Florida State University Law Review

Volume 20 | Issue 4 Article 2

Spring 1993

The Residual Hearsay Exception Reconsidered

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THE RESIDUAL HEARSAY EXCEPTION RECONSIDERED

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I. INTRODUCTION

WE have an adversary system of justice in the English-speaking countries.[1] Thus, the responsibility to put in evidence rests with the parties, not with the court. While the last actual trial by battle occurred in 1638,[2] we still have a "battle of wits"[3] in which each party through counsel puts on the best possible case.

Extracting the truth in the typical trial situation normally involves a clash between two competing stories. Zealous advocacy is a duty required of every attorney[4] and demands that the attorney present an account of the case in a light that best serves the client's interests.[5] In preparation for trial, an attorney ought to vigorously dig out the hidden pieces of pertinent information. During the search for auspicious evidence, witnesses are deposed, interrogatories are served, documents are examined, physical and mental examinations are performed, and experts are asked to give opinions. At the end of the search, each party formulates a separate narrative from the same body of evidence.

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1. *See, e.g.*, Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985); Singer v. United States, 380 U.S. 24 (1965); GEOFFREY HAZARD, ETHICS IN THE PRACTICE OF LAW 127 (1978).

2. BALLENTINE'S LAW DICTIONARY 1299 (3d ed. 1969). The date, however, is open to some dispute. *Compare* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 413-14 (Butterworths 2d ed. 1979) ("The appeal had been defunct since medieval times.") *with* BOUVIER'S LAW DICTIONARY 3416 (3d rev. 1914) (wager of battle was in the statutes of South Carolina as late as 1857).

3. *See* Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., concurring); Hardman v. Helene Curtis Indus., 198 N.E.2d 681 (Ill. App. 1964); David M. Morris, Note, *Attorney Fee Forfeiture*, 86 COLUM. L. REV. 1021, 1050 (1986).

4. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983) ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *see also* Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984), *rev'd sub nom.* Nix v. Whiteside, 475 U.S. 157 (1986).

5. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983). Such conduct, however, is limited. A lawyer may not knowingly make a false statement of material fact or law to a tribunal. *Id.*

Before a jury of one's peers, each narrative will undergo rigorous cross-examination designed to unearth the truth. Evidence is given under oath in the morally suasive courtroom atmosphere, while the trier of fact assiduously peruses the countenances of the witnesses. The trial is controlled by rules of evidence, and it is within the rules of evidence that we find one of our greatest engines for truth—the rule against hearsay.[6]

Next to a trial by jury, there is, perhaps, nothing more esteemed in our Anglo-American law of evidence than the rule against hearsay.[7] Before there was a rule against hearsay, a person might be tried and convicted by an out-of-court declaration without being allowed the opportunity to confront his or her accuser. Such was the case when Sir Walter Raleigh was found guilty of high treason in 1603.[8] Raleigh was convicted largely on the evidence of a statement from an alleged fellow conspirator, Lord Cobham, who himself was in prison and was not produced at the trial. Cobham later retracted his confession, which retraction (according to advocates of the Crown) was later recalled.[9]

By the 1500s, the testimony of witnesses had become the principal source of proof.[10] The practice of using a jury (originally a jury of twenty-four men[11]) started to appear around the year 1122 under the reign of Henry I of England.[12] Apart from this developing system, "trial by battle" and "trial by ordeal" were frequently employed.[13]

As testimony by witnesses given in court became the predominant source of proof, it became evident that hearsay was generally unrelia-

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6. FED. R. EVID. 801.

7. JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1364(II)(9) (James H. Chadbourn rev. ed. 1974). Wigmore called the rule "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 methods of procedure." *Id.*

8. JOHN G. PHILLIMORE, HISTORY AND PRINCIPLES OF THE LAW OF EVIDENCE 157-68 (1850). *See also* California v. Green, 399 U.S. 149, 177 n.10 (1970); Richard L. Marcus, *The Tudor Treason Trials: Some Observations on the Emergence of Forensic Themes*, 1984 U. ILL. L. REV. 675.

9. PHILLIMORE, *supra* note 8, at 163-64. *See also* Marcus, *supra* note 8.

10. JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 53-65 (1898).

11. *Id.* at 53 ("[A]ssemble the County of Berkshire and cause twenty-four of the older men to be chosen to answer on oath."). Blackstone states the jury starts at twelve (including the plaintiff), but that the opponent was allowed to match that number with his own "compurgators." 3 WILLIAM BLACKSTONE, COMMENTARIES *343; *see also* Apodaca v. Oregon, 406 U.S. 404 (1972).

12. THAYER, *supra* note 10, at 53-65.

13. *Id.* at 34-46. The practice of wager of battle is discussed at 3 WILLIAM BLACKSTONE, COMMENTARIES *337-41; trial by ordeal is discussed at 4 WILLIAM BLACKSTONE, COMMENTARIES *342-45.

ble.[14] In time, an exclusionary rule was developed to control the circumstances in which hearsay could be admitted because hearsay came to be considered inherently unreliable.[15] The rule against hearsay allows the trier of fact to hear the witness subjected to contemporaneous cross-examination. Cross-examination allows the trier of fact to check for signs of nervousness, friendly or hostile attitude, hesitations, and accuracy in perception and memory. Cross-examination may reveal errors, falsifications, unreliability of a declarant's assertions, or "twistifications."

Exceptions to the rule against hearsay supposedly are grounded in the premise that use of an extrajudicial statement is necessary and/or was made under circumstances that guarantee its trustworthiness.[16] When these requirements are relaxed, the rule against hearsay tends to disappear. Currently, the federal rules recognize forty (more or less) exceptions to hearsay.[17] In addition to the "nonhearsay" exceptions,[18] the exceptions include the residual or "catchall" exceptions 803(24) and 804(b)(5), which the State of Washington and twenty-three other states have refused to adopt.[19] Of all the exceptions, the residual exceptions have probably generated the greatest amount of controversy.[20]

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14. *See* THAYER, *supra* note 10, at 518-19; 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 214-19 (3d ed. 1944); *see also* United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977).

15. WIGMORE, *supra* note 7, § 1364(I)(2).

16. *Id.* § 1422; *see also* Scholle v. Cuban-Venezuelan Oil Voting Trust, 285 F.2d 318, 321 (2d Cir. 1960).

17. DAVID F. BINDER, HEARSAY HANDBOOK 86 (2d ed. 1983).

18. FED. R. EVID. 801(d)(1), (2), etc.

19. BINDER, *supra* note 17, § 40.03 (2d ed. 1983 & Supp. 1990). The adopting states are Alaska, Arizona, Arkansas, Colorado, Delaware, Hawaii, Idaho, Iowa, Louisiana, Minnesota, Mississippi, Montana, Nevada, Nebraska, New Mexico, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, West Virginia, Wisconsin, and Wyoming. *Id.*

20. *See* Feeda F. Bein, *Prior Inconsistent Statements: The Hearsay Rule, 801(d)(1)(A) and 803(24)*, 26 UCLA L. REV. 967 (1979); Paul Bergman, *Ambiguity: The Hidden Hearsay Danger Almost Nobody Talks About*, 75 KY. L.J. 841 (1987); Jonathan E. Grant, *The Equivalent Circumstantial Guarantees of Trustworthiness Standard for Federal Rule of Evidence 803(24)*, 90 DICK. L. REV. 75 (1985); Edward J. Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 SAN DIEGO L. REV. 239 (1978); Randolph N. Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431 (1986); Scott M. Lewis, *The Residual Exceptions to the Federal Hearsay Rule: Shuffling the Wild Cards*, 15 RUTGERS L.J. 101 (1983); George R. Nock, *Twist and Shout and Truth Will Out: An Argument for the Adoption of a "Safety-Valve" Exception to the Washington Hearsay Rule*, 12 U. PUGET SOUND L. REV. 1 (1988); John L. Ross, *Confrontation and Residual Hearsay: A Critical Examination and a Proposal for Military Courts*, 118 MIL. L. REV. 31 (1987); David A. Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867 (1982); Fredrica Hochman, Note, *The Residual Exceptions to the Hearsay*

The residual hearsay exceptions threaten to swallow the hearsay rule.[21] Since 1975, the use of Rules 803(24) and 804(b)(5), and their state equivalents, have been reported in more than 140 federal cases and in more than ninety state cases.[22] Contrary to the intent of Con-

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Rule in the Federal Rules of Evidence: A Critical Examination, 31 RUTGERS L. REV. 687 (1978); Gary W. Majors, Comment, *Admitting "Near Misses" Under the Residual Hearsay Exceptions*, 66 OR. L. REV. 599 (1988); Michael E. McCue, Note, *Nebraska's Residual Hearsay Exceptions: How Broad a Scope?*, 61 NEB. L. REV. 187 (1982); Kathryn J. Stumpf, Comment, *The Catchall Exceptions to the Hearsay Rule: Merging Rules 803(24) and 804(b)(5) of the Federal Rules of Evidence*, 37 FED'N INS. & CORP. COUNS. Q. 73 (1986); Lizbeth A. Turner, Comment, *Admission of Grand Jury Testimony Under the Residual Hearsay Exception*, 59 TUL. L. REV. 1033 (1985).

21. *See* sources cited *supra* note 20. The cited articles note how residual exceptions 803(24) and 804(b) (5) have caused substantial erosion to the rule against hearsay. For a strong example of the dangers of hearsay testimony and an eroding hearsay rule, see United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977).

22. STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL, 360-74, 436-38 (5th ed. 1990) & 78-81, 90-93 (Supp. 1992). *See also* State v. Bravo, 762 P.2d 1318 (Ariz. 1988), *cert. denied*, 490 U.S. 1039 (1989); State v. Smith, 673 P.2d 17 (Ariz. 1983), *cert. denied*, 465 U.S. 1074 (1984); State v. Barger, 810 P.2d 191 (Ariz. Ct. App. 1990), *rev. denied*, 812 P.2d 628 (Ariz. 1991); State v. Ruelas, 798 P.2d 1335 (Ariz. Ct. App.), *rev. granted in part and denied in part*, 798 P.2d 1307 (Ariz. 1990); State v. Ramirez, 688 P.2d 1063 (Ariz. Ct. App. 1984); State v. Hughes, 584 P.2d 584 (Ariz. Ct. App. 1978); Smith v. State, 798 S.W.2d 94 (Ark. 1990); Ward v. State, 770 S.W.2d 109 (Ark. 1989); Blaylock v. Strecker, 724 S.W.2d 470 (Ark. 1987); Hill v. Brown, 672 S.W.2d 330 (Ark. 1984); *In re* Cheryl H., 200 Cal. Rptr. 789 (Cal. Ct. App. 1984); People v. Bowers, 801 P.2d 511 (Colo. 1990); People v. Newbrough, 803 P.2d 155 (Colo. 1990); Stevens v. People, 796 P.2d 946 (Colo. 1990); Oldsen v. People, 732 P.2d 1132 (Colo. 1986); People v. Mathes, 703 P.2d 608 (Colo. 1985); W.C.L. v. People, 685 P.2d 176 (Colo. 1984); State v. Torres, 556 A.2d 1013 (Conn. 1989); *In re* Sean H., 586 A.2d 1171 (Conn. App. Ct.), *certif. denied*, 588 A.2d 1078 (Conn. 1991); State v. Tyson, 579 A.2d 1083 (Conn. App. Ct.), *certif. denied*, 582 A.2d 207 (Conn. 1990); State v. Maldonado, 536 A.2d 600 (Conn. App. Ct.), *certif. denied*, 541 A.2d 1239 (Conn. 1988); Distefano v. State, 526 So. 2d 110 (Fla. 1st DCA 1988); People v. Coleman, 563 N.E.2d 1010 (Ill. App. Ct. 1990), *appeal denied*, 567 N.E.2d 335 (Ill. 1991); State v. Burrell, 412 N.W.2d 556 (Iowa 1987), *cert. denied*, 485 U.S. 937 (1988); State v. Brown, 341 N.W.2d 10 (Iowa 1983); Fitch v. Burns, 782 S.W.2d 618 (Ky. 1989); Wager v. Commonwealth, 751 S.W.2d 28 (Ky. 1988); Estes v. Commonwealth, 744 S.W.2d 421 (Ky. 1987); Maynard v. Commonwealth, 558 S.W.2d 628 (Ky. Ct. App. 1977); Buckbee v. United Gas Pipe Line Co., 561 So. 2d 76 (La. 1990); Commonwealth v. Pope, 491 N.E.2d 240 (Mass. 1986); People v. Straight, 424 N.W.2d 257 (Mich. 1988); State v. Lanam, 459 N.W.2d 656 (Minn. 1990), *cert. denied*, 111 S. Ct. 693 (1991); State v. Renier, 373 N.W.2d 282 (Minn. 1985); State v. Hansen, 312 N.W.2d 96 (Minn. 1981); Ecklin v. Planet Ins. Co., No. C7-90-1521, 1991 WL 1956 (Minn. Ct. App. Jan. 15, 1991); State v. Lundquist, No. C0-90-419, 1990 WL 188729 (Minn. Ct. App. Dec. 4, 1990); *In re* K.R.C. No. C6-90-604, 1990 WL 140798 (Minn. Ct. App. Oct. 2, 1990); State v. Willette, 421 N.W.2d 342 (Minn. Ct. App. 1988); State v. Smith, 384 N.W.2d 546 (Minn. Ct. App. 1986); State v. Bellotti, 383 N.W.2d 308 (Minn. Ct. App. 1986); M.N.D. v. B.M.D., 356 N.W.2d 813 (Minn. Ct. App. 1984); Cummins v. State, 515 So. 2d 869 (Miss. 1987); State v. J.C.E., 767 P.2d 309 (Mont. 1988); State v. Plant, 461 N.W.2d 253 (Neb. 1990); Petersen v. Petersen, 451 N.W.2d 390 (Neb. 1990); Schoch's Estate v. Kail, 311 N.W.2d 903 (Neb. 1981); State v. D.R., 537 A.2d 667 (N.J. 1988); State v. Engel, 493 A.2d 1217 (N.J. 1985); Whalen v. Avis Rent A Car Sys., Inc., 529 N.Y.S.2d 52 (N.Y. App. Term 1988); State v. Lynch, 393 S.E.2d 811 (N.C. 1990); State v. Cummings, 389 S.E.2d 66 (N.C. 1990); State v. Fletcher, 368 S.E.2d 633 (N.C. 1988); State v. McElrath, 366 S.E.2d 442 (N.C. 1988); State v. Triplett, 340 S.E.2d 736 (N.C. 1986); State v. Fearing, 337 S.E.2d 551

gress, these figures suggest that the catchall exceptions are being used more generally than in rare and exceptional circumstances.[23]

Acknowledging that the residual exceptions have potential to obliterate the rule against hearsay, this widespread use compels us to ask whether the rule against hearsay will be viable. This Article argues that the catchall exceptions weaken the rule against hearsay, and that the policy of fostering fair trials is best advanced by excluding the catchall exceptions from the Rules of Evidence. In support of this argument, the Article explores the creation of the residual exceptions, explains why at least one state—Washington—has refused to adopt the residuals, and maintains that adoption is both undesirable and unnecessary.

II. CREATION OF THE RESIDUAL EXCEPTION

The case most frequently cited in support of a residual exception managed to reach a correct result without any residual exception at all. The Court of Appeals for the Fifth Circuit in *Dallas County v. Commercial Union Association Co.*[24] addressed the issue of whether the tower of the county courthouse in Selma, Alabama, collapsed because it was struck by lightning (covered by insurance) or because of structural weakness and deterioration of the structure (not covered). When the structure was investigated, charcoal and charred timbers

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(N.C. 1985); State v. Smith, 337 S.E.2d 833 (N.C. 1985); *In re* Hayden, 384 S.E.2d 558 (N.C. Ct. App. 1989); State v. Moore, 360 S.E.2d 293 (N.C. Ct. App. 1987), *rev. denied*, 364 S.E.2d 664 (N.C. 1988); Phillips & Jordan Inv. Corp. v. Ashblue Co., 357 S.E.2d 1 (N.C. Ct. App.), *rev. denied*, 360 S.E.2d 92 (N.C. 1987); State v. Platt, 354 S.E.2d 332 (N.C. Ct. App.), *rev. denied*, 358 S.E.2d 529 (N.C. 1987); State v. Hollingsworth, 337 S.E.2d 674 (N.C. Ct. App. 1985); Torgerson v. Rose, 339 N.W.2d 79 (N.D. 1983); State v. Boston, 545 N.E.2d 1220 (Ohio 1989); State v. Woodring, 577 N.E.2d 1157 (Ohio Ct. App. 1989); Barr v. State, 761 P.2d 897 (Okla. Crim. App. 1988); Newbury v. State, 695 P.2d 531 (Okla. Crim. App. 1985); *In re* A.D.B., 778 P.2d 945 (Okla. Ct. App. 1989); State v. Campbell, 705 P.2d 694 (Or. 1985); State v. Apperson, 736 P.2d 1026 (Or. Ct. App. 1987); State v. Vosika, 731 P.2d 449 (Or. App. 1987); State v. Harris, 717 P.2d 242 (Or. Ct. App. 1986); Commonwealth v. Ceja, 427 A.2d 631 (Pa. 1981); Commonwealth v. Haber, 505 A.2d 273 (Pa. Super. Ct. 1986); L.W.B. v. Sosnowski, 543 A.2d 1241 (Pa. Commw. Ct. 1988); State v. Davis, 401 N.W.2d 721 (S.D. 1987); *In re* C.L., 397 N.W.2d 81 (S.D. 1986); State v. Traversie, 387 N.W.2d 2 (S.D. 1986); State v. McCafferty, 356 N.W.2d 159 (S.D. 1984), *cert. denied*, 476 U.S. 1172 (1986); State v. Edward, 400 S.E.2d 843 (W. Va. 1990); State v. Sorenson, 421 N.W.2d 77 (Wis. 1988); Mitchell v. State, 267 N.W.2d 349 (Wis. 1978); State v. Washington, 461 N.W.2d 448 (Wis. Ct. App.), *rev. denied*, 465 N.W.2d 655 (Wis. 1990); State v. Sorenson, 449 N.W.2d 280 (Wis. Ct. App. 1989); Kurtz v. Burlington No. R.R. Co., 447 N.W.2d 394 (Wis. Ct. App. 1989); State v. Brunner, 433 N.W. 2d 334 (Wis. Ct. App. 1988); State v. Borchert, 284 N.W.2d 120 (Wis. Ct. App. 1979).

23. S. REP. No. 1277, 93d Cong., 2d Sess. 16 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7066. The residual exceptions were intended to be used in only exceptional and unanticipated situations which are not specifically covered by the specific exceptions. *Id.*

24. 286 F.2d 388 (5th Cir. 1961) (hearsay, if reliable, can be admitted where declarant is available for cross-examination, but does not testify), *overruled in part*, Fidelity & Casualty Co. v. Funell, 383 F.2d 42 (5th Cir. 1967).

were found. To show that lightning may not have been the cause of the charring, the insurer offered in evidence a copy of a newspaper article published in Selma fifty years earlier, which described a fire in the courthouse while it was under construction.[25] The article did not fit within any recognized hearsay exception; nevertheless, the Fifth Circuit concluded that if hearsay evidence is especially necessary and contains sufficient circumstantial guarantees of trustworthiness, the evidence can be admitted even though it does not fit within one of the recognized exceptions.[26] In this instance the necessity was the fact that knowledgeable witnesses had either died or their memories had faded.[27] The special mark of trustworthiness was the knowledge that a local newspaper would be highly unlikely to falsify a story widely known and discussed in the community.[28] In the years that followed *Dallas County*, efforts were undertaken—mainly by law professors—to codify a uniform set of hearsay exceptions, and they often advocated the residual exception.[29]

Congress considered the hearsay exceptions in the period following 1972.[30] In the original draft of 803(24) as propounded by the Advisory Committee and adopted by the United States Supreme Court,[31] a hearsay statement could be admitted if it was found to have "comparable circumstantial guarantees of trustworthiness."[32] The House Judiciary Committee originally deleted the residual exceptions out of concern that they would inject "too much uncertainty" into the law of evidence and "hinder the ability of practitioners to prepare for trial."[33] Rather than approve such a vague rule, the House Committee pro-

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25. *Id.* at 390-91.

26. *Id.* at 396-98.

27. *Id.* at 396.

28. *Id.* at 397.

29. Rupert Cross, *What Should Be Done About the Rule Against Hearsay*, 1965 CRIM. L. REV. 68; Mason Ladd, *Uniform Evidence Rules in the Federal Courts*, 49 VA. L. REV. 692 (1963); B.H. McPherson, *A Statutory Exception to the Hearsay Rule*, 5 U. QUEENSL. L.J. 30 (1965); G.D. Nokes, *Some Suggestions on Hearsay*, 1965 CRIM. L. REV. 81; Lester B. Orfield, *Uniform Federal Rules of Evidence*, 67 DICK. L. REV. 381 (1963); Jack B. Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353 (1969); James R. Clark, Comment, *Evidence Law in Wisconsin: Towards a More Practical, Rational and Codified Approach*, 1970 WIS. L. REV. 1178.

30. *See* Federal Rules of Evidence Act, Pub. L. No. 93-595, 88 Stat. 1926 (1975); *Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973); *Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973); H.R. REP. No. 650, 93d Cong., 1st Sess. (1973); H.R. REP. No. 1597, 93d Cong., 2d Sess. (1974); S. REP. No. 1277, *supra* note 23.

31. H.R. REP. No. 650, *supra* note 30, at 5.

32. *Id.*; S. REP. No. 1277, *supra* note 23, at 7065.

33. H.R. REP. No. 650, *supra* note 30, at 6.

posed that it be excised because Rule 102 would "permit sufficient flexibility to admit hearsay evidence in appropriate cases under various factual situations that might arise."[34] Adoption of the residual exceptions did not occur until the Senate added amendments to provide greater liberality.[35] The Senate considered—this author thinks erroneously—that any unfettered exercise of judicial discretion could be eliminated.[36] Under the amended exception, a statement could be admitted if it had:

> 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 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.[37]

Of particular importance are the provisions that the evidence be more probative on the point than other evidence and that notice be given. Though their application has perhaps demonstrated otherwise, the drafters thought that these two requirements would provide adequate safeguards against abuse.[38] Since their inception, the residual exceptions have created a kind of revolution in many jurisdictions, a revolution which could escalate. The sort of unfair trial Sir Walter Raleigh had to face so long ago has once again become a very plausible occurrence.

Though hearsay exceptions 803(24) and 804(b)(5) have had substantial acceptance within the legal community, there has been some quite harsh criticism. Many who favor the residual exceptions do so with the caveat that requirements for admissibility should be altered or that

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34. S. REP. No. 1277, *supra* note 23, at 7065. Rule 102 states that the rules should be "construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102.

35. S. REP. No. 1277, *supra* note 23, at 7065-66.

36. *Id.*

37. FED. R. EVID. 803(24).

38. S. REP. No. 1277, *supra* note 23, at 7066.

the entire rule should be modified.[39] Others who accept the residuals urge stricter adherence to the requirements.[40] From all the writing on residual hearsay, one message is very clear: few are satisfied with how it operates and with how it has been applied.[41] For the states that have adopted the residual exceptions, the concerns originally expressed by the House Judiciary Committee have become prophetic.[42]

III. WASHINGTON'S REFUSAL TO ADOPT THE CATCHALL EXCEPTIONS: ONE STATE'S EXPERIENCE

Between 1976 and 1978, the Washington Judicial Council ("WJC") met on numerous occasions to discuss adopting the Federal Rules of Evidence.[43] Rather than adopt the residual exceptions, the Judicial Council decided that Rule 102 would give sufficient room for "growth and development of the law of evidence to the end that the truth may be ascertained."[44] The WJC found that the residual exceptions potentially nullify the rule against hearsay because they allow the trial judge too much discretion.[45] Though the exceptions contain safeguards, the WJC noted that the trial judge may use the elastic standards to create new exceptions. Thus, the WJC thought the rule against hearsay, our most esteemed rule for promoting a fair trial, would be too easily subverted.[46]

By refusing to adopt the residual exceptions, Washington State has avoided the dangers that come with the use of such an amorphous exception. The residuals are a "Trojan Horse" that has been set upon the judiciary to wreak havoc and to emasculate the rule against hearsay. Advocates for the exception, like the fated inhabitants of ancient

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39. *See* Bergman, *supra* note 20, at 883; Lewis, *supra* note 20, at 126-32; Nock, *supra*, note 20, at 32-36; Sonenshein, *supra* note 20, at 901-05; Hochman, *supra* note 20, at 718-19; Stumpf, *supra* note 20, at 94-96; Turner, *supra* note 20, at 1064-70.

40. Grant, *supra* note 20, at 93-99; Jonakait, *supra* note 20, at 478-81; Ross, *supra* note 20, at 89-92.

41. *See, e.g.*, Thomas Black, *Federal Rules of Evidence 803(24) & 804(b)(5)—The Residual Exceptions—An Overview*, 25 HOUS. L. REV. 13, 56-57 (discussing how Congressional intent may be violated by abuse of the exceptions).

42. *See generally* Jo A. Harris, *Catch(24): Residual Hearsay*, 12 LITIG., Fall 1985, at 10. Harris notes that "[o]ne of the problems in trying to assess the present status of the catch-alls is that many courts are paying no more than lip service to any of the requirements. Courts are simply not treating the residual rules as something special requiring careful analysis and articulated findings." *Id.* at 11.

43. Washington State Judicial Council, Transcript of Meetings (1976-1978) (consideration of the proposed Rules of Evidence).

44. Washington State Judicial Council, Transcripts 122 (Jun. 24, 1977). *See also supra* note 34 and accompanying text for discussion of Rule 102.

45. Washington State Judicial Council, Transcripts 5 (Sept. 11, 1976).

46. Washington State Judicial Council, *supra* note 44, at 122.

Troy, erroneously believed that the exceptions could be adequately controlled by adding strict requirements for admission.[47] Yet time has proven that the federal courts have not been consistent in their use of the exceptions, and it does not seem likely that the exceptions will ever be applied in a coherent and uniform fashion.[48] A good portion of this inconsistency must be attributed to the noncategorical nature of such a vague provision.[49] The author thinks Washington's decision to reject the residuals is sound.

The WJC based its rejection of the residual exceptions on four premises:[50] (1) trial judges would vary greatly in their application of "the elastic standard of equivalent trustworthiness";[51] (2) lack of uniformity in application of the standard makes "preparation for trial difficult";[52] (3) appellate courts would be unable to "effectively apply corrective measures";[53] and (4) Rule 102 gives courts "room to construe an existing hearsay exception broadly in the interest of ascertaining truth . . . ."[54] These reasons essentially echo the concerns originally expressed by the House Judiciary Committee in 1973.[55] For a greater appreciation of the WJC's decision, it is helpful to take a deeper look at the requirements for admission of residual hearsay and to examine how they have been applied in the federal courts.

IV. Requirements for Admission of Residual Hearsay

A. Standards for Measuring Trustworthiness

Close examination of the elastic standard of "guarantees of trustworthiness" demonstrates that application is limited only by the imag-

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47. Fed. R. Evid. 803(24). To satisfy the concerns expressed by the House, the Senate "adopted a residual exception for Rules 803 and 804(b) of much narrower scope and applicability than the Supreme Court version." S. Rep. No. 1277, *supra* note 23, at 16. It was thought and intended by the Senate "that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule." *Id.*

48. Federal case law has demonstrated that application of the standards for admission under the residuals has been anything but uniform and predictable. *See* Harris, *supra* note 42.

49. Neither of the residuals fit within a class exception. In the traditional approach to hearsay, the judge must make a determination of whether the particular circumstances surrounding the assertion satisfy the elements of an exception; however, with the residuals, the judge merely makes a determination of whether the hearsay is necessary and trustworthy. The lack of constraints on such an open-ended approach has produced diverse interpretations within the federal courts. *See, e.g.*, Jonakait, *supra* note 20, at 458-67.

50. Wash. R. Evid. 803(b), cmt.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. H.R. Rep. No. 650, *supra* note 30, at 5; S. Rep. No. 1277, *supra* note 23, at 7065.

ination. The other enumerated exceptions to the hearsay rule each have specific reasons posited as providing guarantees of trustworthiness. The problem, then, is how to accurately delineate such a standard in a catchall exception. At present, the general language requirement for "circumstantial guarantees of trustworthiness" has inspired judicial formulation of three independent standards for measuring trustworthiness: extrinsic corroboration only, both extrinsic corroboration and surrounding circumstances, and surrounding circumstances only. Applications of these standards have not yet exhausted all possibilities.[56]

The extrinsic corroboration standard measures trustworthiness by analyzing factors that are outside the evidence itself. This includes the availability at trial of the out-of-court declarant. The Fifth Circuit's decision in *United States v. Barnes*[57] is an example of how this standard is used. In *Barnes* the defendant was convicted of conspiracy to import and possess cocaine and of possession of cocaine with intent to distribute.[58] At trial the government brought in a codefendant's prior confession that implicated Barnes. Barnes contended that the trial court erred by not instructing the jury to consider this confession for impeachment purposes only.[59] The Fifth Circuit disagreed and found the confession admissible as substantive evidence.[60] The court determined that the confession bore circumstantial guarantees of trustworthiness because the declarant was available and in fact testified.[61] In addition, the declarant's statement was corroborated by the agents who took it and by the testimony of another coconspirator whose accounts of the scheme were remarkably similar to the declarant's.[62] Such an analysis clearly ignores circumstances that surrounded the out-of-court statement and, instead, bases admission solely on matters that occurred at trial.

A second standard measures trustworthiness by looking at the surrounding circumstances involved in the making of the out-of-court statement as well as the extrinsic corroboration.[63] *United States v. Van*

56. *See* Sonenshein, *supra* note 20.
57. 586 F.2d 1052 (5th Cir. 1978).
58. *Id.* at 1054.
59. *Id.*
60. *Id.* at 1055.
61. *Id.*
62. *Id.*
63. *See, e.g.*, United States v. Panzardi-Lespier, 918 F.2d 313, 316 (1st Cir. 1990); United States v. Lang, 904 F.2d 618, 624 (11th Cir.), *cert. denied*, 111 S. Ct. 305 (1990); United States v. Fernandez, 892 F.2d 976, 980 (11th Cir. 1989), *cert. dismissed sub nom.* Recarey v. United States, 495 U.S. 944 (1990); United States v. Doerr, 886 F.2d 944, 956-57 (7th Cir. 1989); United States v. Chapman, 866 F.2d 1326, 1330 (11th Cir.), *cert. denied*, 493 U.S. 932 (1989); United

Lufkins[64] is representative of this standard. Van Lufkins was convicted of assault for kicking his victim in the head.[65] He argued that the district court erred by admitting hearsay statements made by the victim to his sister and an FBI agent because the statements lacked circumstantial guarantees of trustworthiness.[66] The Eighth Circuit Court of Appeals disagreed and affirmed the decision to admit the statements.[67]

The court found the testimony to be trustworthy because the victim's statements were made shortly after the incident and it was a fortuitous circumstance that caused the witness to be at the same place.[68] Furthermore, the victim's statement to the FBI agent was found to be sufficiently trustworthy because it was corroborated by other evidence.[69] From this cursory statement of the case it is apparent that the court used both extrinsic corroboration and surrounding circumstances to arrive at its conclusion.

A third view used in determining the standard for trustworthiness looks to the circumstances surrounding the extrajudicial statement; extrinsic corroboration is ignored.[70] Representative of this standard is *Karme v. Commissioner*.[71] In *Karme* the defendant claimed that the Tax Court committed reversible error by receiving certain bank records and testimony in evidence.[72] Karme correctly claimed that the bank records could not be brought within the "business records"

States v. Workman, 860 F.2d 140, 146 (4th Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); United States v. York, 852 F.2d 221 (7th Cir. 1988); United States v. Roberts, 844 F.2d 537, 546 (8th Cir.), *cert. denied*, 488 U.S. 983 (1988); United States v. Dorian, 803 F.2d 1439, 1445-46 (8th Cir. 1986); United States v. Renville, 779 F.2d 430 (8th Cir. 1985); United States v. Cree, 778 F.2d 474 (8th Cir. 1985); United States v. Van Lufkins, 676 F.2d 1189 (8th Cir. 1982) (discussed *infra* notes 64-69 and accompanying text); United States v. McPartlin, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); United States v. Bailey, 581 F.2d 341, 1348-50 (3d Cir. 1978); United States v. Williams, 573 F.2d 284 (5th Cir. 1978); United States v. Leslie, 542 F.2d 285 (5th Cir. 1976); *see also sources cited infra* note 110.

64. 676 F.2d 1189 (8th Cir. 1982).

65. *Id.* at 1191.

66. *Id.*

67. *Id.* at 1192.

68. *Id.*

69. *Id.*

70. *See, e.g.*, Wilander v. McDermott Int'l, Inc., 887 F.2d 88 (5th Cir. 1989), *aff'd*, 498 U.S. 337 (1991); United States v. Wilkus, 875 F.2d 649, 655 (7th Cir.), *cert. denied*, 493 U.S. 865 (1989); United States v. Marshall, 856 F.2d 896, 901-02 (7th Cir. 1988); United States v. Howard, 774 F.2d 838, 845 (7th Cir. 1985); Barker v. Morris, 761 F.2d 1396, 1403 (9th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986); Karme v. Commissioner, 673 F.2d 1062, 1065 (9th Cir. 1982) (discussed *infra* notes 71-76 and accompanying text); Huff v. White Motor Corp., 609 F.2d 286, 293-95 (7th Cir. 1979).

71. 673 F.2d 1062 (9th Cir. 1982).

72. *Id.* at 1064.

exception[73] because Special IRS Agent James Lynch, who microfilmed the documents, was not a custodian capable of testifying that the records were kept in the course of regularly conducted business activity.[74] Nevertheless, the court admitted the records under 803(24).[75] The court found that the bank records bore circumstantial guarantees of trustworthiness because of the distant location of the bank and because there was no evidence to suggest the bank records were anything other than what they purported to be.[76] This analysis excluded the use of extrinsic corroboration; the court relied completely on the surrounding circumstances.

As these cases indicate, a court need not be consistent in its use of such standards. The standard used can very easily be changed to meet the necessities of current political expediency or judicial whim. We have here a container into which anything can be poured.

The amorphous character of the trustworthiness requirement is highlighted in the near-miss situation. A "near miss" occurs when the out-of-court statement almost fits within an enumerated exception, but just misses falling within the exception because it lacks some factor that defines the exception. Some courts hold that such evidence may properly be admitted under the residuals; other courts hold the opposite.

In *United States v. Leslie*[77] the Fifth Circuit determined that a "near miss" can properly be admitted under the residual exception on the ground of "near miss" alone. The defendants in *Leslie* were convicted of transporting a stolen automobile from Indiana to Alabama.[78] During interrogation by the FBI, the appellants made incriminating statements that they later recanted.[79] The jury was instructed at trial that

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73. FED. R. EVID. 803(6). A business record is admissible when it is:

> kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Id.

74. *Karme*, 673 F.2d at 1064.

75. *Id.* at 1065.

76. *Id.*

77. 542 F.2d 285 (5th Cir. 1976). Other cases where "near miss" hearsay has been admitted are United States v. Fernandez, 892 F.2d 976 (11th Cir. 1989); United States v. Doerr, 886 F.2d 944 (7th Cir. 1989); United States v. Doe, 860 F.2d 488 (1st Cir. 1988), *cert. denied*, 490 U.S. 1049 (1989); United States v. Workman, 860 F.2d 140 (4th Cir. 1988); United States v. Roberts, 844 F.2d 537 (8th Cir. 1988); Karme v. Commissioner, 673 F.2d 1062 (9th Cir. 1982); United States v. AT&T, 516 F. Supp. 1237 (D.D.C. 1981).

78. *Leslie*, 542 F.2d at 286.

79. *Id.* at 287.

prior inconsistent statements were received for the sole purpose of determining credibility and were not to be considered as substantive evidence.[80] Appellants contended that the limiting instruction was insufficient, but the Fifth Circuit Court of Appeals thought the jury was entitled in any case to consider the statements substantively under 803(24).[81]

Under Federal Rule of Evidence 801(d)(1), prior inconsistent statements must generally be subjected to cross-examination, and in any case must be under oath, before they can be used as substantive evidence;[82] however, using 803(24), the Fifth Circuit concluded that circumstantial guarantees of trustworthiness were equivalent to the somewhat inflexible requirements of 801(d)(1).[83] First, the court determined that the declarants/appellants were available for cross-examination by the party against whom the statements were made.[84] Second, the court emphasized that the statements were made only a few hours after the events related in them and were transcribed shortly thereafter.[85] Finally, the declarants admitted that they knowingly and voluntarily signed forms waiving their right to remain silent.[86] The Fifth Circuit concluded that the prior statements bore sufficient guarantees of trustworthiness; therefore cross-examination was not required.

An opposite view appears in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*[87] In *Zenith* the defendants contended that the "residual hearsay exceptions cannot be invoked as the basis for the admissibility of evidence which is generically of a type covered by another specific hearsay exception, but which fails to meet the precise

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80. *Id.* at 288.

81. *Id.* at 289.

82. Federal Rule 801(d)(1) provides as follows:

> (d) Statements which are not hearsay.—A statement is not hearsay if—
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> (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 the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; . . . .

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

83. United States v. Leslie, 542 F.2d 285, 290 (5th Cir. 1976).

84. *Id.*

85. *Id.*

86. *Id.*

87. 505 F. Supp. 1190 (E.D. Pa. 1980). Other cases that have not admitted "near miss" hearsay are *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); United States v. Love, 592 F.2d 1022 (8th Cir. 1979).

requirements of that specific exception."[88] The issue confronted was whether a business record must qualify for admission under Rule 803(6) and not under the residual exceptions.[89] The district court agreed in principle with the defendants' position, but refused to apply it to the evidence presented.[90]

The district court quoted the Advisory Committee's explanation that the residual exceptions are designed to cover "new and presently unanticipated situations" and the Senate Judiciary's comment that "an overly broad residual hearsay exception could emasculate the hearsay rule . . . ."[91] The Advisory Committee, in this court's view, did not intend for the residual exceptions to be used to qualify evidence which is of a type covered (or *not* quite covered) by a specific exception.[92] These exemplary cases demonstrate the wide range of interpretations possible under the catchall exceptions.

B. Lack of Uniformity in Application

The second major problem with residual hearsay is its lack of any certainty, uniformity, or predictability. This has created a great deal of doubt about the rule against hearsay. As a result, preparation for trial has become more difficult because attorneys can no longer be certain whether an out-of-court declaration is inadmissible. As previously discussed, the standard of circumstantial guarantees of trustworthiness is impossible to define narrowly and is limited only by the imagination. Equally abused by the courts is the requirement that the hearsay be more probative than any other evidence available.

The residuals allow a proponent to use hearsay only if other equally probative evidence cannot be obtained by reasonable efforts.[93] Hearsay statements will thus tend to be admitted when no other evidence can be found. However, a great number of cases involve situations where it is difficult to determine which piece of evidence is more pro-

88. *Zenith*, 505 F. Supp. at 1262.

89. *Id.* at 1263.

90. *Id.* at 1263-64.

91. *Id.* at 1263. The Advisory Committee notes state that the residuals "do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the *spirit* of the specifically stated exceptions." FED. R. EVID. 803(24) advisory committee notes. The notes also state that the Senate Judiciary Committee 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 or vitiate the rationale behind codification of the rules." *Id.* Senate Judiciary Committee notes.

92. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1263 (E.D. Pa. 1980).

93. *See* FED. R. EVID. 803(24), 804(b)(5).

bative. In *United States v. Iaconetti*[94] the jury found a federal government contract inspector guilty of soliciting and accepting a bribe. The defendant moved for a new trial on the ground that the verdict rested upon the rebuttal evidence of two government witnesses which should have been excluded.[95] After analyzing the events that happened on a critical date, the court determined that the testimony of the two rebuttal witnesses was the most powerful evidence on the crucial issue of what was said in view of the outright conflict between the chief witness for the prosecution and the defendant.[96]

The residuals demand that the most probative evidence be used; thus, the most probative evidence must be more likely to logically prove an issue than other evidence.[97] Contrary to what the residuals demand, the court in *Iaconnetti* chose from several items of evidence that were equally probative. This action renders null the requirement that residual hearsay be more probative. In any case, everything else being equal, hearsay should be admitted only when necessary.

Problems with the more probative requirement also appear in the Sixth Circuit's decision in *United States v. Toney*.[98] Toney, who was convicted of bank robbery, contended that the incriminating stolen "bait" money in his possession came from gambling with a codefendant, Jimmie King.[99] To corroborate his story, Toney offered a statement taken from King in which he admitted to playing dice with Toney and claimed that both men won a substantial amount of money.[100] The government offered the hearsay testimony of two men, David Walden and Otis Woods, in rebuttal.[101] They claimed to have seen Toney's gambling activities.[102] From their testimony the trier was invited to infer that Toney had actually suffered a net loss while gambling, and that King, though present in the gambling hall, did not gamble with Toney.[103]

King's statement was excluded at trial, but on appeal the Sixth Circuit approved the evidence because the statement was "more probative on the point for which it [was] offered than any other evidence"

94. 406 F. Supp. 554 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

95. *Id.* at 555.

96. *Id.* at 559.

97. *See* FED. R. EVID. 803(24), 804(b)(5); *see also* Anderson v. Harry's Army Surplus Inc., 324 N.W.2d 96 (Mich. Ct. App. 1982).

98. 599 F.2d 787 (6th Cir. 1979).

99. *Id.* at 788.

100. *Id.* at 789.

101. *Id.* at 788-89.

102. *Id.*

103. *Id.* at 789.

that Toney could obtain.[104] The court arguably erred in finding King's statement to be more probative than Toney's direct testimony. Unlike *Dallas County v. Commercial Union Assurance Co.*,[105] which inspired the creation of the approach that residual exceptions were designed to embody,[106] King's statement was admitted on the general theory that a jury needs access to all possible information to ascertain the truth.[107] In *Dallas County*, however, hearsay evidence was admitted because no other reliable and competent evidence was available to resolve the issue in controversy.

C. *Notice*

Another problem with inconsistency is the requirement for notice. Contrary to the intent of Congress, the courts have been very lenient in their application of this requirement. A flexible notice requirement effectively destroys pretrial predictability and serves to further weaken the hearsay rule. The residual exceptions state that notice of intent to admit a statement is to be given "sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it. . . ."[108] The notice requirement, however, like the standard for trustworthiness, is vague. Consequently, the courts have not been consistent in its use. Some courts strictly adhere to the notice requirement,[109] but the majority have been quite flexible and admitted evidence even when notice is first given after commencement of trial.[110]

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104. *Id.* at 790.

105. 286 F.2d 388 (5th Cir. 1961).

106. FED. R. EVID. 803(24) Senate Judiciary Committee notes. These notes cite Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961) (containing standards for admitting hearsay that does not fit within a traditional exception).

107. United States v. Toney, 599 F.2d 787, 790 (6th Cir. 1979).

108. FED. R. EVID. 803(24), 804(b)(5).

109. *See* Wilander v. McDermott Int'l, Inc., 887 F.2d 88, 92 (5th Cir. 1989); United States v. Wilkus, 875 F.2d 649, 655 (7th Cir. 1989); United States v. Cowley, 720 F.2d 1037, 1045 (9th Cir. 1983), *cert. denied*, 465 U.S. 1029 (1984); Johnson v. William C. Ellis & Sons Iron Works, Inc., 609 F.2d 820, 823 (5th Cir. 1980); United States v. Ruffin, 575 F.2d 346, 358 (2d Cir. 1978); United States v. Oates, 560 F.2d 45, 72 n.30 (2d Cir. 1977); *see also infra* notes 140-56 and accompanying text.

110. *See* United States v. Panzardi-Lespier, 918 F.2d 313, 317 (1st Cir. 1990); United States v. Calkins, 906 F.2d 1240, 1245 (8th Cir. 1990); Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1553 (9th Cir. 1989); United States v. Chapman, 866 F.2d 1326, 1332 (11th Cir. 1989); United States v. Doe, 860 F.2d 488, 492 (1st Cir. 1988); United States v. Bailey, 581 F.2d 341, 348 (3d Cir. 1978); United States v. Iaconetti, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *see also infra* notes 123-39 and accompanying text.

In *United States v. Frazier*[111] the defendant objected to the use of 803(24) on the grounds that timely notice had not been given.[112] The court disagreed and found that testimony could be admitted where a fair opportunity to meet the statements occurred at trial and that earlier notice would not have made a material difference.[113]

Frazier was convicted in a jury trial of assault and other crimes arising out of an attack on a three-year-old victim.[114] Four declarations given by the victim, Nicole, were received over Frazier's objections. The first statement was an initial report of the incident, which was given to Nicole's fourteen-year-old sister upon Nicole's return home from school.[115] The second account was given to Nicole's mother.[116] The third was given to a naval shipyard security officer.[117] The fourth was made to a Philadelphia detective the day after the attack.[118] Although the government turned over the statements about five weeks before the trial, the government did not give written notice of its intention to rely on 803(24) at that time.[119]

Frazier contended that 803(24) was intended to be narrowly construed and that admission of the victim's statements was error.[120] The district judge disagreed. The court observed that the purpose of the notice requirement was to give the defendant the opportunity to attack the trustworthiness of a statement.[121] Even though Frazier was not given written notice of the government's intention to rely on 803(24), the court believed that Frazier had had a fair opportunity to attack the trustworthiness of the statements.[122] Though the evidence might have been used as prior inconsistent statements to impeach, the government instead employed Rule 803(24) as a device to make the statements substantive evidence.

Unlike *United States v. Frazier*, where the defendant received statements five weeks before trial, other courts have admitted statements where there was no such forewarning.[123] In *United States v. Carl-*

111. 678 F. Supp. 499 (E.D. Pa.), *aff'd*, 806 F.2d 255 (3d Cir. 1986).
112. *Id.* at 502-03.
113. *Id.* at 503.
114. *Id.* at 501.
115. *Id.* at 501-02.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 503.
120. *Id.* at 503-04.
121. *Id.* at 503 (citing Piva v. Xerox Corp., 654 F.2d 591 (9th Cir. 1981)).
122. *Id.*
123. *See* Furtado v. Bishop, 604 F.2d 80, 93 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980); United States v. Bailey, 581 F.2d 341, 348 (3d Cir. 1978); United States v. Carlson, 547 F.2d 1346, 1355 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); United States v. Leslie, 542 F.2d 285, 291 (5th Cir. 1976).

son,[124] for example, the Eighth Circuit Court of Appeals held that it was proper to receive evidence under the residuals despite the lack of any formal pretrial notice at all.[125] The defendants were convicted of cocaine offenses. Notice was excused at trial when (1) the government learned that its witness would disobey a court order and refuse to testify on the eve of trial, (2) the defendant was acutely aware of the substance of the proffered evidence, and (3) the transcript of the grand jury testimony was given to the defendant two days before trial.[126]

United States v. Leslie[127] involved an equally liberal application of the notice requirement. In this case the Fifth Circuit Court of Appeals ruled that some latitude in the notice requirement must be permitted when the need for particular evidence first becomes apparent after the trial begins.[128] Even if counsel did not give notice, the *Leslie* court held that because defense counsel undoubtedly expected the prosecution to call one or more of the alleged accomplices, and because defense counsel was able to thoroughly examine them as to their mental condition and motivation, fair *opportunity* had been provided to meet the statements, even if no *notice* had been given.[129]

In *United States v. Bailey* the court focused on fairness.[130] The court determined that the notice requirement is satisfied when the proponent of the evidence is without fault in failing to give notice prior to trial and the trial judge offers sufficient time, by means of a continuance, for the adverse party to prepare to contest the evidence and/or its admission.[131]

Perhaps the most liberal application of the notice requirement is found in *Furtado v. Bishop*,[132] where state prisoners sued prison officials to recover for alleged beatings, unjustified segregated confinements, and deprivation of their right to communicate with courts.[133] At trial the plaintiffs argued that the defendants were not prejudiced by a failure to give notice of intent to offer a particular affidavit because defendants were not, as claimed, surprised by the document.[134] Defense counsel's comments indicated that he had anticipated that the

124. 547 F.2d 1346 (8th Cir. 1976).
125. *Id.* at 1355.
126. *Id.*
127. 542 F.2d 285 (5th Cir. 1976).
128. *Id.* at 291.
129. *Id.*
130. 581 F.2d 341, 348 (3d Cir. 1978).
131. *Id.*
132. 604 F.2d 80 (1st Cir. 1979).
133. *Id.* at 85.
134. *Id.* at 92.

evidence would be offered.[135] Though the trial court's offer of a continuance was abrupt, defense counsel showed little interest in such an option.[136] Upholding admission of the affidavit, the First Circuit Court of Appeals determined that defense counsel's waiver of continuance, along with his expectation that the disputed evidence would be offered, were sufficient to obviate the notice requirement.[137] The court found some justification for this liberal interpretation in the fact that, unlike the majority of other cases, the instant case was civil.[138] When there is no constitutional right of confrontation, the court thought that freer play should be given to the discretion of the trial judge in admitting evidence.[139]

A minority of courts has adopted a strict approach to the notice requirement.[140] In these cases use of residual hearsay is prohibited unless advance notice is given. A good example is the Ninth Circuit Court of Appeals' decision in *United States v. Cowley*.[141] In this case the defendants appealed their conviction of willfully and knowingly making material false declarations before a grand jury.[142] The pivotal factual dispute centered on a bank executive's role in a banking transaction.[143] At trial the judge allowed the managing director of International Investment Bank to testify, over objection, that he received two letters purporting to be from the executive.[144] These letters failed to meet the requirements of any enumerated exception.[145] The defendants argued that because the government did not give advance notice of its intention to offer the banker's testimony about the letters, the testimony did not fall within Rule 803(24).[146]

The court agreed and found that the lack of notice made the testimony inadmissible hearsay under Rule 803(24).[147] Admission of this testimony as foundation for the letters was error—but harmless error.[148] Because there was abundant evidence to support the jury's con-

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135. *Id.*
136. *Id.* at 93.
137. *Id.*
138. *Id.*
139. *Id.*
140. *See* United States v. Cowley, 720 F.2d 1037, 1045 (9th Cir. 1983), *cert. denied*, 465 U.S. 1029 (1984); United States v. Ruffin, 575 F.2d 346, 358 (2d Cir. 1978); United States v. Oates, 560 F.2d 45, 72-73 n.30 (2d Cir. 1977); *see also supra* note 109.
141. 720 F.2d 1037 (9th Cir. 1983), *cert. denied*, 465 U.S. 1029 (1984).
142. *Id.* at 1039.
143. *Id.*
144. *Id.* at 1044.
145. *Id.*
146. *Id.* at 1045.
147. *Id.*
148. *Id.*

clusion, the court determined that the trial judge's admission of the testimony did not merit reversal.[149] Thus, in spite of the inadmissibility of the statement under the enumerated exceptions, the government was still able to make use of the incriminating declarations.

Another example of the strict approach comes from *United States v. Ruffin*,[150] where the court held that Rule 803(24) could be utilized only if notice of an intention to rely upon it were given in advance of trial.[151] The defendant was convicted of income tax evasion for filing false and fraudulent personal and corporate income tax returns.[152] At trial, the court admitted testimony from a clerk about what various land record documents in the county clerk's office indicated.[153] On appeal, the court held that the decision to allow the clerk's testimony about the content of the documents was error because it frustrated the legislative intent underlying the enactment of the residuals.[154] The court found that "[t]here is absolutely no doubt that Congress intended that the requirement of advance notice be rigidly enforced."[155] Dispensing with pretrial notice "would . . . countenance outright circumvention of the carefully considered and drafted requirements of Fed. R. Evid. 803(24)."[156]

D. The Confrontation Clause Dilemma

Predictability has also been eroded by use of the residual exceptions and the conflicts that are encountered with the Sixth Amendment Confrontation Clause. The Sixth Amendment states simply: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[157] This tends to enhance the reliability and trustworthiness of the evidence. An early effort to articulate the meaning of the Confrontation Clause came in *Mattox v. United States*.[158] The Supreme Court identified the primary purpose of confrontation as the prevention of trial by *ex parte* affidavits and the provision of opportunity for cross-examination before the jury, except

149. *Id.*
150. 575 F.2d 346 (2d Cir. 1978).
151. *Id.* at 358.
152. *Id.* at 349.
153. *Id.* at 357.
154. *Id.* at 358.
155. *Id.* (quoting United States v. Oates, 560 F.2d 45, 72 n.30 (2d Cir. 1977)).
156. *Id.*
157. U.S. CONST. amend. VI.
158. 156 U.S. 237 (1895). The court held that the Sixth Amendment guarantees the accused's right to compel the witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Id.* at 242-43.

in certain cases of necessity.[159] The problem with the residual exceptions is that they permit the use of the type of hearsay which has not been received since the Seventeenth Century. The resulting confusion has created two separate approaches.

1. The Liberal Approach

In the most liberal approach, grand jury testimony may be admitted without violating the hearsay rule or the Confrontation Clause when the prerequisite of trustworthiness is met.[160] This approach has been adopted in several circuits, of which the Fourth Circuit has been the most consistent.

In *United States v. West*[161] a tape-recorded transcript of grand jury testimony made by Victor Brown, who was slain before trial, was received in evidence. The transcript was used to convict the defendant of distributing heroin.[162] The Fourth Circuit Court of Appeals held that such testimony was permissible under Rule 804(b)(5) of the Federal Rules of Evidence and the Confrontation Clause of the Sixth Amendment.[163] In their argument, the defendants focused on the requirement for "equivalent circumstantial guarantees of trustworthiness."[164] To show that Brown's testimony was untrustworthy, the defendants pointed out Brown's prior criminal record and emphasized their lack of any opportunity to cross-examine him.[165]

The Fourth Circuit described Brown's testimony as proceeding from "very exceptional circumstances providing substantial guarantees of trustworthiness."[166] Before Brown made contact with the defendants, agents took elaborate steps to assure that Brown had no drugs or money other than what was supplied by the agents. In addition, Brown was under constant surveillance, photographs were taken of the drug transactions, and Brown's transmitter was broadcasting

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159. *Id.*

160. *See, e.g.*, United States v. Panzardi-Lespier, 918 F.2d 313, 316, 317 (1st Cir. 1990); United States v. Doerr, 886 F.2d 944, 958 (7th Cir. 1989); Barker v. Morris, 761 F.2d 1396 (9th Cir. 1985); United States v. Barlow, 693 F.2d 954, 964 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); United States v. Boulahanis, 677 F.2d 586, 588-89 (7th Cir.), *cert. denied*, 459 U.S. 1016 (1982); United States v. Garner, 574 F.2d 1141, 1144 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978); United States v. West, 574 F.2d 1131, 1135 (4th Cir. 1978); *see also* Ohio v. Roberts, 448 U.S. 56 (1980) (preliminary hearing testimony).

161. 574 F.2d 1131 (4th Cir. 1978).

162. *Id.* at 1133.

163. *Id.*

164. *Id.* at 1134.

165. *Id.*

166. *Id.* at 1135.

his conversations with the defendants.[167] Because agents had so thoroughly documented the transactions, deception by Brown was virtually impossible.[168]

The hearsay testimony of Brown satisfied the requirements of *Dutton v. Evans*,[169] in that it bore sufficient "indicia of reliability" and provided the jury with a firm basis for judging the truthfulness of Brown's statements.[170] The *Dutton* court looked to the "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant."[171] The effect was that the court merged the hearsay inquiry concerning trustworthiness with the constitutional inquiry. As stated in *West*, "It should not be surprising that the same circumstances suffice to meet the requirements of Rule 804(b)(5) and of the Confrontation Clause."[172]

The Fourth Circuit Court of Appeals again addressed the issue of when to admit grand jury testimony in *United States v. Garner*.[173] In *Garner* the trial court admitted the sworn grand jury testimony of Warren Robinson, a witness who refused to testify at trial. As in *West*, the Fourth Circuit ruled that such testimony did not violate the Confrontation Clause if it bore sufficient guarantees of reliability and the circumstances contained a sufficient basis for a jury to assess its trustworthiness.[174]

Like *West*, *Garner* involved a drug trafficking charge; however, the guarantees of trustworthiness in *Garner* were not as strong as in *West*. To corroborate Robinson's grand jury testimony, the prosecution produced a witness who confirmed Robinson's statements.[175] Moreover, the prosecution introduced records of airline tickets, customs declarations, passport endorsements, and European hotel registrations, which showed irrefutable evidence of the defendants' travels to the sites of the drug transactions.[176] Though weaker than in *West*, the court determined that the evidence was still sufficient to meet the requirements of the Confrontation Clause.[177]

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167. *Id.*
168. *Id.*
169. 400 U.S. 74 (1970).
170. United States v. West, 574 F.2d 1131, 1137-38 (4th Cir. 1978).
171. *Dutton*, 400 U.S. at 89.
172. *West*, 574 F.2d at 1138.
173. 574 F.2d 1141 (4th Cir. 1978).
174. *Id.* at 1144.
175. *Id.*
176. *Id.* at 1145.
177. *Id.* at 1146.

This approach was adopted by the Sixth Circuit Court of Appeals in *United States v. Barlow*.[178] Barlow claimed that his right to confrontation was violated and that under Rule 804(b)(5), the trial court abused its discretion in admitting the grand jury testimony of his wife, who refused to testify against the defendant at trial.[179] The court of appeals did not agree; the three judges thought the statements made by the declarant, Iantha Humphries, carried substantial guarantees of trustworthiness.[180] Humphries' testimony, which conflicted with Barlow's alibi, conveyed personal, inside information. Though Humphries' testimony did not have the strong corroboration that was found in *West*, the court drew the distinction between testimony used as direct evidence in proving guilt and testimony used to prove a "collateral" matter.[181] By itself, Humphries' testimony did not relate evidence of criminal activity; therefore, the court reasoned, corroboration need not be as strong.[182] In drawing such a distinction, the Sixth Circuit created yet another twist to the elastic standard of trustworthiness: The courts may develop an ambiguous, sliding scale of corroborative evidence and gauge admissibility according to the purpose for which the evidence is offered.

For its Sixth Amendment analysis, the *Barlow* court resorted to the two-step test announced by the Supreme Court in *Ohio v. Roberts*.[183] This test requires (1) that the declarant be unavailable and (2) that the declarations possess "adequate indicia of reliability."[184] The Supreme Court added that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."[185] Under this two-step analysis, unavailability of the witness was not an issue in *Barlow*; however, the court addressed the question of reliability.[186] The *Barlow* court also refused to distinguish between the trustworthiness requirements of Rule 804(b)(5) and the Sixth Amendment, though it assumed that a distinction existed.[187]

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178. 693 F.2d 954 (6th Cir. 1982).
179. *Id.* at 960.
180. *Id.* at 962.
181. *Id.*
182. *Id.* at 962-63.
183. *Id.* at 963 (citing Ohio v. Roberts, 448 U.S. 56 (1980)).
184. *Roberts*, 448 U.S. at 66.
185. *Id.*
186. United States v. Barlow, 693 F.2d 954, 964 (6th Cir. 1982).
187. *Id.*

The Seventh Circuit Court of Appeals followed a similar approach in *United States v. Boulahanis*,[188] in which the defendant appealed his conviction for violation of the Hobbs Act and other offenses.[189] At trial, a key witness, James Chiampas, refused to testify because he feared for his life; nevertheless, the court permitted publication of Chiampas's grand jury testimony.[190] Boulahanis contended that admission of the grand jury transcript violated both the Federal Rules of Evidence and the Sixth Amendment. The court found, however, that the testimony had sufficient guarantees of trustworthiness to meet the requirements of 804(b)(5) and the Confrontation Clause. A tape had been made of extortionate conversations between the declarant and the defendant.[191] Though Chiampas was not cross-examined, his statement was made voluntarily.[192] In addition, other eyewitness testimony corroborated Chiampas' grand jury testimony.[193] The court found the evidence highly trustworthy, so admission did not violate the Sixth Amendment or Rule 804(b)(5).[194]

2. *The Waiver Theory*

The second major approach to admissibility of grand jury testimony is the waiver theory. A valid waiver occurs when there has been an intentional abandonment of a known right or privilege. With waiver theory, a party, through his conduct, is presumed to have relinquished his constitutional right to confrontation.[195] At least four circuits have used this approach.[196] The leading case is the Eighth Circuit's decision in *United States v. Carlson*.[197] Here, the main issue involved admissibility of the grand jury testimony of James Tindall, who refused to testify on the eve of trial for fear of reprisals.[198] The court determined that the testimony was admissible under Rule 804(b)(5) because it was, as circumstances suggested, trustworthy.[199]

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188. 677 F.2d 586 (7th Cir.), *cert. denied*, 459 U.S. 1016 (1982).
189. *Id.* at 587.
190. *Id.* at 588-89.
191. *Id.* at 587.
192. *Id.* at 589.
193. *Id.* at 588.
194. *Id.*
195. *See, e.g.*, Brookhart v. Janis, 384 U.S. 1 (1966); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
196. *See* United States v. Cree, 778 F.2d 474 (8th Cir. 1985); United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982); United States v. Thevis, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); United States v. Balano, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980).
197. 547 F.2d 1346 (8th Cir. 1976).
198. *Id.* at 1352.
199. *Id.*

Tindall's testimony related facts that surrounded a cocaine transaction in which he participated and of which he had firsthand knowledge.[200] In addition, Tindall's statements were made under oath and he never recanted his grand jury testimony or expressed reservations about its accuracy.[201] The court concluded that Tindall's testimony was sufficiently trustworthy to be admitted under Rule 804(b)(5).

In analyzing the Confrontation Clause issue, the *Carlson* court chose to assume that Carlson's right of confrontation might be affronted upon admission of Tindall's grand jury testimony.[202] The question, then, was whether Carlson had somehow waived his rights. Waiver can take various forms. An accused may forego his right by neglecting to cross-examine witnesses, by stipulating to the admission of evidence, or by entering a guilty plea. In *Carlson*, however, the court held that an accused may waive his right of confrontation by pursuing a course of conduct inimical to the administration of justice.[203] The court found that Carlson intimidated Tindall into not testifying, and determined that such conduct effects a waiver of the right of confrontation, stating that "the Sixth Amendment does not stand as a shield to protect the accused from his own misconduct or chicanery."[204] Therefore admittance of Tindall's grand jury testimony caused no constitutional error.[205]

The previous discussion is intended to demonstrate how the residuals can effectively emasculate the rule against hearsay. As with the other requirements for admitting hearsay, the courts have also been inconsistent in applying the Confrontation Clause. Statements that were once inadmissible under the specific exceptions can now be brought in through the "back door" under the catchall exceptions. Hence, sometimes those accused of committing a crime must now defend themselves against hearsay statements without an opportunity to confront their accusers. Moreover, broad application of the residuals has reduced pretrial predictability. No longer can one accurately ascertain whether a statement is inadmissible hearsay. This is not merely an argument of law over justice. The rule against hearsay was created, among other things, to promote justice by ensuring the exclusion of unreliable evidence. Application of the residual exceptions in the federal courts helps demonstrate that truth and justice may better be served in those states that have excluded the catchall exceptions.

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200. *Id.* at 1354.
201. *Id.*
202. *Id.* at 1355.
203. *Id.* at 1358.
204. *Id.* at 1359.
205. *Id.*

V. RULE 102 IS SUFFICIENT FOR OUR CURRENT NEEDS

Evidence Rule 102 gives the trial judge authority to interpret the rules in such fashion as to avoid unjust results.[206] To reach a just result, judges are granted broad discretion in circumstances that are not explicitly covered by the rules. When applying the rules, judges may reasonably be asked to outline the salient policies, factors, and goals so the bar may adjust accordingly. This promotes an appropriate balance between the need to accommodate change and the need to preserve rudimentary principles of evidence. When compared with the uncertainty produced by the residual exceptions, the flexibility provided by Rule 102 presents a preferable means to preserve the rule against hearsay and yet not unduly restrict the production of data conducive to the discovery of truth. Notwithstanding this sound reasoning, the WJC's stance against adopting 803(24) and 804(b)(5) has not come without criticism.[207]

It has been argued that lack of a separate residual exception will cause existing exceptions to be twisted beyond their appropriate scope.[208] In Washington State, two supreme court decisions have been taken to justify this concern.[209] Some may argue that such "fundamentally unsound" decisions mandate the need for a safety-valve exception to the hearsay rule; however, such arguments are based on the premise that the general exception can be controlled by stricter requirements and that the evidence, though hearsay, sufficiently supports the policy of ensuring a fair trial.[210]

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206. The Advisory Committee's note to Rule 102 states that "[f]ollowing the rules is not an end in itself. Rather the rules are carefully designed to enable judges, lawyers, litigants, and juries to achieve sound results . . . . Rule 102 recognizes the responsibility judges bear by enumerating goals which cannot be achieved mechanically, and which will compete with another at times." (quoting 10 MOORE'S FEDERAL PRACTICE, ¶ 102.02 (1976)). The comments further note that "[t]his approach implies a considerable grant of discretion to the trial judge in situations not explicitly covered by the rules which may require differentiated treatment in the light of special factors." (citing 1 J. WEINSTEIN, EVIDENCE ¶ 102[01] (1975)). WASH. R. EVID. 102 cmts.

207. *See* Nock, *supra* note 20.

208. The Senate Judiciary Committee expressed concern that "without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed)." FED. R. EVID. 803(24) Senate Judiciary Committee note; *see also* Nock, *supra* note 20.

209. *See* State v. Parris, 654 P.2d 77 (Wash. 1982); State v. Smith, 651 P.2d 207 (Wash. 1982).

210. *See* Nock, *supra* note 20, at 8-32. Nock points out that *Parris* and *Smith* have expanded the scope of the residual hearsay exceptions, opening the door to a great deal of falsehood. *Id.* Instead of arguing for the exclusion of the statements, Nock argues for the adoption of a "safety-valve" exception even though the court failed to adequately address the requirements of the Sixth Amendment. *Id.* at 30-32.

A. State v. Parris[211]

John Parris was charged as an accomplice in the unlawful delivery of heroin.[212] On the night of the incident, an informant, Milliron, contacted the police and advised them that he had arranged a "buy" of heroin. Milliron, along with Officer Hurley, drove to the address where the transaction was to occur. Upon arrival, the two were met by William DeHart, who told Milliron and Hurley that someone was getting the drugs. Milliron asked, "Do you mean John's going to get them?";[213] but, at trial, he could not recall DeHart's response to the question. Milliron also asked from whom [John] was going to get the drugs, and DeHart responded "that he did not know."[214] DeHart, Milliron, and Hurley arranged to meet one-half hour later.[215]

At trial Parris objected to the testimony by Hurley and Milliron about their earlier conversation.[216] The objection was based on the grounds that the testimony made DeHart a witness against Parris. This was significant because DeHart had asserted his Fifth Amendment privilege against self-incrimination and therefore Parris could not cross-examine DeHart.[217] The trial court found the testimony admissible on the ground that it qualified as an exception to the hearsay rule under Evidence Rule 804(b)(3), as a statement against penal interest.[218] The court of appeals[219] and the Supreme Court of Washington affirmed the ruling.[220]

Washington Rule of Evidence 804(b)(3) provides as follows:

> (b) 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 the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the

211. 654 P.2d 77 (Wash. 1982). *See also* State v. Rice, 844 P.2d 416 (1993) (The Washington Supreme Court perceives the difficulty, but has not yet enunciated a sound doctrine.).
212. *Parris*, 654 P.2d at 78.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at 79.
217. *Id.*
218. *Id.* at 80.
219. State v. Parris, 633 P.2d 914, 921 (Wash. Ct. App. 1981).
220. State v. Parris, 654 P.2d 77, 84 (Wash. 1982).

> declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.[221]

Traditionally, the common law limited this exception to statements against pecuniary or proprietary interests.[222] The rationale for this limitation was expressed by the United States Supreme Court in *Chambers v. Mississippi*:[223]

> Exclusion, where the limitation prevails, is usually premised on the view that admission would lead to the frequent presentation of perjured testimony to the jury. It is believed that confessions of criminal activity are often motivated by extraneous considerations and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interest.[224]

At present, Rule 804(b)(3) includes an exception for statements against penal interest.[225] To pass muster, statements against penal interest must meet requirements of the Confrontation Clause and ought to conform to sound hearsay doctrine.[226]

The issue in *Parris* was whether an out-of-court statement made by one offender is admissible against another offender as a statement against penal interest when the statement inculpates both actors.[227] Much of the reasoning in *Parris* came from the Fifth Circuit's decision in *United States v. Alvarez*.[228] In *Alvarez* the court held that inculpatory statements were admissible when corroborating circumstances "clearly indicate the trustworthiness of the statement."[229] The *Alvarez* decision was partially based on the court's failure to take a thorough look at the legislative history behind federal Rule 804(b)(3).[230] A more careful examination, however, shows that the House Judiciary Committee clearly intended to omit inculpatory statements from the exception.[231]

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221. WASH. R. EVID. 804(b)(3).

222. *See* Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 29-52 (1944).

223. 410 U.S. 284 (1973).

224. *Id.* at 299-300.

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

226. 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE 804-130 (1992); James E. Beaver & Cheryl McCleary, *Inculpatory Statements Against Penal Interest:* State v. Parris *Goes Too Far*, 8 U. PUGET SOUND L. REV. 25 (1984).

227. State v. Parris, 654 P.2d 77, 78 (Wash. 1982).

228. 584 F.2d 694 (5th Cir. 1978), *cited in Parris*, 654 P.2d at 80.

229. *Alvarez*, 584 F.2d at 701.

230. *Id.* at 700.

231. *See* Nock, *supra* note 20, at 8-32. *See generally* United States v. Palumbo, 639 F.2d 123, 129-34 (3d Cir.) (Adams, J., concurring), *cert. denied*, 454 U.S. 819 (1981); United States v. Goodlow, 500 F.2d 954, 957 n.2 (8th Cir. 1974) (construing the proposed rule).

The first published drafts of 804(b)(3) stated, in part, that "[t]his exception does not include a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused."[232] Although this last sentence was dropped from the final draft, the Advisory Committee's notes to this exception caution against allowing inculpatory statements into evidence.[233] In support of this position, the notes cite *Douglas v. Alabama*[234] and *Bruton v. United States*.[235] Both cases involved confessions by codefendants that implicated the accused, and both courts held such statements inadmissible.[236] As a cautionary note, the Advisory Committee note to Rule 804(b)(3) said that "a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest."[237] Aside from the concerns expressed by the Advisory Committee, the opinion in *Parris* demonstrates that the court did not follow the requirements of the rule.[238]

The plain language of Rule 804(b)(3) states that the declaration must be one which "tended to subject the declarant to civil or criminal liability, or . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."[239] This expressly requires that the declarant must be aware that the statement was against the declarant's interest.[240] Probative value of the statement is guaranteed only to the extent that the declarant knows it is against his interest.[241] Despite this requirement, the Washington Supreme Court in *Parris* admitted DeHart's statements even though DeHart had no reason to believe that he was conversing with police informants.[242] Without such knowledge, DeHart could not pos-

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232. *Revised Draft of Proposed Rules of Evidence*, 55 F.R.D. 315, 438-39 (Committee on Practice and Procedure 1971).

233. FED. R. EVID. 804(b)(3) advisory committee's notes.

234. 380 U.S. 415 (1965).

235. 391 U.S. 123 (1968).

236. *Id.*; *Douglas*, 380 U.S. 415.

237. FED. R. EVID. 804(b)(3) advisory committee's notes.

238. State v. Parris, 654 P.2d 77, 83 (Wash. 1982). See Beaver & McCleary, *supra* note 226, for a more thorough criticism of *Parris*.

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

240. *Id.* The *Parris* court recognized that "it is not the fact that the declaration is against interest but the declarant's awareness of the fact which gives the statement significance . . . ." State v. Parris, 654 P.2d 77, 82 (Wash. 1982).

241. WEINSTEIN & BERGER, *supra* note 226, at 804-133 to 135.

242. *Parris*, 654 P.2d at 83. Parris believed that he was dealing with bona fide purchasers, rather than narcotics agents and, therefore, did not expect that his statements would lead to his arrest. The court, however, found there was no motive for him to lie. *Id.*

sibly have appreciated the risk he incurred while conversing with the informants.

As for the right of confrontation, *Parris* held that a statement would satisfy the Confrontation Clause if it is within a firmly rooted exception or if it has particularized guarantees of trustworthiness.[243] The right of confrontation allows the trier of fact to check the demeanor of the witness.[244] Furthermore, the United States Supreme Court has held that a deprivation of the right to cross-examination denies the accused his Fourteenth Amendment guarantee of due process of law.[245]

Confrontation means cross-examination.[246] The only significant exception occurs when the statement is not crucial to the outcome of the cause.[247] In Washington, the state constitution gives the accused the right "to meet the witnesses against him face to face."[248] This implies that actual physical confrontation is required. In *State v. Valladares*[249] the court pointed out that the *Washington Constitution* provides greater protection than the hearsay rule and the Sixth Amendment.[250] Given the overwhelming mandate for confrontation, the *Parris* decision was clearly in error.

In the search for truth, the *Parris* court compromised requirements of confrontation and hearsay doctrine. The legislative history of

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243. *Id.* at 79-81.

244. *See* Mattox v. United States, 156 U.S. 237, 242-43 (1895).

245. *See* Pointer v. Texas, 380 U.S. 400, 405 (1965) ("[T]o deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.").

246. Some form of cross-examination has always been required to satisfy the Sixth Amendment. *See* Ohio v. Roberts, 448 U.S. 56, 68-70 (1980); California v. Green, 399 U.S. 149 (1970), 157-58; Bruton v. United States, 391 U.S. 123, 126 (1968); Douglas v. Alabama, 380 U.S. 415, 418-20 (1965).

247. *See* Dutton v. Evans, 400 U.S. 74, 88 (1970) (no denial of the right to confrontation because "the statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight.").

248. WASH. CONST. art. I, § 22. The *Washington Constitution* provides in part:

> RIGHTS OF THE ACCUSED.
>
> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases . . . .

249. 664 P.2d 508 (Wash. 1983).

250. *Id.* at 514 (Williams, C.J., concurring specially) (The court "may interpret the Washington Constitution as more protective of individual rights than parallel provisions of the United States Constitution. . . . [T]he 'face-to-face' language of Const. art. I, § 22 seems to require actual physical confrontation between the accused and any adverse witnesses.").

804(b)(3) shows that inculpatory third-person penal interest statements were meant to be excluded.[251] Moreover, Washington's constitution requires face-to-face confrontation.[252] Abrogation of these two requirements deprived the defendant of his right to a fair trial. The addition of a residual exception would only compound this difficulty. If Washington wants to preserve the rule against hearsay and promote justice within the truth-seeking process, the creation of a residual exception will not further those goals.

B. State v. Smith[253]

Richard Smith was charged with a vicious assault.[254] The victim, Rachael Conlin, was severely assaulted in her motel room, which she kept for "work-related" activities.[255] A police officer was called to her hospital room; there she divulged that Smith had assaulted her, and she did not know what to do.[256] Conlin later went to the police station where she voluntarily gave a sworn statement, which described the details of the assault and identified Smith as her assailant.[257] The affidavit was signed and sworn before a notary.[258]

At trial Conlin reiterated the facts of her statement with the unexpected exception that her assailant had now become someone named Gomez rather than the defendant Smith.[259] Conlin admitted giving the prior statement to the police, but added that she did so because she was angry at Smith for forcing her to stay overnight in the motel room with Gomez.[260] When Conlin recanted her original, sworn story, the prosecutor offered the sworn statement; it was the only evidence identifying Smith as the assailant. The trial judge ruled the statement to be admissible under Washington Rule of Evidence 801(d)(1)(i), but later retracted his position and granted a new trial.[261] The Supreme Court of Washington reinstated the jury verdict, pronouncing the statement admissible.[262]

The relevant hearsay exception to Rule 801(d)(1)(i) provides:

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251. *See supra* notes 221-41 and accompanying text.
252. *See supra* notes 248-50 and accompanying text.
253. 651 P.2d 207 (Wash. 1982).
254. *Id.* at 208.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* at 209.
261. *Id.*
262. *Id.* at 211.

> (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 (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, *or other proceeding*, or in a deposition . . .[263]

The issue in *Smith* was whether this provision permitted "the admission of a trial witness's prior inconsistent statement, as substantive evidence, when that statement was made as a written complaint (under oath subject to penalty of perjury) to investigating police officers."[264] To answer this question, the court focused on the meaning of the term "other proceeding" found in the rule.

Though a considerable investigation was conducted, the court focused its analysis upon the reliability of the statement.[265] It was felt that guarantees of trustworthiness were met because "the statement was attested to before a notary, under oath and subject to penalty for perjury."[266] The statement was also written in Conlin's own words, and the jury, seeing Conlin testify on the stand, "was in a position to determine which statement was true."[267] Another consideration was that the statement was the product of a police investigation that was conducted to assist the prosecutor in determining whether to file an information.[268] The filing of an information, a grand jury indictment, an inquest proceeding, and the filing of a criminal complaint before a magistrate were all identified as acceptable methods for making a determination of probable cause.[269] Because the term "other proceedings" was deemed to encompass the latter three methods, the court held that the term also included police investigations.[270]

Though one can suspect that allowing the statement into evidence in *Smith* was just, the analysis used to arrive at the result is certainly subject to attack. Under the language of Rule 801(d)(1)(i), prior inconsistent statements are admissible as substantive evidence only if they are "given under oath subject to penalty of perjury at a trial, hearing, or other proceeding."[271] Formalized proceedings are con-

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263. WASH. R. EVID. 801(d)(1)(i) (emphasis added).
264. State v. Smith, 651 P.2d 207, 208 (Wash. 1982).
265. *Id.* at 209-10.
266. *Id.* at 210.
267. *Id.*
268. *Id.* at 210-11.
269. *Id.*
270. *Id.*
271. WASH. R. EVID. 801(d)(1)(i).

ducted in a manner designed to ensure the reliability and trustworthiness of a given statement.[272] Unlike a trial or deposition, a police investigation cannot possibly provide the same types of guarantees that add credibility to the witness's prior statement. Quite often, a police investigation is conducted before the witness has had time to calm down from what is usually a traumatizing event. At those moments, the perception and memory of the witness may be clouded. In addition, the witness is not subject to cross-examination; thus, the opposing party does not have the opportunity to observe the demeanor of the witness and check the veracity of the statement. Though there are several indicia of reliability surrounding the making of Conlin's statement, a station-house investigation is not the equivalent of a "proceeding," as required by 801(d)(1)(i).

Much of the court's reasoning rests upon the questionable decision of the Ninth Circuit Court of Appeals in *United States v. Castro-Ayon*.[273] While it is well-accepted that "other proceeding" includes a grand jury proceeding,[274] the Ninth Circuit expanded the interpretation to include a tape-recorded statement given under oath in an immigration investigation.[275] In *Castro-Ayon* the court determined that enough similarities existed between grand jury proceedings and immigration proceedings to admit the statement.[276] Unlike *Castro-Ayon*, the court in *Smith* sidestepped the issue of whether a station-house investigation is a "proceeding" and, instead, focused on the reliability of the surrounding circumstances.[277]

There is substantial authority that no variation of police investigative activity constitutes a proceeding.[278] In Florida, for example, the

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272. United States v. Day, 789 F.2d 1217, 1222 n.2 (6th Cir. 1986). The court also noted that "[i]n seeking to limit the admissibility of prior inconsistent statements for substantive purposes, Congress determined that statements given under oath at a 'formal proceeding' were inherently more reliable than statements given in absence of such formalities." *Id.* at 1222.

273. State v. Smith, 651 P.2d 207, 209 (Wash. 1982) (citing United States v. Castro-Ayon, 537 F.2d 1055 (9th Cir.), *cert. denied*, 429 U.S. 983 (1976)).

274. *See* John F. Gillespie, *What Is "Other Proceeding" Under Rule 801(d)(1)(A) of Federal Rules of Evidence, Excepting from Hearsay Rule Prior Inconsistent Statement Given "At a Trial, Hearing, or Other Proceeding,"* 37 A.L.R. FED. 855, 857 (1978).

275. *Castro-Ayon*, 537 F.2d at 1057.

276. *Id.* at 1058 (immigration proceedings and grand jury proceedings are both "investigatory, ex parte, inquisitive, sworn, basically prosecutorial, held before an officer other than the arresting officer, recorded, and held in circumstances of some legal formality").

277. *Smith*, 651 P.2d at 211 (The court stated that "each case depends on its facts with reliability the key.").

278. *See, e.g.*, United States v. Livingston, 661 F.2d 239, 242-43 (D.C. Cir. 1981) (Prior inconsistent statement to postal inspector not made in "proceeding," distinguishing *Castro-Ayon* on the ground that "the circumstances fall far short of those in a grand jury proceeding, the paradigmatic 'other proceeding' under the rule." *Id.* at 243.); United States v. Ragghianti,

courts have declined to follow *Smith*, stating, "[i]nvestigative interrogation is neither regulated nor regularized; it contains none of the safeguards involved in an appearance before a grand jury . . . and it has no quality of formality and convention which could arguably raise the interrogation to a dignity akin to that of a hearing or trial."[279] The court in *Smith* likened an investigation to other proceedings that are designed to make a determination of probable cause.[280] The *Smith* court felt that this proved that an investigation was a proceeding. A major error in this analysis lies in the fact that standards for proceedings used to determine probable cause are lower than those required for admitting prior inconsistent statements.[281]

Again, like the decision in *Parris*, the court in *Smith* compromised rudimentary evidentiary principles. Evidence Rule 102 would not produce such anomalies. The victim did not give her statement in a proceeding designed to ensure its reliability. Given Washington's requirement of "face-to-face confrontation,"[282] the witness's prior statement should have been subjected to cross-examination. Denial of the right to confrontation deprived the defendant of a fair trial. Enactment of the residual exception would only make unsound decisions such as we observe in *Parris* and *Smith* easier.

VI. CONCLUSION

Because the standards for admissibility are vague, federal courts have been inconsistent in their application of the residuals. The resulting open-ended use has allowed trial judges to expand upon traditional hearsay exceptions unduly. What was once inadmissible can now be admitted against a criminal defendant as substantive evidence, without allowing confrontation of the accuser. Furthermore, trial lawyers can no longer effectively ascertain whether an out-of-court declaration is admissible or not. For those jurisdictions that have adopted 803(24) and 804(b)(5) or their equivalent, the rule against hearsay has

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560 F.2d 1376, 1381 (9th Cir. 1977) (Inconsistent statement to investigating FBI agent inadmissible; "There is, after all, a difference between a prior statement obtained from a witness by the police in the course of a criminal investigation, and testimony given under oath in a formal proceeding."); Martin v. United States, 528 F.2d 1157, 1161 (4th Cir. 1975) (substantive admissibility of sworn inconsistent statement to federal agents by witness is error since interrogation was not "proceeding"); *see also* Delgado-Santos v. State, 471 So. 2d 74 (Fla. 3d DCA 1985).

279. *Delgado-Santos*, 471 So. 2d at 78.

280. State v. Smith, 651 P.2d 207, 210-11 (Wash. 1982).

281. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 235-39 (1983) (in a proceeding for probable cause, the identity of any witnesses and informants is often unknown and they are often unavailable for questioning; as a result, the statements obtained to determine probable cause are highly suspect).

282. WASH. CONST. art. I, § 22.

potentially been vitiated. Truth and justice are best supported by keeping catchall exceptions out of evidence rules. Hearsay evidence is inherently unreliable, and its use can deny fair trials and allow tragedies such as Sir Walter Raleigh's case. If the hearsay rule is to be abolished, then let us do it forthrightly and not in stages.