.

Two residual hearsay exceptions are included in the current Rules, and these provisions seem to embody a nontraditional approach to hearsay. Does the inclusion of the two residual exceptions mean that, in spite of all the other indications,²⁵ the Rules in fact rejected the traditional approach to hearsay?

II. THE RESIDUAL EXCEPTIONS AND THE TRADITIONAL HEARSAY APPROACH

Rule 804(b)(5) permits the introduction of an out-of-court assertion even though the hearsay does not fit within a class exception.²⁶ Basically, once the advance notice requirement is satisfied this residual exception permits the introduction of hearsay upon a showing that the statement has circumstantial guarantees of trustworthiness equivalent to the specific exceptions of Rule 804,²⁷ and that the proffered hearsay is more probative than other reasonably obtainable evidence. These two requirements look like restatements of the reliability and necessity concepts which seemingly give the judge power to assess the admissibility of hearsay in a sharply different

fied the rules. *Id.* at 345 & 377 (both exceptions stated, "[b]y way of illustration only, and not by way of limitation, the following are examples of statements conforming with the requirements of this rule . . ."). Proposed rule 8-03 listed 23 such illustrations, *id.* at 345-50, and proposed rule 8-04 listed five at 377-78.

This approach was quickly abandoned. The Supreme Court rejected the subordination of the specific hearsay exceptions to the principles of reliability and necessity as too drastic a change from the traditional hearsay doctrine. R. LEMPERT & S. SALTZBURG, *supra* note 2, at 499. In the revised draft, the "illustrations" became categorical exceptions. FED. R. EVID. (Revised Draft), 51 F.R.D. 315, 419-22, 438-39 (1971). The hearsay structure reverted to the traditional framework.

25. See *supra* note 24.

26. (B) HEARSAY EXCEPTIONS. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(5) 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 makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 804(b)(5). FED. R. EVID. 803(24) tracks Rule 804(b)(5) except that it does not require that the declarant be unavailable.

27. FED. R. EVID. 804(b)(1)-(4) recognizes hearsay exceptions for former testimony, dying declarations, statements against interest, and statements of personal or family history.

and expanded fashion than permitted by the traditional approach. Instead of determining whether the circumstances surrounding the assertion satisfy the elements of an exception, the judge determines whether the hearsay is necessary and trustworthy.

Viewed this way, the hearsay catchalls appear to abandon the common law approach. Legislative history, however, shows that the drafters of the residual exceptions did not intend to upset the traditional framework.

The 1971 draft of the Rules, which adopted the traditional hearsay framework, contained the forerunners of the residual exceptions.²⁸ The Advisory Committee's introductory note to these provisions stated that, although the specific exceptions draw fully from past knowledge concerning hearsay, it would be "presumptuous" to believe that all worthwhile hearsay had been listed.²⁹ So that the hearsay rule would not be "a closed system," two residual exceptions were included.³⁰ The Committee then warned that the catchalls "do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate trustworthiness *within the spirit of specifically stated exceptions*."³¹

The residual exceptions met resistance. The House of Representatives eliminated them, explaining, "The [House Judiciary] Committee deleted these provisions . . . as injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial."³²

The Senate reinstated them. The Senate Judiciary Committee concluded that catchalls were necessary, but, concerned about undercutting existing hearsay doctrine, agreed "with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions"³³ The Senate Report concluded that the residual

28. FED. R. EVID. (Revised Draft), 51 F.R.D. 315, 422, 439 (1971). At the conclusion of each list of specific hearsay exceptions, the draft added, "Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." *Id.*

29. *Id.* at 437, 445.

30. *Id.*

31. *Id.* (emphasis added). See also FED. R. EVID. Art. VIII advisory committee introductory note.

32. H.R. REP. NO. 650, 93d Cong., 1st Sess. 6 (1973), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7079. See also 4 J. BAILEY & O. TRELIS, THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS (1980).

33. S. REP. NO. 1277, 93d Cong., 2d Sess. 19, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7066. See also J. BAILEY & O. TRELLES, *supra* note 32. The Senate

exceptions were not a grant of broad power to the trial courts, but were rules with a strictly limited reach:

It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions.³⁴

When the Conference Committee's version, which adopted the Senate's provision with the addition of the notice requirement, was reported on the floor of the House, questions were raised about the residual provisions' effect on the traditional hearsay approach. Representative Holtzman was concerned that the catchall exceptions effectively abolished existing hearsay doctrine.³⁵ Representative Dennis, a Conference Committee member, replied that he preferred to omit the residual exceptions, but supported them "as a reasonable compromise which really does not add a whole lot because . . . the operative language is the court's language; *it has got to be something comparable to the ordinary hearsay exceptions.*"³⁶

amended the draft by changing "comparable" to "equivalent" guarantees of trustworthiness and added three additional requirements. Its version read:

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 statement into evidence.

CONF. REP. NO. 1597, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7098, 7106.

34. S. REP. NO. 1277, 93d Cong., 2d Sess. 20, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7066.

35. Representative Holtzman stated:

One of these rules—[R]ule 804(b)(5)—as it came out of the conference committee, creates a general open-ended exception to the hearsay rule. It basically abolishes the rules against hearsay and leaves it to the discretion of every judge to let in any kind of hearsay that he wants [T]his conference report will permit the prosecution to use any kind of hearsay, as long as some particular [f]ederal judge thinks that the hearsay statement is trustworthy The conference committee created an exception which swallows up the rule

120 CONG. REC. 40,892-93 (1974).

36. *Id.* at 40,894 (emphasis added). Professor Imwinkelried, advocating an expansive interpretation of the residual exceptions, cited Representative Holtzman's comments and concluded, "Notwithstanding Representative Holtzman's vigorous opposition, the House and Senate adopted the compromise language hammered out in the Conference Committee." Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 SAN DIEGO L. REV. 239, 252 (1978). Imwinkelried, however, fails to mention anything about the reply of Representative Dennis.

In assessing the intended reach of the residual provision, the Third Circuit noted Repre-

This legislative history illustrates the intended scope of the residual exceptions. They were adopted to allow for growth and flexibility in the hearsay rule, but only within the spirit of the traditional approach. Congress never intended that a trial judge admit hearsay under a residual exception whenever he believed it necessary and reliable or true. Only hearsay comparable to the hearsay permitted under a specific exception was to be admitted.

Although the legislative intent is clear, the language of the residual exceptions is not. Rule 804(b)(5) contains six requirements.³⁷ Of these, the courts have been most concerned with the "equivalent circumstantial guarantees of trustworthiness" element.³⁸ This wording is not precise enough to give much guidance

sentative Dennis' response and stated, "Representative Dennis, because of his role in Congressional consideration of the rules, would seem to be an 'authoritative person' whose statements are entitled to some weight in evaluating the legislative intent in modifying the residual rules of hearsay." *United States v. Bailey*, 581 F.2d 341, 347 n.9 (3d Cir. 1978). A Rule 804(b)(5) interpretation required the court to "keep in mind its limited scope as intended by Congress." *Id.* at 347. *See also* *United States v. Love*, 592 F.2d 1022, 1026 (8th Cir. 1979) ("The history of Rule 804(b)(5) and its counterpart, Rule 803(24), indicates that Congress did not intend to create a broad new hearsay exception. The intent of Congress was that Rule 804(b)(5) would be used very rarely, and only in exceptional circumstances."). *Accord* *United States v. Kim*, 595 F.2d 755, 765 (D.C. Cir. 1979); *Lowery v. Maryland*, 401 F. Supp. 604, 608 (D. Md. 1975).

37. The requirements of Rule 804(b)(5) are: (1) that the declarant is unavailable; (2) the hearsay is not "specifically covered" by any of the specific exceptions of Rule 804 but still has "equivalent circumstantial guarantees of trustworthiness" to them; (3) that the hearsay goes to prove a material fact; (4) that the hearsay is "more probative" than any other evidence reasonably obtainable by the hearsay's proponent; (5) that the general purposes of the rules and the interests of justice will be served by introducing the hearsay; and (6) that the hearsay's proponent give advance notice of his intention to use the hearsay. *See* FED. R. EVID. 804(b)(5).

38. "The courts have been most concerned with the requirement that there be circumstantial guarantees of trustworthiness equivalent to those that justify other hearsay exceptions." R. LEMPERT & S. SALTZBURG, *supra* note 2, at 503. *See also* *United States v. Barlow*, 693 F.2d 954, 960 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983) ("Although there is general agreement that grand jury testimony can be admitted under Rule 804(b)(5), differences exist as to the exact terms of its admission, particularly on the question of what constitutes 'equivalent circumstantial guarantees of trustworthiness' within the meaning of the rule.").

The least significant elements are those requiring that the hearsay prove a material fact and that the hearsay admission serve the general purposes of the rules and the interests of justice. The legislative history of the hearsay exceptions fails to explain the meaning of either element; commentators agree that neither has any real substance. *See, e.g.,* Yasser, *Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule*, 11 TEX. TECH L. REV. 587, 608 (1980) ("The requirement that evidence be of a material fact is redundant and unnecessary, because if not material, the evidence would not be relevant and would be inadmissible under Rule[s] 401 and 402."); *accord* Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867, 874 n.46 (1982). One court interpreted the material fact language to mean "the exception should not be used for trivial or collateral matters." *United States v. Iaconetti*, 406 F. Supp. 554, 559

whether to admit the hearsay under a residual exception. Instead, it has been viewed as a grant of broad discretionary power to trial judges.³⁹ Thus far, the higher courts have furnished little guidance regarding the exercise of this discretion.

III. THE HEARSAY ARTICLE AND GRAND JURY TESTIMONY

Grand jury testimony provides a useful arena in which to examine the proper operation of a residual exception. The drafters specified, in several hearsay provisions, that grand jury testimony is normally not to be admitted at trial.⁴⁰ Consistent with these provisions, the drafters did not intend for the residual exceptions to sanction wholesale admission of grand jury testimony.

A. *Grand Jury Testimony as Former Testimony*

A party seeking to introduce grand jury testimony at trial is trying to admit former testimony which the hearsay exception for former testimony, Rule 804(b)(1), does not allow.⁴¹ The exception's key requirement is that the party against whom the former testimony is being offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."⁴²

(E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977). Even read this way, the requirement matters little. See R. LEMPERT & S. SALTZBURG, *supra* note 2, at 503 ("This reading, like the more technical reading, will not limit the applicability of the exceptions where they truly matter.").

The general purposes and interests of justice clause is redundant; it is merely a restatement of Rule 102. 4 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE*, ¶ 803(24)[01], at 803-379 (1985); see also R. LEMPERT & S. SALTZBURG, *supra* note 2, at 503 ("[I]f the statement is material, trustworthy and necessary, the purposes of the rules and the interests of justice will almost certainly be served by its admission.").

39. See J. WEINSTEIN & M. BERGER, *supra* note 38, at ¶ 803(24)[01], at 803-374 ("Since there is an enormous variation in the guarantee of trustworthiness among these specific exceptions, the range of discretion granted the trial judge [by a residual exception] is quite large.").

40. See *infra* notes 40-43 and accompanying text.

41. RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE . . .

(B) HEARSAY EXCEPTIONS. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

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

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

42. See FED. R. EVID. 804(b)(1). The Rule's history demonstrates the importance of this requirement. The draft which the Supreme Court submitted to Congress required an opportunity to develop the testimony, but that opportunity did not necessarily have to be

Since grand jury testimony is produced in an *ex parte* proceeding, no one besides the prosecutor has the chance to develop the testimony. Thus, grand jury testimony is usually not admissible as former testimony.⁴³

B. *Grand Jury Testimony as Statements Against Interest*

The grand jury testimony sought to be introduced at trial often takes the form of statements against interest. The declarant tells the grand jurors, "I committed the crime and the defendant did it with me." Even though Rule 804(b)(3)⁴⁴ contains a specific exception for statements against interest, this sort of grand jury testimony is not to be routinely admitted under this exception.

A statement to grand jurors may not be reliable as against interest just because a declarant implicates himself along with others. In these circumstances, the declarant may have strong motives to falsify. The Rules Advisory Committee cautioned against admitting such hearsay under Rule 804(b)(3) because the statements may not truly be against interest, but rather, an attempt to gain favor with

afforded the party opposing the hearsay at trial as long as the motive and interest to develop the testimony were "similar to those of the party against whom now offered." FED. R. EVID. (Revised Draft), 51 F.R.D. 315, 438 (1971).

Congress found this too lax. The House Report stated, "The Committee considered that it is generally unfair to impose upon the party against whom the hearsay is being offered responsibility for the manner in which the witness was previously handled by another party." H.R. REP. NO. 650, 93d Cong., 1st Sess. 15 (1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7075, 7088. Consequently, Congress inserted the more restrictive provision into the Rule.

43. Grand jury testimony may be admissible as former testimony against the government. *See* *United States v. Henry*, 448 F. Supp. 819, 821 (D.N.J. 1978) (grand jury testimony admissible when offered by criminal defendants under Rule 804(b)(1) because the prosecution had the opportunity to develop the testimony in the grand jury); *see also* *United States v. Klauber*, 611 F.2d 512, 516-17 (4th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980) (suggesting, without holding, admissibility of grand jury testimony as former testimony if introduced against the government).

44. RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

• • • •

(B) HEARSAY EXCEPTIONS. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

• • • •

(3) STATEMENT AGAINST INTEREST. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

FED. R. EVID. 804(b)(3).

the authorities.⁴⁵ Grand jury testimony is not routinely admissible as a statement against interest.⁴⁶

C. Grand Jury Testimony as Admissions by a Coconspirator

The grand jury testimony sought to be introduced often takes the form of the witness claiming that he and the defendant were coconspirators. While Rule 801(d)(2)(E) exempts the admission of a coconspirator from the hearsay ban, it does not permit the introduction of this type of grand jury testimony. To be admissible, the Rule requires the statements be made by a "co-conspirator of a party during the course and in furtherance of the conspiracy."⁴⁷ Conspiracy testimony before the grand jury does not further the illegal enterprise. Furthermore, since the testimony usually comes after the witness has been arrested or his part in the conspiracy has otherwise ended, the statements are not made during the course of the conspiracy.⁴⁸ For these reasons, the testimony is not admissible as a coconspirator's statement.

45. FED. R. EVID. 804(b)(3) advisory committee note. See also Comment, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 COLUM. L. REV. 159, 164 (1983) ("Other motives to falsify may be present even when there is no fear of reprisal for admitting a crime: the desire to share blame with another; the wish for revenge; the hope of diverting attention from oneself; and even publicity seeking or simple lying."); *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1102 (5th Cir. 1981), cert. denied, 459 U.S. 834 (1982) (adding another motive to falsify accusatory statements against interest: "the enmity often generated in a conspiracy gone awry . . .").

46. Courts have been wary of admitting statements made to law enforcement agents as statements against interest when the declarant inculcates others besides himself. See *Sarmiento-Perez*, 633 F.2d at 1102-03 (statements made while in custody cannot be admitted as statements against interest). Most courts have not drawn such an absolute rule. See E. CLEARY, MCCORMICK ON EVIDENCE § 279, at 826 (3d ed. 1984) [hereinafter cited as MCCORMICK ON EVIDENCE]. However, courts "know that statements to law enforcement officials may be part of a plea bargaining process or may be otherwise motivated by a desire to curry favor. This does not mean that such statements are never admitted. It does mean that such statements are subject to close scrutiny." R. LEMPERT & S. SALTZBURG, *supra* note 2, at 491.

47. FED. R. EVID. 801(d)(2)(E). A statement is not hearsay if it "is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." *Id.*

48. Once a conspiracy has ended, the statements of its former members are admissible only against themselves Conspiracies are considered to have ended when the conspiracy has achieved its goal or has in some other way been broken up or disbanded. Thus, the arrest or indictment of the conspirators will be treated as terminating the conspiracy.

R. LEMPERT & S. SALTZBURG, *supra* note 2, at 398.

D. Grand Jury Testimony as Inconsistent Statements

Rule 801(d)(1)(A)⁴⁹ permits the introduction of inconsistent statements as proof of the statements' contents. Prior to its enactment, the Rule produced a struggle in Congress about whether grand jury testimony ought to come within its boundaries.⁵⁰ Although the current Rule permits such testimony, the restrictions on its admissibility illustrate the congressional expectation that grand jury testimony would not be routinely admissible under the hearsay article.

Rule 801(d)(1)(A) does not require that the inconsistent statement have been taken subject to cross-examination. An inconsistent statement may be admitted for its truth if the declarant testifies

49. RULE 801. DEFINITIONS

The following definitions apply under this article:

. . . .

(D) STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if —

(1) PRIOR STATEMENT BY WITNESS. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition

FED. R. EVID. 801(d)(1)(A).

50. Rule 801(d)(1)(A) as sent to Congress was much broader than that finally adopted. The original version allowed the introduction of all statements for their truth as long as the declarant was subject to cross-examination. FED. R. EVID. (Revised Draft), 51 F.R.D. 315, 413 (1971).

The House narrowed this provision and provided that a prior inconsistent statement was admissible only if it had been made "under oath [and] subject to cross-examination . . ." 120 CONG. REC. 2366, 2383 (1974). The Senate, strenuously urged by the Justice Department that the bill be changed back to the Supreme Court version, rejected the House version and reinstated the earlier provision. See *Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Committee on the Judiciary*, 93d Cong., 2d Sess. 112 (1973) (testimony of Vincent Rakestraw, Assistant Attorney General).

The major reason for the Justice Department's position was a concern about organized crime's intimidation of witnesses:

The argument in favor of admitting prior inconsistent statements as evidence stems largely from the fact that, in organized crime cases, prospective witnesses who have given grand jury or other statements to law enforcement authorities are often intimidated and caused to change their story at trial. In such cases, the prior statement can, to be sure, be used to impeach their testimony, but if the witness is the only or the principal witness against the accused, the criminal tactic succeeds since the government's case must fail for lack of proof.

Id. at 358 (Senate Judiciary Comm. Staff Memorandum). The House Report noted that the draft version had some support "based largely on the need to counteract the effect of witness intimidation in criminal cases . . ." H.R. REP. NO. 650, 93d Cong., 1st Sess. 13 (1973), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7086.

The Senate Report specifically noted that "[t]he House severely limited the admissibility of prior inconsistent statements by adding a requirement that the prior statement must have been subject to cross-examination, thus precluding even the use of grand jury statements." S. REP. NO. 1277, 93d Cong., 2d Sess. 20, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7062.

at trial, is subject to cross-examination, and the prior statement was given under oath "at a trial, hearing, or other proceeding, or in a deposition" ⁵¹ The express purpose of the "other proceedings" language was to permit the use of grand jury testimony containing inconsistent statements. ⁵²

The Rule, however, restricts the introduction of grand jury testimony. The availability of trial cross-examination is crucial; prior inconsistent statements, including grand jury testimony, may only be admitted when the declarant can be cross-examined in front of the trial jury. ⁵³ If the declarant is absent, the Rule cannot be used.

This review of various provisions of the hearsay articles illustrates that the specific rules admitting hearsay exclude the wholesale introduction of grand jury testimony. Interpreting the catchall exceptions to allow systematic admission of grand jury testimony is inconsistent with the drafters' intentions.

IV. THE FOURTH CIRCUIT AND GRAND JURY TESTIMONY

The Fourth Circuit has been a leader in admitting grand jury testimony under the residual exceptions. ⁵⁴ The key element in its analytic framework for the residual exceptions—whether sufficient

51. See FED. R. EVID. 801(d)(1)(A).

52. The Conference Committee stated that Rule 801(d)(1)(A) "as adopted covers statements before a grand jury." CONF. REP. NO. 1597, 93d Cong., 2d Sess. 10, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7098, 7104. See also J. BAILEY & O. TRELLES, *supra* note 32.

32. Professor Blakey has stated:

The difference between the House version, requiring that the statement have been made "subject to cross-examination" and the version finally adopted, providing that the statement must have been made "under oath subject to the penalty of perjury" during some sort of proceeding, is that statements made during testimony before a grand jury, where only the prosecution may present evidence, can now be used to support a verdict at a subsequent trial despite a change of heart and story by the declarant.

Blakey, *Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence*, 64 KY. L.J. 3, 9 (1975). See also R. LEMPERT & S. SALTZBURG, *supra* note 2, at 515-16 ("The language admitting inconsistent statements made under oath at 'other proceedings' was included at the insistence of the Senate so that grand jury testimony would be admissible where it varied from the declarant's courtroom statements.").

53. See Blakey, *supra* note 52, at 10 (noting that "the existence of an opportunity for present cross-examination of the witness at trial provides adequate protection for the party or parties against whom the evidence is offered."); FED. R. EVID. 801(d)(1)(A) advisory committee note (stating that the dangers of hearsay are largely nonexistent for inconsistent statements because the declarant testifies subject to cross-examination in front of the jury).

54. See *McKethan v. United States*, 439 U.S. 936, 939 (1978) (Stewart, J., dissenting from denial of certiorari) ("The Courts of Appeals are struggling with the problem of the admissibility of hearsay evidence not falling within one of the traditional exceptions to inadmissibility. The Fourth Circuit has taken a relatively liberal view of the admissibility of grand jury testimony").

corroboration exists at trial to establish that the hearsay is trustworthy—has been used by almost all courts interpreting the catchalls.⁵⁵ The approach to the residual provisions which places reliance upon corroboration is incorrect. It leads not only to the near routine admission of grand jury testimony, in violation of the drafters' intent, but also subverts the hearsay framework of the Rules.

A. *The Fourth Circuit Cases*

1. *United States v. West*

*United States v. West*⁵⁶ was the initial Fourth Circuit case to consider the admissibility of grand jury testimony under a residual exception. The prosecution's crucial evidence that three defendants committed federal heroin offenses was Michael Victor Brown's grand jury testimony.

Brown "volunteered" his services to federal agents while jailed on a pending charge. The agents arranged for West to purchase drugs from two of the defendants.⁵⁷ After each drug transaction, which was observed, recorded and photographed, a drug enforcement agent wrote a detailed statement of the events.⁵⁸ Brown then read, corrected, and signed the statement.⁵⁹

When Brown subsequently appeared before the grand jury, the "government attorney read the statements that Brown had signed and [had him confirm] they were correct."⁶⁰ Before trial, Brown was murdered. The prosecution sought to introduce the grand jury testimony under Rule 804(b)(5).⁶¹ The trial court admitted the

55. Lewis, *The Residual Exceptions to the Federal Hearsay Rule: Shuffling the Wild Cards*, 15 RUTGERS L.J. 101, 116-23 (1983).

56. 574 F.2d 1131 (4th Cir. 1978).

57. *Id.* at 1133.

58. *Id.*

59. *Id.*

60. *Id.* at 1134. As a result of his cooperation, Brown was released from jail, his drug charge dismissed, a parole detainer lifted, and he was given \$855. *Id.*

61. *Id.* The notice requirement of Rule 804(b)(5) was clearly met. The prosecution notified the defendants a week before the scheduled trial date of its intention to rely on the residual exception. After the grand jury testimony was ruled admissible, a week's continuance was given. *Id.* Compliance with the notice provision, however, is not always as clear.

The Rule explicitly states that if pretrial notice is not given, the hearsay cannot be admitted. FED. R. EVID. 804(b)(5). Notice is required "to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it" *Id.* See also Note, *The Federal Courts and the Catchall Hearsay Exceptions*, 25 WAYNE L. REV. 1361, 1375 (1979) ("[P]retrial notice must be given in all circumstances. If notice was not given before trial, the catchall hearsay evidence must not be admitted."). Some courts have followed this reasoning. See, e.g., *United States v. Atkins*, 618 F.2d 366, 372 (5th Cir. 1980) ("[T]here is absolutely no doubt that Congress intended that the require-

hearsay, and the Court of Appeals affirmed the resulting convictions.⁶²

ment of advance notice be rigidly enforced."); *United States v. Oates*, 560 F.2d 45, 73 n.30 (2d Cir. 1977).

The majority of courts, however, have "imparted sufficient flexibility to permit the admission of hearsay under the residual exceptions despite the absence of pretrial notice to the adverse party when the proponent has not become aware of the need to offer such evidence until after trial has commenced." *Sonenshein*, *supra* note 38, at 901. *See, e.g.*, *United States v. Iaconetti*, 540 F.2d 574, 578 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) (although notice not given in advance of trial, notice during trial held adequate because "some latitude must be permitted in situations like this in which the need does not become apparent until after the trial has commenced."). *See also* *United States v. Bailey*, 581 F.2d 341, 348 (3d Cir. 1978) (holding notice during trial sufficient when the trial judge "offered sufficient time, by means of granting a continuance, for the party against whom the evidence is to be offered to prepare to meet and contest its admission.").

One commentator argues for flexibility in the notice provision, with the opportunity for a continuance as the better policy:

Given the uncertain nature of the trial process, there will be occasions when a conscientious and farsighted litigator will be faced with situations of genuine surprise, which could not have reasonably been anticipated. The flexible view satisfies the purpose of the notice requirements, which is to provide adequate time for the opponent to prepare, placing the opponent in no worse position than he would have faced had pretrial notice been given.

Sonenshein, *supra* note 38, at 904. Other commentators argue in favor of the notice provision noting that pretrial notice serves functions other than allowing

the adversary an opportunity to question the hearsay. Knowing before trial whether certain evidence will be admitted may also affect a party's litigation strategy and proclivity to settle. In addition, if notice must be given before trial, hearsay cannot be resorted to when a party finds that other attempts to prove a point have not been convincing. It may even be that the requirement of pre-trial notice was one means by which the Congress meant to ensure that the residual exceptions would be used "very rarely, and only in exceptional circumstances."

R. LEMPERT & S. SALTZBURG, *supra* note 2, at 504.

Even if flexibility is the better approach, it is impermissible. "The language of Rules 803(24) and 804(b)(5) unequivocally require [sic] pretrial notice." *Sonenshein*, *supra* note 38, at 904. *See also* *Yasser*, *supra* note 38, at 608 ("The advance notice requirement is so clearly stated that to sidestep it is to flirt with lawlessness.").

Sonenshein has suggested a simple solution to the notice dilemma. "Congress should amend the residual exception rules to conform to the flexible view of notice and rescue the courts that have adopted it from decisions which are unquestionably correct as a matter of policy, but erroneous as a matter of law." *Sonenshein*, *supra* note 38, at 905. At least one state has had the foresight to adopt such flexibility in its version of the residual exception. *See OR. EVID. CODE R. 803(24)* (requiring pretrial notice "or [notice] as soon as practicable after it becomes apparent that such statement is probative of the issues at hand . . .").

An adverse party's case can be harmed when notice is given during trial, even if a continuance is available. Courts should not, therefore, blithely accept any excuse for the absence of advance notice. *See United States v. Lyon*, 567 F.2d 777 (8th Cir. 1977), *cert. denied*, 435 U.S. 918 (1978) (lack of pretrial notice for introduction of a transcribed interview under Rule 804(b)(5) excused because proponent not aware of witness's poor memory prior to trial; no reason given why proponent was not aware of poor memory before trial); *cf. United States v. Iaconetti*, 540 F.2d 574, 578 n.6 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) (requiring pretrial notice be given if at all possible; flexibility accorded only those situations where notice wholly impracticable).

62. *West*, 574 F.2d at 1131.

On appeal, the defendants only contested whether the grand jury testimony satisfied the "equivalent circumstantial guarantees of trustworthiness" requirement of Rule 804(b)(5). The court concluded that the trustworthiness guarantees for Brown's testimony probably exceeded those for some of the specific hearsay exceptions.⁶³ The hearsay had the requisite assurances of reliability because of "the corroboration provided by the observations of the agents, the pictures they took and their recordings of the conversations."⁶⁴

2. *United States v. Garner*

Four days after *West*, the Fourth Circuit again admitted grand jury testimony under Rule 804(b)(5). The court's reasoning in *United States v. Garner*⁶⁵ made clear that corroboration is the analytic key to circumstantial guarantees of trustworthiness. The decision also exposed the problems, dangers, and shortcomings of relying on corroboration to justify hearsay admission under the residual exception.

Warren Robinson's grand jury testimony was introduced against codefendants who were convicted of heroin offenses. Robinson, like the declarant in *West*, cooperated with authorities to mitigate his own criminal liabilities. He told the grand jury that one codefendant, Garner, had recruited him into a heroin importation scheme with the defendant, McKethan, who had European sources for the contraband.⁶⁶ Robinson also testified that the defendants took a number of overseas trips and that he accompanied them twice.⁶⁷

Before trial, Robinson decided that he would not testify again. He persisted in this refusal even though urged to testify by his attorney and threatened with contempt.⁶⁸ Although Robinson ultimately testified in court, he repudiated his grand jury testimony, answered some questions indicating a lack of knowledge, and refused to answer others.⁶⁹ The trial court admitted the grand jury testimony under Rule 804(b)(5).

63. *Id.* at 1135. Judge Widener dissented, disagreeing with the majority's "estimation of the reliability of testimony taken before a grand jury and therefore not subject to cross-examination." *Id.* at 1138.

64. *Id.* at 1135.

65. 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978).

66. *Id.* at 1143.

67. *Id.*

68. *Id.*

69. *Id.*

The Fourth Circuit Court of Appeals affirmed, distinguishing *United States v. Gonzalez*,⁷⁰ in which the Fifth Circuit refused to admit grand jury testimony under the residual exception. In *Gonzalez*, Guerrero was called before the grand jury after his drug importation conviction. After evasions and proddings, he identified Gonzalez as the source of the drugs.⁷¹ At the subsequent trial, however, Guerrero refused to testify, and his grand jury testimony was admitted.⁷²

The Fifth Circuit reversed, holding the testimony inadmissible under Rule 804(b)(5). The court concluded that the grand jury testimony did not have the required guarantees of trustworthiness because whether Guerrero

told the truth or not was incidental to what would happen to him if he did not say *something*. If he answered the questions at the time, he would be free of the threat of contempt. The important thing to him was that he gave *an* answer, be it true or not.⁷³

The Fourth Circuit distinguished *Gonzalez* from *Garner* because of the pressure placed on Guerrero to produce answers and because of his concern that truthful answers could be dangerous.⁷⁴ This distinction makes little sense. Similar pressures existed in both *Garner* and *West*, since the declarants faced long prison terms that could be reduced in exchange for their testimony. The declarants in those cases were surely aware of the risks involved in testifying against drug dealers who might become vengeful. The pressures in *Garner* and *West*, then, were precisely those faced by the declarant in *Gonzalez*. The *Garner* and *West* declarants had the same possible escape that the *Gonzalez* declarant had—false testimony.

Garner found the necessary circumstantial guarantees of trustworthiness in two forms of corroborating evidence: other trial evidence consistent with the declarant's grand jury testimony and a defendant's in-court testimony.⁷⁵

Part of the consistent corroboration came from the trial testimony of McKee, a woman who accompanied Garner and Robinson on a European drug-importation trip.⁷⁶ The appellate court accepted this testimony as a full confirmation of the declarant's grand

70. 559 F.2d 1271 (5th Cir. 1977).

71. *Id.* at 1272.

72. *Id.*

73. *Id.* at 1273 (emphasis in original).

74. *United States v. Garner*, 574 F.2d at 1144.

75. *Id.* at 1146.

76. *Id.* at 1144.

jury testimony about the overseas trip, failing to acknowledge its weaknesses compared to the *West* corroboration.

The testimony in *West* presented almost no memory problems since it was based upon records made by police officials nearly contemporaneously with the drug transactions.⁷⁷ They had no apparent motive, other than to obtain a conviction, to testify falsely. Moreover, the corroboration in *West* went to almost every aspect of the grand jury testimony and made the trustworthiness of the hearsay virtually certain.

McKee's testimony, in contrast, was about events that had occurred more than a year earlier.⁷⁸ Her motivations for testifying are not clear, but she was admitting to criminality. If she had made a deal with the prosecutor, she stood to gain from her confirmation of Robinson.⁷⁹ In addition, her testimony only corroborated the declarant about a portion of one trip, a fraction of his grand jury testimony.

Furthermore, McKee's story corroborated nothing about Robinson's inculpation of defendant McKethan. McKee had no contact with McKethan and said nothing about him. Instead, corroboration for Robinson's statements about McKethan was found in travel documents showing that the two defendants made frequent European trips.⁸⁰ However, this evidence is very unlike the confirmatory evidence in *West*, since the travel records corroborated only a small portion of the grand jury testimony about McKethan.

This aspect of *Garner* indicates the Fourth Circuit's willingness to admit hearsay under Rule 804(b)(5), even though only a fraction of the hearsay is confirmed by other evidence. The logical extension of this reasoning must be that, if other evidence corroborates some

77. *United States v. West*, 574 F.2d 1131, 1133 (4th Cir. 1978).

78. *See Garner*, 574 F.2d at 1145.

79. The *Garner* court failed to explain what the witness stood to gain by her testimony. The court did note that the woman shared a hotel room with one defendant while in Europe. *Id.* at 1144. If the two were lovers, could this have produced an incentive for the witness to testify untruthfully to back up the declarant? *Cf. United States v. Atkins*, 618 F.2d 366, 373 (5th Cir. 1980) (letters exculpating the defendant, written by a friend, held not admissible under the residual exception where the court found an indicator of unreliability because the declarant "could well have been motivated by his friendship to fabricate statements in order to provide Atkins with exculpatory evidence."); *United States v. Fredericks*, 599 F.2d 262 (8th Cir. 1979) (holding exculpatory statements made to a government investigator unreliable in part because the declarant was the girlfriend of defendant's brother and thus motivated to give a more favorable version of the incident).

80. *Garner*, 574 F.2d at 1144. The United States introduced records of airline tickets, customs declarations, passport endorsements, and European hotel registrations.

portions of the out-of-court assertions, the uncorroborated parts must also be reliable.

Whatever the usual merits of such reasoning, it presents difficulties here. Robinson's grand jury testimony stated that a courier had been used after Garner's first trip to Europe. The documentary evidence not only failed to corroborate this assertion, it showed that it was false.⁸¹ If McKee's testimony and the documents, which only confirmed some of Robinson's details, were accepted as guarantees of trustworthiness for the rest of his stay, then proof that part of the hearsay is wrong ought to establish the unreliability of the remainder. The *Garner* court, however, did not use such logic. Instead, it concluded, "Testifying from his recollection more than a year later, Robinson may have been confused about which trip [the courier] made, but the record of [the courier's] flight provide[s] general corroboration of Robinson's testimony"⁸²

Garner's treatment of this evidence about the courier is a selective approach to corroboration—the court latches on to the evidence that tends to show the truthfulness of the hearsay and ignores the factors that tend to show its untrustworthiness.⁸³ It also shows a disregard of the basic hearsay dangers. An out-of-court declaration is barred because it may be based upon a bad memory and the declarant's memory cannot be probed by cross-examination. By excusing Robinson's inconsistent testimony as a lapse of memory, the Fourth Circuit ignores one of the fundamental reasons for the rule excluding hearsay—faulty memory. A demonstration that the declarant had a faulty memory ought to be a reason for excluding his

81. *Id.* at 1145.

82. *Id.*

83. The *Garner* court's treatment of Robinson's trial testimony is also noteworthy. He testified that his grand jury testimony was untrue. This disavowal of the hearsay has a strong mark of reliability since it was clearly against Robinson's interest. It was a public confession of perjury for which he was later indicted. *McKethan v. United States*, 439 U.S. 936, 939 (1978) (Stewart, J., dissenting from denial of certiorari). The recantation may have been prompted by feared consequences of testifying at trial rather than by honesty. The same pressures which may have produced a false trial renunciation may also have existed at the time of the grand jury testimony and produced false testimony there. Moreover, Robinson's trial testimony that the grand jury testimony was untrue had some corroboration, since it was established that part of Robinson's statement about the courier was untrue. The Fourth Circuit failed to consider the possibility that the recantation at trial was every bit as reliable as the grand jury testimony. See J. WEINSTEIN & M. BERGER, *supra* note 38, ¶ 804(b)(5)[01], at 804-184 ("The end result is the best of all possible worlds for the prosecution: when a witness is sufficiently available to convey to the jury that he is in mortal fear of the defendant, but is technically unavailable so that his cross-examination is excused, his Grand Jury testimony becomes admissible.").

hearsay; *Garner* instead uses it to justify the hearsay's admission. The court stands the hearsay rule on its head.

Garner, however, did not rely solely on evidence consistent with the grand jury testimony to justify the admission of the hearsay.⁸⁴ The court also perceived a guarantee of trustworthiness in the defendants' lack of convincing trial testimony.⁸⁵ Even if it were proper to consider a defendant's trial testimony in deciding the admissibility of hearsay, that testimony did not change the nature of the corroboration. Coupling the defendant's testimony with McKee's assertions and the travel records still means that *Garner* found sufficient corroboration in evidence that failed to establish the defendant's criminality, came from impeachable sources, confirmed only a portion of the hearsay, and was partially false. Such a low standard of corroboration will result in much hearsay being admitted under the residual exceptions.

In addition, permitting the lack of the defendants' credible rebuttal evidence to corroborate out-of-court testimony raises a host of questions not considered by the Fourth Circuit. If corroboration is at least partly found in a defendant's trial testimony or the lack of testimony, how is a determination on admissibility of hearsay to be made in advance of trial? What happens if the defendant presents convincing trial testimony? Should the judge then strike the already admitted grand jury testimony?

The court's assessment of the defendants' lack of convincing trial testimony really indicates the ad hoc nature of the corroboration finding. The court was not guided by any standards that could be used to decide similar, future admissibility problems.⁸⁶

Finally, *Garner* justified the admission of the hearsay by concluding that the trial jury could evaluate it.⁸⁷ This conclusion came without any consideration of its radical consequences. Our trials are presently based on the central premise that a juror can normally meaningfully evaluate an assertion only after an adversary has a chance to examine the asserter to expose any possible narration, sincerity, memory or perception flaws. Does the corroboration in *Garner* allow the jury to make valid conclusions about these hearsay changes? If it does, as the Fourth Circuit implies, our trial system

84. *Garner*, 574 F.2d at 1145.

85. *Id.*

86. See also *United States v. West*, 574 F.2d 1131 (4th Cir. 1978) (intimating that evidence properly admitted because of resultant jury verdict; jury verdict may be an indicator of trustworthiness).

87. *Garner*, 574 F.2d at 1144.

may change greatly. Assume Robinson did not testify before the grand jury, but testifies at trial, and proceeds on direct examination to state everything he told the grand jury in the real case. Upon cross-examination, however, he refuses to answer any questions. Can the jury evaluate Robinson's testimony? Is that direct testimony admissible?

The Fourth Circuit should have to conclude, yes, as long as the same *Garner* corroboration is present. If Robinson's grand jury testimony can be evaluated and is therefore admissible, so too should we admit this hypothetical direct testimony. If anything, since the jurors have observed the demeanor of Robinson during his entire direct testimony, they can better evaluate the posited testimony than the grand jury statements. The use of corroboration in *Garner* thus leads to the routine admission of direct examination alone, as long as some confirmatory evidence is produced.⁸⁸ It leads to convictions without cross-examinations. Indeed, this is what happened to McKethan. Surely, this use of corroboration, which alters the fundamental structure of our trials by abandoning cross-examination's central role, is wrong.⁸⁹

3. United States v. Walker

Four years after *West* and *Garner* the Fourth Circuit again applied its interpretation of the residual exceptions to grand jury testimony. In *United States v. Walker*,⁹⁰ Parker, a participant in a marijuana importation scheme, was convicted in an earlier proceed-

88. The Supreme Court has found Sixth Amendment Confrontation Clause violations when defendants, even though they had extensively cross-examined the witnesses, were not allowed to ask certain questions. See *Smith v. Illinois*, 390 U.S. 129 (1968) (defendant prohibited from asking where the witness lived); *Davis v. Alaska*, 415 U.S. 308 (1974) (defendant, who was trying to establish juvenile witness bias, prevented from asking witness about probationary status); cf. *United States v. Cardillo*, 316 F.2d 606 (2d Cir.), cert. denied, 375 U.S. 822 (1963) (prosecution witness's direct testimony need not be stricken where self-incrimination privilege claimed on some cross-examination questions regarding only collateral matters; direct testimony would have to be stricken where questions concerned matters directly in issue); *United States v. Frank*, 520 F.2d 1287 (2d Cir. 1975), cert. denied, 423 U.S. 1087 (1976) (defense witness's direct testimony stricken as inadmissible hearsay where self-incrimination privilege prevented cross-examination on non-collateral matters). Accord *United States v. Seifert*, 648 F.2d 557 (9th Cir. 1980); *United States v. Brierly*, 501 F.2d 1024 (8th Cir.), cert. denied, 419 U.S. 1052 (1974). See also MCCORMICK ON EVIDENCE, *supra* note 46, § 19, at 49.

89. *Garner* has provoked strong criticism. See J. WEINSTEIN & M. BERGER, *supra* note 38, ¶ 804(b)(5)[01], at 804-180 (commenting that Rule 804(b)(5) extended to new and unwarranted lengths by the *Garner* opinion); R. LEMPERT & S. SALTZBURG, *supra* note 2, at 505 ("troublesome" case because of the court's admittance of "very damaging evidence made in circumstances that ought to have cast doubt on its reliability").

90. 696 F.2d 277 (4th Cir. 1982), cert. denied, 464 U.S. 891 (1983).

ing. After his conviction, Parker testified before the grand jury pursuant to a grant of immunity and implicated the *Walker* defendants.

At trial, Parker claimed his right against self-incrimination and refused to testify, stating that he feared a perjury prosecution.⁹¹ Parker was ruled unavailable at trial, and the portion of his grand jury testimony that tracked the in-court testimony of another witness was admitted under Rule 804(b)(5).⁹² The Fourth Circuit affirmed, admitting the entire grand jury testimony, since sufficient corroboration existed for it taken as a whole.⁹³

The *Walker* decision, however, reveals more than another application of the residual hearsay exception finding adequate circumstantial guarantees of trustworthiness from corroborative evidence. The Fourth Circuit's approach slighted factors indicating the possible untrustworthiness of the grand jury testimony, ignored the hearsay dangers, and failed to use neutral principles.

The *Walker* declarant wrote to the prosecutor before trial stating that he had been "scared to death" when testifying, told the grand jury things that he could not remember and would have said anything to stay out of prison.⁹⁴ This recantation was given the same short shrift as a similar disavowal in *Garner*, although it raises serious doubts about the trustworthiness of the grand jury testimony. The *Walker* court dispensed with the declarant's disavowal by merely stating, "[t]hough he had been granted immunity for his testimony, however, no one had promised him lighter punishment

91. *Id.* at 279.

92. *Id.*

93. *Id.* at 280-81. The Fourth Circuit did express its concern that the trial court's ruling may not have satisfied the "more probative" requirement of Rule 804(b)(5). *Id.* See *United States v. Heyward*, 729 F.2d 297 (4th Cir. 1984) (holding that the "more probative" requirement of Rule 804(b)(5) not satisfied), *cert. denied*, 105 S. Ct. 776 (1985).

Unlike the language that the hearsay be offered to prove a material fact and that its admission must serve the interests of justice, see *supra* note 37, the "more probative" requirement would seem to be "substantively important." R. LEMPERT & S. SALTZBURG, *supra* note 2, at 503. Some courts refuse to read this language strictly. See, e.g., *United States v. Muscato*, 534 F. Supp. 969, 979 (E.D.N.Y. 1982) (refusing to interpret "more probative" requirement narrowly to exclude cumulative evidence). See also, *Lewis*, *supra* note 55, at 113 (noting that the "more probative" requirement is often ignored); *Sonenshein*, *supra* note 38, at 893 (residual exceptions should be applied only to those few situations "where the proffered hearsay is either the only evidence available on the point, or the evidence is least attenuated from the issue on which it is offered.").

If the hearsay is admitted, its opponent may not be able to gain a reversal because the more probative requirement was violated. *United States v. Mastrangelo*, 561 F. Supp. 1114 (E.D.N.Y.), *aff'd on other grounds*, 722 F.2d 13 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 2385 (1984).

94. *Walker*, 696 F.2d at 280-81.

for it."⁹⁵ That response begs the question. Just because the declarant was not formally promised leniency does not mean that he lacked an incentive to lie. A person in this predicament might well believe, even without an express promise, that giving testimony pleasing to the government might ultimately reduce his punishment. If so, the declarant still had reason to give inculpatory testimony to the grand jury whether or not it was the truth. This the Fourth Circuit ignored.

Walker also demonstrates a lack of neutral principles. It stated that even though only a portion of the grand jury testimony was admitted, the appellate court could examine the entire grand jury testimony.⁹⁶ On this point, the Fourth Circuit reasoned, "If the excluded portion of Parker's grand jury testimony contained established falsehoods, we would unhesitatingly conclude that they cast doubt upon the whole; when it contains substantiated truths, a reflection of reliability is cast upon the whole."⁹⁷

This bald assertion of the effect of proven falsehoods came without reference to *Garner*, where the grand jury testimony contained testimony proved false.⁹⁸ There the Fourth Circuit did not conclude that the falsehood cast doubt upon all of the grand jury testimony. There was no reason given why the blanket statement of *Walker* did not apply to *Garner*. Perhaps, this statement really illustrates the fundamental consistency of the Fourth Circuit—point out everything that tends to justify the admission of the grand jury

95. *Id.*

96. *Walker* gave short shrift to the hearsay dangers when it, like *Garner*, concluded that the jurors could evaluate the hearsay. *Id.* at 281. See *supra* notes 86-87 and accompanying text. The court noted that because the grand jury testimony had been presented to the trial jury in "question and answer form, the jury could assess for itself the extent to which the questions were suggestive." *Walker*, 696 F.2d at 281. But see *United States v. Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977) (leading questions are a sign of unreliability). Of course, our evidentiary law contains a general ban on leading questions. See FED. R. EVID. 611(c). The prohibition's existence indicates that suggestive questions present more dangers than *Walker* recognizes. One obvious concern is that leading questions may result in answers with little, if any, relevance. See *United States v. Muscato*, 534 F. Supp. 969, 977 (E.D.N.Y. 1982). The *Walker* court's lack of concern about leading questions may indicate an assumption underlying the opinion about why the declarant did not testify at trial. With logic that applies here, Professor Blakey has commented about the substantive use of prior inconsistent statements:

This is a desirable result if one believes that most witnesses who contradict out-of-court statements do so for fear or favor. But it is not a desirable result if one believes that out-of-court statements may have been obtained by leading or misleading the witness. Of course, the jury will do its best to decide whether the out-of-court version is true, but the general ban on hearsay is based upon a belief that this is not protection enough.

Blakey, *supra* note 52, at 43.

97. *Walker*, 696 F.2d at 281.

98. See *supra* note 81 and accompanying text.

testimony under Rule 804(b)(5) and ignore anything that cuts against admissibility.

4. *United States v. Murphy*

*United States v. Murphy*⁹⁹ involved the grand jury testimony of Lattisaw, the defendant's confederate. In return for his full testimony before the grand and trial juries, the government promised Lattisaw he would not be prosecuted for two other offenses. At Murphy's trial, Lattisaw refused to be sworn, and his grand jury testimony was admitted under Rule 804(b)(5). The Fourth Circuit affirmed, holding that there were "abundant indicia of reliability and trustworthiness of Lattisaw's grand jury testimony."¹⁰⁰ Once again, these indicia were found in corroboration. The principal corroborative evidence came from a witness who had driven the getaway car. The court reasoned that "[h]er testimony was entirely consistent with Lattisaw's grand jury testimony."¹⁰¹ Additional corroboration was found in the testimony of two eyewitnesses and in the recovery of the getaway car containing a mask used in the robbery.

5. *United States v. Thomas*

The trend in these Fourth Circuit cases is to admit the corroborated grand jury testimony of an unavailable witness. Since grand jury testimony of a sole witness seldom stands alone in implicating a defendant, some corroboration for the hearsay almost always exists. Grand jury testimony under Rule 804(b)(5) is then routinely admitted. This trend became even clearer in *United States v. Thomas*.¹⁰²

Two declarants testified before the grand jury in *Thomas*. One declarant had participated in the marijuana importation scheme and, granted immunity, told the grand jury that the trawler he was aboard had picked up contraband in South America. The other declarant, a commercial fisherman, told the grand jury he had seen the vessel off the South American coast weeks before its seizure, and that it did not appear to have been engaged in fishing.

When neither declarant could be produced at trial, the court permitted their grand jury testimony to be introduced under Rule 804(b)(5). The Fourth Circuit affirmed, stating that it "is clear

99. 696 F.2d 282 (4th Cir. 1982), cert. denied, 461 U.S. 945 (1983).

100. *Id.* at 286.

101. *Id.*

102. 705 F.2d 709 (4th Cir.), cert. denied, 464 U.S. 890 (1983).

from *West* and *Garner* the grand jury testimony of an unavailable witness may be introduced under certain conditions. . . ."¹⁰³ The decision did not discuss the equivalent circumstantial guarantees of trustworthiness requirement.¹⁰⁴ Although the appellate opinion

103. *Id.* at 711-12.

104. The court only discussed the unavailability requirement of Rule 804(b)(5). *Id.* at 712.

- "Unavailability as a witness" includes situations in which the declarant —
- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
 - (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
 - (3) testifies to a lack of memory of the subject matter of his statement; or
 - (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
 - (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means.

FED. R. EVID. 804(a).

Unavailability has been a central issue in a number of cases. In some, the concern is whether the requirements of Rule 804(a)(5) are satisfied. *See, e.g., United States v. Smith*, 577 F. Supp. 1232, 1233-35 (S.D. Ohio 1983) (witness refused to respond to subpoena; held, reasonable efforts had been made and witness was therefore unavailable).

More often, the unavailability issue has concerned a witness who appears in court but refuses to testify. *See, e.g., United States v. Barlow*, 693 F.2d 954 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983) (grand jury testimony admitted where exercise of spousal privilege made declarant unavailable). *Cf. United States v. Mathis*, 559 F.2d 294 (5th Cir. 1977) (spousal privilege not permitted where marriage a sham; declarant available to testify).

A more difficult unavailability issue concerns the witness who is present and has no valid privilege but refuses to testify. *See* FED. R. EVID. Rule 804(a)(2). The declarant is unavailable if he refuses to testify, even though cited for contempt. *See, e.g., United States v. Carlson*, 547 F.2d 1346, 1353 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977) (declarant would not testify although sentenced to six months for contempt). Courts, however, have found unavailability even in the absence of a contempt citation. *See, e.g., United States v. Murphy*, 696 F.2d 282 (4th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983) (declarant unavailable even though he was in court, refused to testify, and was not held in contempt); *United States v. Boulhanis*, 677 F.2d 586 (7th Cir.), *cert. denied*, 459 U.S. 1016 (1982) (declarant found unavailable even though not cited for, or threatened with, contempt; grand jury testimony admitted); *cf. United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980) (declarant not unavailable where he was not held in contempt although refusal to testify broke a plea bargain, thereby subjecting him to further prosecution).

Of the two residual exceptions, only Rule 804(b)(5) expressly requires the unavailability of the declarant. The "more probative" requirement, however, also makes the availability of the declarant an important consideration under Rule 803(24). *See United States v. Mathis*, 559 F.2d 294 (5th Cir. 1977) (hearsay inadmissible under Rule 803(24) where declarant available); *cf. United States v. Balano*, 618 F.2d 624, 628 n.6 (10th Cir.), *cert. denied*, 449 U.S. 840 (1980) ("Under no circumstances, including coercive acts by a defendant, should cross-examination of an available witness not be constitutionally mandated.") (emphasis in original). *But see* J. WEINSTEIN & M. BERGER, *supra* note 38, ¶ 804(b)(5)[01], at 804-173 (where declarant available and does not appear, hearsay evidence should only be admitted under Rule 803(24) "in circumstances where the guarantees of trustworthiness are inordinately high, or the evidence is of a kind where cross-examination would not enhance reliability").

Consequently, a court's determination of a declarant's availability is always important for deciding a residual hearsay question. *See Lewis, supra* note 55, at 126 (advocating elimina-

identified some corroboration, it was uniquely different from the preceding cases.

The defendants' conviction was largely dependent upon the grand jury testimony.¹⁰⁵ The only non-hearsay corroboration was the seizure of the trawler, the evidence that the seized trawler did not appear to have been engaged in fishing, and the discovery of small amounts of marijuana on board. That evidence did little to establish the defendants' guilt as large-scale importers. Thus, two sets of otherwise inadmissible out-of-court assertions corroborated each other and justified the admission of each. The *Thomas* court accepted such corroboration as sufficient under Rule 804(b)(5) without further discussion. Thus, the Fourth Circuit's position must be that grand jury testimony of unavailable witnesses is routinely admissible under the residual exception whenever the hearsay has a modicum of corroboration.

V. ERRORS IN THE FOURTH CIRCUIT'S APPROACH

The Fourth Circuit's approach to Rule 804(b)(5), which looks to corroboration at the time of trial to determine whether the hearsay will be admitted, is wrong for five reasons.¹⁰⁶ First, it has led to

tion of Rule 803(24) to insure that residual hearsay is truly necessary). *Cf.* D. BINDER, HEARSAY HANDBOOK § 40.05, at 446 (2d ed. 1983) (asserting that Rule 804(b)(5) is meaningless because, although Rule 804(b)(5) is identical to Rule 803(24), Rule 804(b)(5) applies only if declarant is unavailable; Rule 803(24) applies regardless of declarant's availability).

105. *Thomas*, 705 F.2d at 711.

106. Although all of the Fourth Circuit cases expressly rely upon corroboration to justify the admission of the grand jury testimony, another rationale is implicit in many of the decisions. The court frequently implies that the defendants caused the declarant's unavailability; this may have affected the court's decisions. *See, e.g.*, *United States v. West*, 574 F.2d 1131, 1134 (4th Cir. 1978) (declarant and four potential witnesses murdered after agreeing to cooperate in narcotics investigations, but government failed to offer any evidence to show that defendants were responsible for the murders); *United States v. Garner*, 574 F.2d 1141, 1143 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978) (noting that general impression from trial court transcript was that pressures brought upon defendant made him unwilling to testify); *United States v. Murphy*, 696 F.2d 282, 286 (4th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983) (noting strong indications that declarant was being programmed by defendants not to testify at trial). This appears to have occurred in other circuits as well. *See, e.g.*, *United States v. Boulhanis*, 677 F.2d 586 (7th Cir.), *cert. denied*, 459 U.S. 1016 (1982) (suggesting that declarant's refusal to testify was based on fear of reprisal by defendant); *cf.* *Herdman v. Smith*, 707 F.2d 839 (5th Cir. 1983) (without discussing waiver theory, the court held in a civil suit that an affidavit, given to police 18 months after defendant instructed the declarant, who was the wife of defendant's employee, admissible under a residual exception). These cases may also be construed to indicate that the court was admitting the grand jury testimony because the defendants' actions had waived or forfeited any objection to the hearsay's admission.

Courts have held that if a defendant waives his sixth amendment right to confront a grand jury witness at trial, he concomitantly waives his objection under Rule 804(b)(5) to the introduction of the hearsay. A defendant's behavior that makes the grand jury witness unavailable

the near routine admission of grand jury testimony. This interpretation of the residual exception fundamentally conflicts with other hearsay provisions.¹⁰⁷

Second, Congress intended that the residual exceptions would authorize the admission of hearsay only in truly exceptional circumstances.¹⁰⁸ The Fourth Circuit cases demonstrate that corroborated grand jury testimony is just not that rare.¹⁰⁹

Third, the corroboration approach creates an unnecessary con-

at trial can effectuate such a waiver. *United States v. Thevis*, 665 F.2d 616, 630-33 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); *United States v. Balano*, 618 F.2d 624, 628 (10th Cir.), *cert. denied*, 449 U.S. 840 (1980); *cf. United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1977), *cert. denied*, 431 U.S. 914 (1978) (holding grand jury testimony admissible under Rule 804(b)(5) where defendant waived his confrontation rights).

Courts, however, are split on the appropriate burden of proof to establish such a waiver. *Compare Thevis*, 665 F.2d at 630-31 (adopting a clear and convincing evidence standard) with *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), *cert. denied*, 104 S.Ct. 2385 (1984) and *Balano*, 618 F.2d at 629 (both adopting a preponderance of the evidence standard). *Mastrangelo* illustrates the importance of this dispute since on remand the court found that a waiver had been established by a preponderance of the evidence, but not by clear and convincing evidence. *United States v. Mastrangelo*, 561 F. Supp. 1114, 1119-20 (E.D.N.Y.), *aff'd*, 722 F.2d 13 (2d Cir. 1983).

A split in the circuits may also be developing regarding what behavior constitutes a waiver. *Compare Thevis*, 665 F.2d at 630 (holding that a defendant waives his confrontation rights when, for the purpose of preventing a witness from testifying, he causes the witness to be unavailable) and *Mastrangelo*, 722 F.2d at 14 (holding that a defendant's failure to inform the authorities that a witness was going to be killed constituted a waiver) with *Olson v. Green*, 668 F.2d 421 (8th Cir.), *cert. denied*, 456 U.S. 1009 (1982) (holding that only the defendant's personal actions or actions of someone directed by defendant can waive the defendant's confrontation rights; coconspirator's intimidation of a witness did not constitute a waiver).

Although the Fourth Circuit implied that witness intimidation was present, the court specifically rejected a waiver of confrontation rights as a basis for its decision in the grand jury cases. *See, e.g., Murphy*, 696 F.2d at 286 (no waiver of confrontation rights even where strong indications found that defendants were manipulating grand jury witnesses).

The government's apparent fault may also influence the court. *See United States v. Toney*, 599 F.2d 787 (6th Cir. 1979) (criticizing government's handling of declarant's statement, stating that defendant should have been allowed to introduce it under Rule 804(b)(5); court's discussion did not mention the guarantees of trustworthiness requirement).

107. *See supra* notes 40-43 and accompanying text.

108. *See supra* note 50.

109. *United States v. Thevis*, 665 F.2d 616, 629 (5th Cir. 1982):

Corroborated grand jury testimony which for one reason or another is unavailable at trial is neither rare nor exceptional, and in our opinion its general admission under this theory would constitute a "major revision" of the hearsay rule that, as the Senate Judiciary Committee admonished, is for the legislature, not the judiciary.

See also Burstein, *Admission of an Unavailable Witness' Grand Jury Testimony: Can It Be Justified?*, 4 CARDOZO L. REV. 263, 268 (1983) ("[T]he need to admit prior grand jury testimony is somewhat commonplace . . ."); J. WEINSTEIN & M. BERGER, *supra* note 38, ¶ 804(b)(5)[01], at 804-179 ("Rule 804(b)(5) should not become an automatic formula for introducing uncross-examined grand jury statements or other statements of dubious reliability which do not meet the requirements of other hearsay exceptions.").

flict within the residual exception itself. Rule 804(b)(5) not only requires equivalent circumstantial guarantees of trustworthiness, but also requires that the proffered hearsay be necessary, that is, more probative than other reasonably obtainable evidence. The more the hearsay is corroborated, however, the less necessary it becomes. Relying upon corroboration to establish trustworthiness leads to the anomalous result that the more trustworthiness is demonstrated, the less likely it is that the hearsay should be admitted.¹¹⁰ Surely, Congress did not intend an interpretation that inevitably results in internal conflict.

Fourth, since the term "corroborating circumstances" was used in Rule 804(b)(3), Congress would have used it again in Rule 804(b)(5) if corroboration had been intended to guarantee trustworthiness.¹¹¹ Rule 804(b)(3) classifies as a hearsay exception statements that tend to subject an unavailable declarant to criminal liability. That rule, however, imposes a special burden on the criminal defendant attempting to exculpate himself by introducing such hearsay. The accused must not only show that the statement is against penal interest, but also that "corroborating circumstances clearly indicate the trustworthiness of the statement."¹¹²

Fifth, the Fourth Circuit failed to consider the "near-miss" problem—the residual exception treatment of hearsay that nar-

110. While the Fourth Circuit ignores this tension, other courts that have relied upon corroboration to justify the admission of grand jury testimony have recognized it. *See, e.g.,* *United States v. Boulhanis*, 677 F.2d 586, 588 (7th Cir.), *cert. denied*, 459 U.S. 1016 (1982) (noting that corroboration undermines the second condition of hearsay admissibility under Rule 804(b)(5), which requires that the declaration be the most probative evidence possible); *United States v. Bailey*, 581 F.2d 341, 349 (3d Cir. 1978) (noting that exclusive reliance on corroboration to establish trustworthiness "might increase the likelihood of admissibility when corroborating circumstances indicate a reduced need for the introduction of the hearsay statement").

111. The Fourth Circuit has essentially changed the opening portion of residual exception Rule 804(b)(5) from "A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness . . ." to "a statement not specifically covered by any of the foregoing exceptions but being corroborated . . ." *See* *Sonenshein*, *supra* note 38, at 883 (noting that except for "declarations against penal interest offered to exculpate a defendant, no requirement of corroboration exists as a precondition to the admissibility of evidence under one of the enumerated exceptions. None should therefore be required before admitting hearsay under the residual exceptions."). *See also* *Lewis*, *supra* note 55, at 116-17 (noting that imposition of an added corroboration requirement confuses the trustworthiness requirement).

112. *See* *FED. R. EVID. 804(b)(3)*; *Tague*, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 *GEO. L.J.* 851, 980 (1981) (describing the penal interest corroboration requirement as "unique among hearsay exceptions"); *see also* *United States v. Thevis*, 84 *F.R.D.* 57, 63 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir. 1982) (noting that except for Rule 804(b)(3), other Rule 804 exceptions admitted without corroborating evidence).

rowly fails to gain admission under a specific provision of the hearsay rules. This problem occurred in *Garner*. Robinson's hearsay was introduced under Rule 804(b)(5), which requires unavailability. Although Robinson was present for cross-examination in front of the trial jury, he would not answer all questions, testifying only that he knew the defendants and that his grand jury testimony inculpat- ing them was not accurate. The Fourth Circuit reasoned that "the jury saw and heard Robinson on the witness stand. What they saw and heard may have been of substantial assistance to the jury in assessing the truthfulness of his grand jury testimony."¹¹³

In other words, although the exception requires unavailability, his "availability" aided the hearsay's admission. This reasoning is not sanctioned by Rule 804(b)(5). Rule 801(d)(1)(A), which bases admissibility on the declarant's availability, seems more appropriate. That Rule allows the admission of grand jury testimony when the witness' trial testimony is inconsistent with the grand jury testi- mony and the witness is subject to cross-examination.¹¹⁴ Its justifi- cation is that the jury will see and hear the declarant and use these perceptions in assessing the truth of the prior statements.¹¹⁵

In *Garner*, most of Rule 801(d)(1)(A)'s elements were satisfied. Robinson appeared at trial and proclaimed that his former testi- mony was not correct, establishing the requisite inconsistency. The prior statement was given under oath in a proceeding. The only question is whether Robinson was subject to cross-examination at trial. Since he refused to answer all questions on cross-examination, this presented a difficult issue, one never addressed by the Court of Appeals.¹¹⁶ Robinson's prior statements apparently narrowly missed satisfying the provision of Rule 801(d)(1)(A) requiring cross-examination. How the residual exception should treat hear- say that just fails to gain admission under a specific hearsay provi- sion is the "near-miss" problem.¹¹⁷

Examining the opening words of the catchalls provides insight

113. *Garner*, 574 F.2d at 1146.

114. See FED. R. EVID. 801(d)(1)(A).

115. See *supra* note 53 and accompanying text.

116. See *Garner*, 574 F.2d at 1146.

117. See Sonenshein, *supra* note 38, at 885 (describing the near-miss situation); R. LEMPERT & S. SALTZBURG, *supra* note 2, at 504. Courts have split on how to handle the near-miss. See Sonenshein, *supra* note 38, at 885-88 (collection of cases dealing with this problem). Commentators have also split. Compare Note, *supra* note 61, at 1372 (concluding that admission of near-miss hearsay violates the purpose of the residual exception) with Note, *Residual Hearsay Exceptions: Are They Really Trustworthy?*, 44 BROOKLYN L. REV. 1125, 1133 (1978) (concluding that automatic exclusion of near-miss hearsay violates the purposes of the Rules).

into resolving this problem. Hearsay admission is sanctioned by Rules 803(24) and 804(b)(5) only when the statement is "not specifically covered by any of the foregoing exceptions"¹¹⁸ Congress limited the residual exceptions to situations where the hearsay is not "covered" by a specific exception; not to those situations where hearsay was "not admissible" under another Rule.¹¹⁹ "Covered" is a broader term. It implies that hearsay, even though not admissible under a specific exception, may still be within a Rule's ambit. If the specific provision covers the proffered hearsay, it cannot be admitted under a residual exception.

The proper approach to the "near-miss" problem is first to determine whether the line drawn by a specific provision was meant to keep inadmissible the proffered sort of "near-miss."¹²⁰ Only if the answer is negative can the hearsay be considered under a residual exception.¹²¹ To ignore this analysis of the "near-miss" problem, as *Garner* did,¹²² subverts the drafters' work in enacting the specific provisions of the hearsay article.

118. See FED. R. EVID. 803(24), 804(b)(5) (emphasis added).

119. House debates demonstrate the intent that courts rigidly adhere to the boundaries of the hearsay exceptions. Representative Holtzman was concerned that the residual exception "swallows up the [hearsay] rule and negates the work of both the House Judiciary Committee and the conference committee." 120 CONG. REC. 40,893 (1974). She then raised the near-miss problem, noting that the conference committee deleted a Senate proposal that would have permitted police reports to be admitted as substantive evidence. *Id.* Holtzman was concerned that police reports could be admitted under the residual exception if a trial judge found comparable guarantees of trustworthiness. *Id.* at 40,895. Representative Dennis, a conference committee member, replied that he did not believe admission of police reports was ever possible. *Id.* He also stated that the use of police reports was removed in the conference and that he could not "see how anybody could suggest that introducing such a report is possible . . . under these rules" *Id.*

120. See Sonenshein, *supra* note 38, at 900-01 (suggesting that the "general purposes" requirement of the residual exception should be used to handle the near-miss); R. LEMPERT & S. SALTZBURG, *supra* note 2, at 504 (concluding that "[t]he better policy is for the courts to defer to legislative history where there is evidence that Congress or the Advisory Committee deliberated over the lines they were drawing and to make their own judgments when there is no evidence that a matter was considered").

121. Compare *In re IBM Peripheral EDP Devices Antitrust Litigation*, 444 F. Supp. 110, 113 (N.D. Cal. 1978) (court refused to admit former testimony under a residual exception, stating, "[I]t is unlikely that Congress meant this exception to be used to circumvent its own restriction of another exception.") with *In re Screws Antitrust Litigation*, 526 F. Supp. 1316 (D. Mass. 1981) (court admitted former testimony under a residual exception even though the hearsay narrowly missed being admissible under the former testimony specific hearsay exception Rule 804(b)(1)).

122. See J. WEINSTEIN & M. BERGER, *supra* note 38, ¶ 804(b)(5)[01], at 804-183-84 (suggesting that the admissibility of the grand jury testimony in *Garner* should have been analyzed under Rule 801(d)(1)(A)).

VI. THE USE OF CORROBORATION AS AN EQUIVALENT
CIRCUMSTANTIAL GUARANTEE OF
TRUSTWORTHINESS SUBVERTS HEARSAY'S
FUNDAMENTAL FRAMEWORK

Reversing the prosecutorial tables is a good way to assess where the corroboration approach leads. The Fourth Circuit¹²³ admits grand jury testimony under a residual exception if it is corroborated.¹²⁴ Corroboration is accepted as sufficient even if it does not confirm all of the grand jury testimony, and the inculpatory portions of the hearsay have not been corroborated. If the court is truly using neutral principles and not merely justifying the hearsay's admission because it believes a defendant guilty, the corroboration approach should apply equally to a defendant seeking to introduce hearsay under a catchall exception.

Assume that a defendant is being tried for a robbery committed by a lone gunman at three in the afternoon. Defense counsel gives

123. Other courts have relied on varying degrees of corroboration to determine admissibility under the residual exceptions. See Sonenshein, *supra* note 38, at 876-77 n.55 (summarizing cases); United States v. Ward, 552 F.2d 1080 (5th Cir.), *cert. denied*, 434 U.S. 850 (1977) (hearsay statement held admissible under Rule 804(b)(5) solely because of strong corroboration); United States v. Bailey, 581 F.2d 341, 349 (3d Cir. 1978) ("trustworthiness of a statement should be analyzed by evaluating not only facts corroborating the veracity of the statement, but also the circumstances in which the declarant made the statement and the incentive he had to speak truthfully or falsely.").

124. The Fourth Circuit has not specified what must be corroborated to justify admission under the residual exceptions. Does corroboration have to establish the trustworthiness of the declarant, the hearsay statement, or both? Cf. Tague, *supra* note 112, at 949-50 (discussing what must be corroborated under the penal interest exception's corroboration requirement). Most Fourth Circuit grand jury cases, however, merely rely upon the hearsay corroboration. Corroboration of the declarant's personal trustworthiness was not required, and the many indicators of their dubious credibility were ignored or deemed unimportant. The credibility of confessed coconspirators who exchange benefits for their testimony or who recant their prior assertions obviously is suspect.

Other Fourth Circuit cases, however, provide an interesting contrast. See, e.g., United States v. Hinkson, 632 F.2d 382 (4th Cir. 1980) (excluding statement proffered under Rule 803(24), reasoning that the statement lacked circumstantial guarantees of trustworthiness where declarant was a "braggart"); United States v. MacDonald, 688 F.2d 224 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983) (defendant sought to introduce exculpatory statements of declarant; held, corroboration requirement of the penal interest exception not met, although defendant produced much corroboration for the statements, since declarant's "long-standing drug habits made her an inherently unreliable witness"); see also Comment, *The Corroboration Requirement of Federal Rule of Evidence 804(b)(3) and United States v. MacDonald: How Things Should Not Work*, 131 U. PA. L. REV. 999, 1008 (1983) (summarizing *MacDonald*); cf. United States v. Murphy, 696 F.2d 282, 284-85 (4th Cir. 1982) (grand jury testimony admitted under Rule 804(b)(5), even though declarant "admitted to an expensive heroin habit, which he financed through thefts . . ." and part of corroboration came from a witness who admitted that she "was a heroin addict, supporting a \$100 a day habit by shoplifting").

appropriate notice of his intention to use Rule 804(b)(5) and establishes that he served several subpoenas at declarant Smith's home. Smith has not responded, and the attorney states that he has no further knowledge of Smith's whereabouts.

At trial, defendant seeks to introduce a transcript of questions by his attorney and answers by Smith made shortly after the defendant's arrest. A notary, available for trial, administered an oath to Smith. The stenographer who made the transcript swears to its accuracy. The transcript contains Smith's assertions that defendant was with him the entire day, the two did various activities together, and could not have been the robber because the defendant and Smith were watching television together at the time of the robbery.

The defense then produces the parish priest who confirms that Smith and the defendant attended Mass together, as Smith asserted. Bank records confirm Smith's assertion that the defendant deposited a check, and the bank's surveillance film establishes that Smith and the defendant were there together. People from a take-out-food restaurant remember Smith and the defendant. Television station logs corroborate Smith's description of the shows they watched together. A waitress testifies that Smith and the defendant ate dinner together that night.

Are Smith's out-of-court declarations admissible? No specific hearsay exception admits them, but defendant relies upon Rule 804(b)(5) as interpreted by the Fourth Circuit to justify their introduction.

Under the Fourth Circuit's approach, this hearsay should be admitted. Its corroboration exceeds that of most grand jury testimony admitted by the Fourth Circuit. Furthermore, unlike *Garner*, nearly every aspect of the hearsay is confirmed. The corroboration comes from an uninvolved person, not witnesses who were admittedly involved in the crimes as were the *Garner* and *Murphy* declarants. Admittedly, Smith may be the defendant's friend, but this factor should not outweigh the corroboration in light of the Fourth Circuit's acceptance of grand jury testimony produced by declarants trying to reduce their criminal liabilities.

Of course, the corroboration for the portion that truly furnishes the alibi—that Smith and defendant were watching television together at the time of the robbery—is weak and could have been made up. On the other hand, the Fourth Circuit's approach does not require the incriminatory portions of the hearsay be corroborated, provided there is corroboration for other portions of the statement. In this hypothetical, the defendant need not even cor-

roborate the exculpatory portion of Smith's statement since he has corroborated the remainder.

Indeed, the Fourth Circuit admits hearsay with much less corroboration. Based upon the *Thomas* implication admitting hearsay corroborated by other hearsay,¹²⁵ the defendant could produce affidavits from other unavailable declarants each claiming to have watched television with the defendant and the others at the relevant time. If the affidavits contain corroborating details, all the hearsay statements should be admitted under the Fourth Circuit's approach.

Should this hearsay be admitted? The dangers of admitting it are clear. Although much has been corroborated, the important parts of the hearsay could easily have been fabricated. The corroboration does not change this possibility, and cross-examination cannot explore the dangers of fabrication or insincerity. The corroboration approach to establishing equivalent circumstantial guarantees of trustworthiness is fundamentally wrong.

First, the finding required under the Fourth Circuit's approach to the residual exception is very different from the factual conclusion required for a specific hearsay exception. When deciding whether hearsay falls within a traditional exception, the court only decides whether the circumstances surrounding the statement fit the exception's requirements. For example, before hearsay can be admitted as an excited utterance, the court has to decide whether the out-of-court statement was made "under the stress" of an exciting event.¹²⁶ Dying declarations are admissible only if the court finds that it was "made by a declarant while believing that his death was imminent."¹²⁷ The court evaluating such statements decides questions that are different from ones the jury must ultimately determine. It rules on admissibility without ever considering whether it believes what the excited or dying declarant said.

The corroboration decision is strikingly different. The court does not examine the circumstances surrounding the making of the assertion, but instead the amount and quality of confirming evidence at trial. This evaluation, in effect, determines whether the corroboration shows the hearsay to be true. By admitting an out-of-court assertion under the corroboration standard, the court, in effect, finds the declarant believable. This violates the fundamental

125. See *supra* note 105 and accompanying text.

126. FED. R. EVID. 803(2).

127. FED. R. EVID. 804(b)(2).

hearsay framework since judges are not authorized by the Rules to admit or exclude evidence based upon their evaluation of its truthfulness.

Furthermore, using corroboration to assess the trustworthiness element required by Rule 804(b)(5) ignores the plain language of that provision. The catchalls do not authorize the admission of hearsay if it is as reliable as that admitted under a specific exception. If this were permitted, Rule 804(b)(5) would instead provide "[s]tatements not covered by any of the foregoing exceptions but just as trustworthy"¹²⁸

This revised language would effectively admit all hearsay, since specific exceptions admit assertions without any pretense of reliability. For example, former testimony has no inherent reliability. All trial testimony is not trustworthy; a jury is commonly presented with contradictory trial declarations. Cross-examination does not invariably provide assurances that the testimony is reliable or trustworthy, but instead presents information to the jurors so they can properly assess the testimony.¹²⁹

Consequently, the admission of former testimony is not based upon reliability; rather, it is admitted because the jury can evaluate it nearly as well as in-court testimony.¹³⁰ If evidence offered under Rule 804(b)(5) only has to be as trustworthy as former testimony, the hearsay does not have to be trustworthy at all.¹³¹

128. See *United States v. Iaconetti*, 406 F. Supp. 554, 558 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) (where Judge Weinstein summarized the residual exceptions as "codify[ing] an open-ended exception for reliable and necessary hearsay"). Judges interpreting the residual exceptions to admit hearsay on an ad hoc basis when they determine the evidence is needed and trustworthy are arrogating unto themselves precisely the discretion Congress determined they were not to have. Recognizing that "some judges do not have the discretion that others do," Senator Ervin commented during hearings on the Rules that he "would rather have the rules say what is admissible rather than discretionary." *Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Committee on the Judiciary*, 93d Cong., 2d Sess. 285 (1973).

129. J. MAGUIRE, *supra* note 12, at 147.

130. *Contra* MCCORMICK ON EVIDENCE, *supra* note 46, § 254, at 760 ("Cross-examination, oath, the solemnity of the occasion, and in the case of transcribed testimony the accuracy of reproduction of the words spoken, all combine to give former testimony a high degree of credibility."); G. LILLY, *supra* note 7, § 74, at 251 (discussing the high trustworthiness of former testimony); R. LEMPET & S. SALTZBURG, *supra* note 2, at 473 (asserting that former testimony is very reliable).

131. See Burstein, *supra* note 109, at 275-76 (discussing the unique and inherently untruthful nature of former testimony due to its lack of guarantees of trustworthiness that might arise from contemporaneity with the relevant events; lacks spontaneity because it is elicited, allowing the questioner complete control over the scope of information provided; advance preparation allows opportunity for testimony to be tailored to appear supported by extrinsic evidence). *But see* R. LEMPET & S. SALTZBURG, *supra* note 2, at 452 (reliability of

Inherently unreliable hearsay is also admissible under Rule 803(4), which excepts statements made for the purpose of medical diagnosis from the hearsay rule.¹³² If hearsay offered under Rule 803(24) need only be as reliable as statements made to a doctor, the hearsay may be unreliable.

The residual exceptions, however, do not authorize the admission of hearsay if it is as trustworthy as that admitted under a specific hearsay exception. Instead, they require *circumstantial guarantees* of trustworthiness equivalent to those of a specific exception. Direct reliability is not the test; rather, *circumstances* that assure reliability must be measured. "Equivalence" requires that the circumstantial guarantees for residual hearsay be of the character and have the same force, function, and effect as those for the specific exceptions. The true starting point for this requirement, then, is an examination of circumstances that insure the trustworthiness of hearsay admitted under the specific exceptions.

VII. CIRCUMSTANTIAL GUARANTEES OF TRUSTWORTHINESS FOR THE SPECIFIC HEARSAY EXCEPTIONS

A. *The Rule 804 Exceptions*

1. *Former Testimony*

The first of the Rule 804 exceptions, the former testimony provision,¹³³ is not based on reliability.¹³⁴ Since its justification is something other than reliability, it has no circumstantial guarantees of trustworthiness to serve as a residual exception point of reference.

2. *Statements Under Belief of Impending Death*

Dying declarations are justified as trustworthy by the "powerful psychological pressures" present upon death.¹³⁵ This exception has traditionally been based on "the assumption that one who knows he

former testimony justified by time lapse and corresponding loss of memory which occurs between earlier hearing and trial).

132. See FED. R. EVID. 803(4). The similar common law exception excluded as unreliable statements to a physician consulted only for the purpose of enabling him to testify. The rule rejected the limitation for the practical reason that, while the statements were not admissible as substantive evidence, the jury would hear them anyway when the physician testified about the bases of his opinion. Admitting them as hearsay eliminates the confusing jury instruction that would otherwise result. See FED. R. EVID. 804(b)(2) advisory committee note.

133. See FED. R. EVID. 804(b)(1).

134. See *supra* notes 129-31.

135. See FED. R. EVID. 804(b)(2) advisory committee notes.

is about to die is unlikely to lie."¹³⁶

The circumstance which guarantees trustworthiness exists at the time of the hearsay utterance,¹³⁷ and that circumstance makes the hearsay danger of insincerity less for this class of hearsay than for other out-of-court assertions. Equivalence with this specific exception requires that the proffered Rule 804(b)(5) hearsay circumstances indicate that at the time of the declaration the hearsay danger of insincerity was reduced or eliminated.¹³⁸

3. *Statements Against Interest*

The statements against interest exception is justified by "the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true."¹³⁹ This rationale requires the speaker be aware when he speaks that the remarks are against his interest.¹⁴⁰ Thus, the circumstances existing at the time a statement against interest is uttered lessens the insincerity danger.

4. *Statements of Personal or Family History*

The true justification for Rule 804(b)(4), which admits state-

136. R. LEMPert & S. SALTzBURG, *supra* note 2, at 482; *Commonwealth v. Smith*, 454 Pa. 515, 517-18, 314 A.2d 224, 225 (1973) (noting the reliability of a dying declaration based upon the classic statement that no one "who is immediately going into the presence of his Maker will do so with a lie upon his lips") (quoting Lush, L.J. in *Regina v. Osman*, 15 Cox Cr. Cas. 1, 3 (Eng. 1881)).

137. G. LILLY, *supra* note 7, § 74, at 258. ("[T]he central feature of dying declarations—and the condition that is essential to admissibility—is that the statement be made at a time when the declarant has a settled expectation of death.")

138. The reliability of this guarantee has been questioned by commentators. See, e.g., R. LEMPert & S. SALTzBURG, *supra* note 2, at 484 (asserting that the exception is rooted more in history than in reason). These criticisms may be important for determining whether the dying declarations' exception should exist. They also would be important concerns for the residual exception if Rule 804(b)(5) authorized the admission of hearsay as reliable as that admitted under a specific exception. If so, a court's determination that dying declarations were not truly trustworthy would lead to the conclusion that unreliable statements could be admitted under the catchall.

Rule 804(b)(5), however, does not admit hearsay as long as it is as reliable as a dying declaration. An exploration of the true trustworthiness of dying declarations is, therefore, not important here. Instead, the residual exceptions require that equivalence must be found between the *circumstantial guarantee* of trustworthiness for the hearsay offered under the residual exception and the *circumstantial guarantee* of trustworthiness for the dying declaration. The proper question is not do the two assertions have comparable trustworthiness, but are the guarantees for the two of the same type and quality.

139. FED. R. EVID. 804(b)(3) advisory committee note.

140. See Tague, *supra* note 112, at 907 ("The trustworthiness of a statement against interest . . . is premised upon the declarant's recognizing the disserving nature of his statement at the time he made it.")

ments of personal or family history, is difficult to determine for two reasons. First, the Rule eliminated a common law requirement for the exception which assured the absence of a motive to falsify. The common law required the pedigree statement be made *ante litem motam*; that is, "before the origin of the controversy giving rise to the litigation in which the statement is offered."¹⁴¹ Second, the Advisory Committee failed to state a justification for Rule 804(b)(4).

Hearsay statements of personal or family history may be justified by accuracy since pedigree statements are unlikely to be the product of a faulty memory or perception.¹⁴² On the other hand, this provision may exist because it "is a minor exception," and little thought was given to it.¹⁴³ Or perhaps, even absent the *ante litem motam* requirement, these statements are usually made without, or at least with a lessened, hearsay danger of insincerity. Or the declarant's special knowledge about family history matters may lessen the chance of a mistaken assertion. Or perhaps, the justification is not reliability, but merely necessity.¹⁴⁴

If reliability is not the justification, this exception cannot be a benchmark for the residual hearsay guarantees of trustworthiness. If pedigree statements are deemed reliable, the circumstances guaranteeing trustworthiness are that, because of the special connection between the declarant and the declaration's subject matter existing when the statement is made, the hearsay is uttered with lessened or eliminated memory, perception, or sincerity problems.

5. *Summary of Rule 804 Circumstantial Guarantees of Trustworthiness Characteristics*

The Rule 804 circumstantial guarantees of trustworthiness have

141. See *In re Lewis' Estate*, 121 Utah 385, 388, 242 P.2d 565, 567 (1952) (concluding that hearsay is trustworthy because family members would know the truth of pedigree matters); MCCORMICK ON EVIDENCE, *supra* note 46, § 322, at 902 (noting the accuracy of discussion of relatives as to family members).

142. MCCORMICK ON EVIDENCE, *supra* note 46, § 322, at 902; see also FED. R. EVID. 804(b)(4) advisory committee note ("The general common law requirement that a declaration in this area must have been made *ante litem motam* has been dropped, as bearing more appropriately on weight than admissibility."); G. LILLY, *supra* note 7, § 78, at 269 n.88 (asserting that the statements of family history exception is an extension of the ancient documents exception).

143. D. BINDER, *supra* note 104, § 30.03, at 395.

144. *Id.* (asserting that hearsay assertions of pedigree are excepted from the hearsay rule because of necessity even though not substantially more trustworthy than hearsay assertions in general); see also MCCORMICK ON EVIDENCE, *supra* note 46, § 322, at 902 ("The general difficulty of obtaining other evidence of family matters, reflected in the unavailability requirement, furnishes impetus for the hearsay exception.").

two characteristics. First, these guarantees eliminate or lessen one or more of the hearsay dangers. An assertion may be wrong because it is insincere, ambiguous, or based upon flawed memory or perception. Hearsay is deemed unreliable because the jury cannot properly evaluate these possible hearsay inaccuracies. If, however, one or more of these concerns is eliminated or reduced for a hearsay class, the chances of that hearsay being unreliable are less than for hearsay generally. Consequently, good reason exists to admit that particular hearsay class.

Second, the guarantees of trustworthiness for the Rule 804 exceptions exist at the time of the hearsay's utterance. The admissibility determination about a particular out-of-court assertion would be the same the moment after it was made as at trial. This characteristic is really a corollary of the first. Out-of-court assertions may be introduced if the hearsay dangers are reduced. Since those dangers exist when the assertion is made, the reduction in the hearsay dangers must occur when the declaration is made. The guarantees of trustworthiness must exist at the time of the hearsay's making.¹⁴⁵

B. *The Rule 803 Exceptions*

The Rule 803 exceptions can conveniently be grouped into four categories. "Of the 23 exceptions, 14 are based upon entries or the absence of entries in documents; three exceptions are based upon reputation; two exceptions provide for the admissibility of court judgments; and four exceptions deal with evidence that frequently is adduced orally."¹⁴⁶

1. *Rule 803 Documentary Exceptions*

The guarantees of trustworthiness for the business records exception, Rule 803(6), are representative of the guarantees for all of the documentary exceptions.¹⁴⁷ The justification for the business records exception "is the recognition that business entities rely heavily upon regularly-kept records and, consequently, that there is an organizational motivation to be thorough and accurate."¹⁴⁸ The

145. Stewart, *supra* note 12, at 24.

146. *But see infra* note 181 (discussing statements against penal interest offered to exculpate an accused).

147. *See* FED. R. EVID. 803(5)-(18) (documentary exceptions). Two of these provisions, FED. R. EVID. 803(7) and (10), which provide for the admission of evidence to prove the absence of entries in business and public records, are "probably not hearsay as defined in Rule 801." FED. R. EVID. 803(7) advisory committee note.

148. G. LILLY, *supra* note 7, at § 68, at 236. *See also* MCCORMICK ON EVIDENCE, *supra*

circumstantial guarantees exist when the record is made¹⁴⁹ and make it unlikely that the hearsay is insincere or the product of a faulty memory or perception.¹⁵⁰

Three of the documentary exceptions— family records, ancient documents, and recorded recollections¹⁵¹—cannot so easily be warranted by extensions of the rationale for the business records exception. The justifications for Rule 803(13), the family records provision, are a “long tradition” of admissibility¹⁵² and necessity, rather than reliability.¹⁵³

The reliability rationale for the ancient documents exception, Rule 803(16), is that the document was created prior to the existence of any motive to falsify arising out of the impending litigation, and the written form reduces the possibility of transmission errors.¹⁵⁴ These justifications are consistent with the other excep-

note 46, § 306, at 872 (“[I]n actual experience the entire business of the nation and many activities function in reliance upon [business] records.”).

149. See MCCORMICK ON EVIDENCE, *supra* note 46, § 306, at 872 (noting one of the circumstances that assures business records’ reliability is that “the entries must have been made at or near the time of the transaction recorded”).

150. The rationale for the business records exception similarly justifies FED. R. EVID. 803(8), the public records exception, and FED. R. EVID. 803(11), the religious organizations records exception. Similar logic supports the existence of FED. R. EVID. 803(9) and (12), the exceptions for records of vital statistics and marriage, baptismal, and similar certificates. See MCCORMICK ON EVIDENCE, *supra* note 46, § 317, at 892-93 and § 319, at 896-97. FED. R. EVID. 803(14) and (15), the exceptions for records affecting an interest in property and for statements in documents affecting an interest in property, are based on a justification comparable to the one for business records. See FED. R. EVID. 803(15) advisory committee note (“The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness.”). Accord D. BINDER, *supra* note 104, § 15.03, at 225.

Comparable reasoning also supports FED. R. EVID. 803(17) and (18), the exceptions for market reports, commercial publications and learned treatises.

151. FED. R. EVID. 803(13),(16) and (5).

152. FED. R. EVID. 803(13) advisory committee note. See also MCCORMICK ON EVIDENCE, *supra* note 46, § 322, at 903 (stressing the traditional nature of this exception).

153. See D. BINDER, *supra* note 104, § 13.03, at 219 (noting that, although family records such as inscriptions in a family Bible “may not be the most trustworthy evidence, they are better than nothing”). But see M. GRAHAM, *supra* note 9, at 224 (justifying reliability on the basis “that the family would not allow an untruthful entry or inscription to be made, or to remain without protest”).

154. M. GRAHAM, *supra* note 9, at 227. See also MCCORMICK ON EVIDENCE, *supra* note 46, § 323, at 904 (citing reasons for the reliability of the ancient document exception); FED. R. EVID. 803(16) advisory committee note (justifying the ancient document exception on the basis that the “danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy”). But see D. BINDER, *supra* note 104, § 17.04, at 232-33 (asserting that necessity is the rationale for the ancient documents hearsay exception, not reliability).

tions, since the circumstances of the document's creation lessened the hearsay dangers of ambiguity and insincerity.

The rationale for recorded recollections, Rule 803(5), is partially based upon the reliability "inherent in a record made while events were still fresh in mind and accurately reflecting them."¹⁵⁵ Since this guarantee existed when the hearsay was made, the danger of a faulty memory is lessened. In addition, recorded recollections, similar to former testimony, can be evaluated much like in-court testimony. The witness must testify at trial and vouch for the accuracy of the record, providing the jury with the opportunity to observe appearance and demeanor.¹⁵⁶ "The witness is also subject to cross-examination under oath concerning [the] prior recollection as recorded."¹⁵⁷

2. Rule 803 Reputation Exceptions

The reputation exceptions admit reliable hearsay by requiring a broad interest in the subject matter of the reputation "so that it can accurately be said that there is a high probability that the matter underwent general scrutiny as the community reputation was formed."¹⁵⁸ In order for reputation to come within this exception, the "general scrutiny" must precede the formation of the community opinion and be in existence when the hearsay is made. This scrutiny produces reliability because it eliminates dependence upon the individual's mental workings; the normal dangers of faulty perception and memory are not present. The sincerity danger is eliminated because a community's assertion, unlike an individual's, is not affected by self-interest or a motive to fabricate.¹⁵⁹

3. Rule 803 Judgment Exceptions

Rule 803(23) excepts from the hearsay rule judgments as to personal, family or general history or boundaries. It is justified on grounds almost identical to those that justify the reputation exceptions.¹⁶⁰ No comparable rationale supports the reliability of Rule

155. FED. R. EVID. 803(5) advisory committee note.

156. D. BINDER, *supra* note 104, § 7.06, at 140.

157. *Id.*

158. MCCORMICK ON EVIDENCE, *supra* note 46, § 324, at 906. See also FED. R. EVID. 803(19),(20), and (21) advisory committee note (basis of reliability of reputation exceptions).

159. See Stewart, *supra* note 12, at 25 (asserting that reputation exceptions are designed to avoid dependence upon any single individual's mental processes; source of the reputation must lie in a settled community acceptance which precludes reliance upon personal opinion or rumor).

160. See FED. R. EVID. 803(23) advisory committee note (noting that verdicts were origi-

803(22), the judgment of a previous conviction. The guarantees vary depending upon whether the judgment is based on a guilty plea or upon a trial verdict. A felony conviction resulting from a guilty plea has reliability guarantees analogous to a statement against interest.

Trial verdicts are reliable for three reasons. First, the convicted person had a strong motivation to prove his innocence.¹⁶¹ Second, the constitutional standard for criminal trials, requiring proof beyond a reasonable doubt, lessens the possibility that the hearsay verdict was based on faulty perceptions or memories.¹⁶² Third, the manner in which this hearsay is produced removes the danger that the declarant spoke out of self-interest or with the motive to fabricate.¹⁶³

4. *Rule 803 Oral Evidence Exceptions*

The four exceptions admitting evidence frequently adduced orally all have trustworthiness guarantees. The reliability circumstance for both present sense impressions, Rule 803(1), and statements of then existing mental, emotional, or physical condition, Rule 803(3), is the absence of time between the declarant's perception and his assertion.¹⁶⁴ The immediacy of the subsequent statement reduces the problems of sincerity and faulty memory.¹⁶⁵

The guarantee of trustworthiness for Rule 803(2), excited utterances, is an event preceding the hearsay that is exciting enough to still reflective capacity at the time of the assertion. The theory is

nally accepted as proof of reputation; shift to separate grounds of reliability proper "since the process of inquiry, shifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation").

161. See also FED. R. EVID. 803(22) advisory committee note (noting that convictions for minor offenses are excluded from the Rule because the motivations to defend are often minimal or nonexistent in comparison to felony charges).

162. See MCCORMICK ON EVIDENCE, *supra* note 46, § 318, at 894 (noting that a criminal judgment represents significantly more reliable evidence than a civil judgment, because of the heavy burden of proof in a criminal case).

163. Cf. D. BINDER, *supra* note 104, § 24.04, at 281 (justifying the trial verdict exception by considering a criminal conviction to "be a publicly recorded investigative finding that is excepted to the hearsay rule as an entry in a public record", Rule 803(8)).

164. See FED. R. EVID. 803(1) advisory committee note (noting that Rule 803(3) "is essentially a specialized application of" Rule 803(1)).

165. See FED. R. EVID. 803(1) advisory committee note (stating that the "substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation"); MCCORMICK ON EVIDENCE, *supra* note 46, § 298, at 860 (commenting that the report is safe from memory errors because it concerns observations made at the time of the statement); see also G. LILLY, *supra* note 7, § 59, at 209 (substantial contemporaneity requirement minimizes the dangers of deliberate misrepresentation and faded memory).

that such a circumstance "produces utterances free of conscious fabrication."¹⁶⁶

Finally, the reliability circumstance for statements for purposes of medical treatment, Rule 803(4), is the "patient's strong motivation to be truthful."¹⁶⁷ The hearsay danger of sincerity is lessened because of the patient's belief "that the effectiveness of treatment he receives may largely depend upon the accuracy of the information he provides the physician."¹⁶⁸

5. *Summary of Rule 803 Circumstantial Guarantees of Trustworthiness Characteristics*

The Rule 803 circumstances guaranteeing reliability are very much like those for the Rule 804 provisions. The circumstances must exist when the hearsay is uttered and reduce or eliminate one or more of the hearsay dangers.¹⁶⁹

The residual hearsay exceptions admit hearsay if it has equivalent circumstantial guarantees to the specific hearsay exceptions. The foregoing review of the specific exceptions illustrates that the circumstances must exist at the time the residual hearsay was uttered and reduce or eliminate the possibility that the out-of-court assertion was the product of ambiguity or narrative difficulties, insincerity, faulty memory, or flawed perceptions. If the guarantees for the hearsay offered under Rule 804(b)(5) or 803(24) do not have these characteristics, the circumstantial guarantees are not of equivalent type and quality as the guarantees of the specific exceptions, and the hearsay is not admissible.¹⁷⁰

166. FED. R. EVID. 803(2) advisory committee note.

167. FED. R. EVID. 803(4) advisory committee note.

168. MCCORMICK ON EVIDENCE, *supra* note 46, § 292, at 690. For a discussion of the portion of the Rule 803(4) admitting statements made to a physician consulted only for the purposes of diagnosis (and testimony of physician), see *supra* note 132 and accompanying text.

169. *Cf.* Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1796-97 (1980):

The reliability of hearsay is usually determined by examining the degree to which believing the evidence requires unsupported reliance upon the declarant's four testimonial capacities: narration, sincerity, memory, and perception. If circumstances indicate that no danger would result from reliance upon one or more of these capacities, an exception is sometimes said to be warranted.

170. Justice Stewart suggested an interpretation of the catchalls which differs from the corroboration approach and the one advocated here. See *McKethan v. United States*, 439 U.S. 936, 939 n.3 (1978) (Stewart, J., dissenting from denial of certiorari) (suggesting possible intended purpose of Rule 804(b)(5) was to provide expansion of hearsay exception categories rather than case-by-case exceptions); *but see* R. LEMPERT & S. SALTZBURG, *supra* note 2, at 505 (asserting that language of Rule 804(b)(5) and legislative intent make it plain that new categories of hearsay exceptions not intended); J. WEINSTEIN & M. BERGER, *supra* note 38, ¶

VIII. ALL CIRCUMSTANCES REDUCING HEARSAY DANGERS
DO NOT JUSTIFY THE ADMISSION OF HEARSAY
UNDER A RESIDUAL EXCEPTION

The traditional hearsay framework makes hearsay presumptively inadmissible. When hearsay is admitted, it is justified by a circumstantial guarantee that reduces one or more hearsay dangers. The guarantees of trustworthiness that exist for all hearsay exceptions, however, cannot be sufficient to satisfy the residual exceptions; otherwise the hearsay prohibition will vanish.

United States v. Williams is illustrative.¹⁷¹ *Williams* involved a tax fraud prosecution. George Bush, an employee of the defendant's firm, gave a signed, pretrial affidavit to Internal Revenue agents. Bush's trial testimony differed from his affidavit. The Fifth Circuit affirmed the affidavit's admission under Rule 803(24), finding numerous circumstantial guarantees of trustworthiness. Bush admitted making the statement willingly, making alterations to ensure its "correctness."¹⁷² "The affidavit was made closer in time to the actual events than was the trial testimony; hence the possibility of lost recollection was reduced."¹⁷³ Finally, since Bush testified, the jury could assess his demeanor.

This last factor is not a trustworthiness guarantee. The jury's observation of Bush's trial testimony supports the conclusion that they could evaluate his hearsay better than an unavailable declarant's hearsay. The jury's opportunity to assess the demeanor of an in-court declarant, however, does not make the former statements reliable and should not be considered in assessing admissibility under a residual exception.

Similarly, the alterations made to the affidavit did not necessarily insure its accuracy. The changes do not guarantee that Bush remembered or perceived the affidavit's subject matter correctly or

803(24)[01], at 803-381-83 (rejecting Justice Stewart's suggestion). Creation of new classes of admissible hearsay, as Justice Stewart suggested, results in major changes in the hearsay rule, and the drafters intended that only Congress should have this power. See S. REP. NO. 1277, 93d Cong., 2d Sess. 20, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7067 ("[R]esidual exceptions are not meant to authorize major judicial revisions of the hearsay rule Such major revisions are best accomplished by legislative actions.").

The rejection of Justice Stewart's "expansion of hearsay categories" approach to Rule 804(b)(5) lends additional support to this Article's assertion that the Fourth Circuit's approach is wrong. That court has, in effect, created a new category of admissible hearsay—the category of corroborated grand jury testimony.

171. 573 F.2d 284 (5th Cir. 1978).

172. *Id.* at 288.

173. *Id.*

that he did not intend to deceive the IRS. Instead, the alterations merely show that the affidavit accurately recorded what he meant to tell the agents, and that the hearsay was correctly reported to the jury.¹⁷⁴ Similarly, his testimony that he made the former statement does not insure the statement's reliability, but only that the hearsay statement was made. These two factors fail to separate this hearsay from hearsay generally. Our trial system, through authentication rules, cross-examination, oath, and demeanor of the in-court witness reporting the hearsay, always presents the jury with information to determine whether the hearsay was actually made and correctly reported.

The court's reasoning that this hearsay had a reduced possibility of lost recollection compared to later trial testimony ignores the fact that hearsay inevitably occurs closer to the event it describes than trial testimony. The hearsay rule will vanish if this factor justifies admission under a residual exception.

Finally, the court noted the affidavit was made willingly. A statement made involuntarily is less reliable than one made without coercion; however, this circumstance exists for hearsay generally, since out-of-court assertions are usually voluntary.

The circumstances relied upon in *Williams* exist for nearly all hearsay. This approach to the residual exceptions would lead to nearly routine hearsay admission.¹⁷⁵ The circumstances reducing the hearsay dangers cannot be the same that exist for almost all hearsay.

Similarly, it is incorrect to rely solely on guarantees that are also present for a broad range of inadmissible hearsay. A court's finding of the requisite circumstantial guarantees allowing the introduction of a category of out-of-court statements that the hearsay rule was meant to ban must be incorrect.¹⁷⁶ Finally, the residual hearsay

174. Compare *United States v. Hinkson*, 632 F.2d 382, 385 (4th Cir. 1980) (correctly holding that the trustworthiness requirement or reliability of Rule 803(24) relates to the credibility of the extrajudicial declarant and not that of the in-court witness) with *United States v. Lyon*, 567 F.2d 777 (8th Cir.), cert. denied, 435 U.S. 918 (1978) (holding the admission of an FBI interview transcript proper under Rule 804(b)(5) based upon trustworthiness guaranteed by FBI agent's detailed testimony regarding how he took and transcribed the statement).

175. The stated Rule 803(24) reliability factors coupled with the jury's opportunity to observe the cross-examination and demeanor of the declarant at trial still results in improper hearsay admission. In effect, *Williams* stands for the proposition that every time the declarant testifies at trial and admits making the out-of-court assertion, the hearsay is admissible. This negates the Rules' restrictions on the substantive admission of prior statements. The *Williams* court's interpretation of the residual exceptions effectively works a major change in the hearsay framework.

176. See, e.g., *United States v. Mastrangelo*, 533 F. Supp. 389 (E.D.N.Y. 1982) (neces-

guarantees must not only be different from those for hearsay generally or for a broad range of inadmissible hearsay; they must have equivalent force to the guarantees of a specific exception. The guarantees for residual hearsay must not only reduce the hearsay dangers, they must reduce them to the same extent as a specific exception.

Consequently, hearsay admission is not justified by every reduction of hearsay dangers. The Rules consistently indicate that not every reduction suffices to admit hearsay. For example, an oath may lessen the danger of insincerity.¹⁷⁷ However, this reduction will not, by itself, suffice to admit the hearsay. The former testimony exception¹⁷⁸ and the inconsistent statement exclusion¹⁷⁹ both impose requirements in addition to the oath.¹⁸⁰

Similarly, hearsay falling just outside the time necessary to qualify as a present sense impression may present a lesser chance that the statement was produced by a faulty memory than hearsay generally. This reduction, by itself, however, is insufficient justification to admit an out-of-court assertion. An exception for such statements of recent perception was considered and rejected by

sary guarantees under Rule 804(b)(5) for admission of a murdered witness' grand jury testimony found because witness had no motive to testify falsely, was not being investigated and not given immunity, took an oath and had firsthand knowledge and reaffirmed and never recanted his story; corroboration existed for his testimony).

The *Mastrangelo* court misinterpreted the Rule 804(b)(5) circumstantial guarantee of trustworthiness requirement. The corroboration and reaffirmation were not circumstances that reduced any hearsay danger when the statement was made. Firsthand knowledge is a requisite for the admission of hearsay; its presence was not a circumstance reducing hearsay dangers. See *McCORMICK ON EVIDENCE*, *supra* note 46, § 247, at 731 n.3 (hearsay declarants, like lay witnesses, generally must also have personal knowledge); see also, *FED. R. EVID.* 602 (requiring a lay witness to have firsthand knowledge of the events testified to). The absence of a motive to fabricate and the perjury possibility may reduce the hearsay dangers. However, although these two factors may not exist for most hearsay, they are present for nearly all grand jury testimony. Every grand jury witness testifies under oath, few are participants in the crime, few are offered immunity, and few have an apparent reason to lie. The *Mastrangelo* circumstances would admit most grand jury testimony under Rule 804(b)(5).

177. An acknowledged minority view, espoused by some commentators, is that the oath has some effect on reducing the hearsay dangers. See *Stewart*, *supra* note 12, at 22-23 (commenting that sworn testimony is more accurate than unsworn testimony because the witness probably exercises greater caution when under oath); *R. LEMPERT & S. SALTZBURG*, *supra* note 2, at 352 n.11 (contending that the oath's value should not be discounted in the absence of empirical evidence of its ineffectiveness in promoting reliable testimony).

178. *FED. R. EVID.* 804(b)(1).

179. *FED. R. EVID.* 801(d)(1)(A).

180. See *FED. R. EVID.* 801(d)(1) advisory committee note (mere presence of oath has never been regarded as sufficient to remove a statement from the hearsay category).

Congress.¹⁸¹

IX. THE PROPER INTERPRETATION OF EQUIVALENT CIRCUMSTANTIAL GUARANTEES OF TRUSTWORTHINESS

Four analytical steps must be taken to satisfy a residual hearsay exception's equivalent circumstantial guarantee of trustworthiness requirement.

First, the court must isolate the circumstances existing when the hearsay was made.

Second, the court must decide whether those circumstances reduce some or all of the hearsay dangers.

Third, the court must determine that these circumstances do not exist for all hearsay or for a broad range of inadmissible hearsay.

181. Proposed Rule 804(b)(2), an unenacted hearsay exception requiring unavailability of the declarant, provided for the admission of

a statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.

FED. R. EVID. (Revised Draft), 51 F.R.D. 315, 438 (1971).

The House Judiciary Committee deleted the provision because it "did not believe that statements of the type referred to bore sufficient guarantees of trustworthiness to justify admissibility." H.R. REP. NO. 650, 93d Cong., 1st Sess. 6 (1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7075, 7079. *But see* United States v. Van Lufkins, 676 F.2d 1189 (8th Cir. 1982) (recent perceptions made by jail assault victim to his sister admitted under Rule 804(b)(5); only indicia of reliability was short time period between incident and statement).

The Rules are replete with other examples where hearsay admission is not sufficiently justified by every reduction of the hearsay dangers. Business records are not admissible, even though circumstances surrounding their making may reduce the hearsay dangers if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." *See* FED. R. EVID. 803(6). Similarly, statements against penal interests reduce hearsay dangers, but Rule 804(b)(3) provides that this reduction may not always justify admission. Consequently, the Rule makes statements exculpating an accused inadmissible "unless corroborating circumstances clearly indicate the trustworthiness of the statement." *See* FED. R. EVID. 804(b)(3).

This is the only provision where the admissibility decision at trial would not necessarily be the same as the moment after the hearsay's utterance. This corroboration requirement, however, is not the same circumstantial guarantee of trustworthiness as those found in the other hearsay exceptions. Concern about the unreliability of exculpatory statements led the drafters to impose an additional and different requirement from the normal guarantees of trustworthiness. *See* Tague, *supra* note 112, at 866-92 (full discussion of legislative history of corroboration provision); MCCORMICK ON EVIDENCE, *supra* note 46, § 298, at 862 (noting that the Rule 804(b)(3) corroboration requirement, which "represents a radical departure from the general pattern of exceptions to the hearsay rule," was incorporated by the Advisory Committee to increase the acceptability of admission of statements against penal interest).

Fourth, the court must decide whether the reduction in the dangers is comparable to that for a specific exception.

These standards eliminate the subversion of the Rules' hearsay framework produced by the corroboration approach to the residual exceptions. They remove the judge's belief about the hearsay's truth or the strength of a party's case from consideration. The judge's decision on the hearsay's admissibility under a residual exception will be similar to that for any other hearsay ruling.

These standards defer to the drafters' decisions that some circumstances do not lessen the dangers sufficient to justify the admission of hearsay. The years of analysis that resulted in the common law exceptions and the drafters' extensive consideration of both that common law and the scholarly comments about it, mean that many decisions about circumstances that reduce the dangers have already been made. Since the residual exceptions will be limited to that small area where no determination about circumstantial guarantees of trustworthiness already exists, the residual exceptions will be confined to rare and exceptional cases.¹⁸² The proposed standards eliminate the inevitable conflict between the more probative and trustworthiness elements of the catchalls produced by the corroboration approach.¹⁸³ They do not rely on trial evidence that tends to make the hearsay less necessary.

The standards are superior to the corroboration approach because they provide articulable guidelines to aid the trial judge's discretion. Since judges will draw on the specific exceptions' comparable circumstantial guarantees, including accumulated case experience and commentators' knowledge, the role of judicial bias will decrease and the predictability and certainty of decisions will increase. Similarly, use of the proposed standards should lead the trial judge to articulate the reasons for a ruling, and articulated, reasoned decisions should lead to more uniform and predictable residual hearsay rulings.

Furthermore, the proposed standards satisfy the language of the residual exceptions and operate within the traditional hearsay framework. They insure equivalent circumstantial guarantees of trustworthiness between residual hearsay and the specific exceptions. The standards properly interpret the residual hearsay Rules' equivalent circumstantial guarantees of trustworthiness

182. See *supra* note 34 and accompanying text.

183. See *supra* note 110 and accompanying text.

requirement.¹⁸⁴

X. THE PROPER APPLICATION OF THE RESIDUAL EXCEPTIONS TO THE GRAND JURY CASES

The proposed standards' application to the Fourth Circuit's grand jury cases would have resulted in the inadmissibility of the hearsay in all but *United States v. West*.¹⁸⁵ In the other cases, no circumstances existed when the grand jury statements were made that sufficiently reduced the hearsay dangers to justify the admission under Rule 804(b)(5).¹⁸⁶ The only circumstance guaranteeing reliability when the hearsay was uttered was an oath administered to the declarants. The Rules clearly indicate that an oath, by itself,

184. *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961), is a good test for the proposed standards. *Dallas County* was the impetus for the residual exceptions, Sonenshein, *supra* note 38, at 868, and both the Senate and the Advisory Committee cited the case as an example of the catchalls' intended operation. S. REP. NO. 1277, 93d Cong., 2d Sess. 19, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7066; FED. R. EVID. 803(24) advisory committee note.

In 1957, the clock tower of the Dallas County courthouse in Selma, Alabama, collapsed. *Dallas County*, 286 F.2d at 390. Several people reported that the tower had recently been struck by lightning and charred wood was found in the debris. *Id.* Dallas County sought to collect on its policies which insured against losses from fire and lightning. *Id.* The insurance companies refused to pay, maintaining that the tower plummeted because of structural weaknesses. *Id.* In the resulting trial, the insurers attempted to prove that the charred wood was aged by introducing a copy of an unsigned, June 9, 1901, Selma newspaper article describing a fire that morning in the dome of the courthouse. *Id.*

The Fifth Circuit affirmed the newspaper article's admission. After determining the hearsay's introduction was necessary because of the unlikelihood of producing a witness with an accurate memory of the fifty-year-old events, the court found the requisite circumstances of trustworthiness in the newspaper reporter's lack of "motive to falsify, and a false report would have subjected the newspaper and him to embarrassment in the community. The usual dangers inherent in hearsay evidence, such as lack of memory, faulty narration, intent to influence the court proceedings, and plain lack of truthfulness are not present here." *Id.* at 397. Analyzed under the proposed standards, the hearsay had circumstantial guarantees of trustworthiness because the circumstances existing when it was uttered reduced or eliminated hearsay dangers. These circumstances did not exist for hearsay generally. In effect, the court concluded that the reductions in the hearsay dangers were at least as great as for the other hearsay exceptions. Significantly, the *Dallas County* court determined the newspaper article's admissibility without using corroboration.

185. 574 F.2d 1131 (4th Cir. 1978).

186. *Cf. United States v. McCall*, 740 F.2d 1331 (4th Cir. 1984) (noting that Fourth Circuit cases held corroborated grand jury transcripts admissible hearsay under Rule 804(b)(5) because "grand jury proceedings, with their attendant formalities—official recording of testimony, protection against witness abuse, and official supervision—afford greater protection for the accuracy of the truthfinding process than does the taking of *ex parte* affidavits"). *But see Note, The Admissibility of Grand Jury Testimony Under 804(b)(5): A Two-Test Proposal*, 74 J. CRIM. L. & CRIMINOLOGY 1446 (1983) (stating that "modern grand jury procedural practices make the reliability of grand jury testimony highly suspect").

is an insufficient trustworthiness guarantee.¹⁸⁷

West's grand jury testimony should have been admitted. The testimony consisted of written statements taken from Brown immediately after the drug transactions occurred.¹⁸⁸ Brown had a significant stake in giving truthful statements. He was fully aware that any fabrications would be immediately disclosed because the drug enforcement agents recorded, photographed and observed the drug transactions. Furthermore, he cooperated in exchange for lesser punishment for a prior conviction.¹⁸⁹ Any insincerity by Brown was strongly against his penal interest.

These circumstances existed when the statements were made, reducing or eliminating the hearsay danger of insincerity. They do not exist for hearsay generally or for a broad range of inadmissible hearsay. The circumstances reducing the insincerity danger are comparable to those of a specific hearsay exception. Indeed, the circumstantial guarantees of this hearsay are akin to a statement against interest. The standards for determining equivalent circumstantial guarantees of trustworthiness were satisfied, and the hearsay was properly admissible under Rule 804(b)(5).

XI. CONCLUSION

The residual exceptions were enacted to allow for the admission of exceptional hearsay not covered by a specific exception, but that still fits within the traditional framework for hearsay exceptions. The approach to the residual exceptions that relies on hearsay corroboration subverts the framework adopted in the Federal Rules of Evidence. The proper approach, which preserves the Rules' hearsay structure, uses four standards to examine whether the circumstances existing when the hearsay was uttered reduced the hearsay dangers sufficiently to justify the admission of the out-of-court statement.

187. See *supra* note 178 and accompanying text.

188. *West*, 574 F.2d at 1134. See *supra* text accompanying note 60.

189. *West*, 574 F.2d at 1135. See *supra* note 60.

