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The Residual Hearsay Exceptions: Maryland's Lukewarm Welcome

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THE RESIDUAL HEARSAY EXCEPTIONS: MARYLAND'S LUKEWARM WELCOME

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I. INTRODUCTION

On July 1, 1994 Maryland codified its rules of evidence,[1] bringing them into accord with the substance of the Federal Rules of Evidence.[2] In doing so, Maryland followed the trend set by thirty-seven other states.[3] The codified evidence rules, known collectively as Title 5 of the Maryland Rules, were made applicable to "all actions and proceedings in the courts of this State,"[4] with some exceptions.[5]

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1. MD. RULES 5-101 to 5-1008.
2. LYNN MCLAIN, MARYLAND RULES OF EVIDENCE 1 (1994). Professor McLain's work provides a summary comparison of each Maryland rule to its federal counterpart. *Id.* at 13-17.
3. Those states include Alaska, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Two United States territories, Guam and Puerto Rico, have also adopted an evidence code. *See* MCLAIN, *supra* note 2, at 1 (collecting statutory provisions).
4. MD. RULE 5-101(a). The rules order, filed by the court of appeals on December 15, 1993, provided "that the Rules in Title 5 . . . shall govern the courts of this state and all parties and their attorneys in all actions and proceedings therein, except as otherwise provided in such Rules." 21:1 MD. R. 16 (Jan. 7, 1994); MCLAIN, *supra* note 2, at 41.
5. MD. RULE 5-101(b). The Maryland Rules of Evidence, other than those relating to the competency of witnesses, MD. RULE 5-101(b), do not apply to the

Additionally, the newly codified rules give Maryland courts the discretion to avoid strict application of the rules in certain proceedings.[6]

One of the more difficult questions that the Court of Appeals of Maryland considered when it codified the rules of evidence was whether to adopt some form of the residual hearsay exceptions set forth in the Federal Rules of Evidence.[7]

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following proceedings:

(1) Proceedings before grand juries;
(2) Proceedings for extradition or rendition;
(3) Direct contempt proceedings in which the court may act summarily;
(4) Small claim actions under Rule 3-701 and appeals under Rule 7-112(c)(2);
(5) Issuance of a summons or warrant under Rule 4-212;
(6) Pretrial release under Rule 4-216 or release after conviction under Rule 4-349;
(7) Preliminary hearings under Rule 4-221;
(8) Post-sentencing procedures under Rule 4-340;
(9) Sentencing in non-capital cases under Rule 4-342;
(10) Issuance of a search warrant under Rule 4-601;
(11) Detention and shelter care hearings under Rule 912; and
(12) Any other proceeding in which, prior to the adoption of the rules in this Title, the court was traditionally not bound by the common-law rules of evidence.

MD. RULE 5-101(b).

6. Maryland Rule 5-101(c) provides:

In the following proceedings, the court may, in the interest of justice, decline to require strict application of the rules in this Title other than those relating to the competency of witnesses:
(1) The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 5-104(a);
(2) Proceedings for revocation of probation under Rule 4-347;
(3) Hearings on petitions for post-conviction relief under Rule 4-406;
(4) Plenary proceedings in the Orphans' Court under Rule 6-462;
(5) Waiver hearings under Rule 913;
(6) Disposition hearings under Rule 915;
(7) Modification hearings under Rule 916; and
(8) Any other proceeding in which, prior to the adoption of the rules in this Title, the court was authorized to decline to apply the common-law rules of evidence.

MD. RULE 5-101(c).

7. The Evidence Rules Subcommittee had recommended, by a divided vote, that the residual exceptions not be adopted. The full Committee had adopted the subcommittee proposal because a motion to reject or amend the proposal failed twice, also by nearly divided votes. Judge Howard S. Chasanow, Address to the Wrangler's Law Club (Oct. 21, 1993) (on file with authors); MCLAIN, *supra* note 2, at 268.

Federal Rule 803 provides:

> the following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> . . . .
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> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.[8]

Rule 804(b)(5) of the Federal Rules of Evidence provides that, though the declarant is not available as a witness, the hearsay rule will not exclude:

> [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.[9]

This Article will explore the historical development of the hearsay rule and will focus on the residual hearsay exceptions. It will discuss the development of the residual exceptions and some of the challenges that the federal courts have encountered when interpreting them. It

8. FED. R. EVID. 803(24).
9. FED. R. EVID. 804(b)(5).

will also examine Confrontation Clause[10] concerns that have been generated by the use of residual hearsay exceptions in criminal trials.[11] Finally, it will discuss the background and substance of Maryland's recently adopted residual exceptions and how those rules differ from their federal counterparts.[12]

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10. The Confrontation Clause of the Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.
11. Idaho v. Wright, 497 U.S. 805 (1990), is the most recent Supreme Court analysis of the interplay between the Confrontation Clause and the residual exception. *See infra* notes 73-76 and accompanying text. The Supreme Court has held that hearsay exceptions which are "firmly rooted" in the common law satisfy the reliability requirement of the Confrontation Clause. *Wright*, 497 U.S. at 814; Bourjaily v. United States, 483 U.S. 171, 183 (1987). The Supreme Court has recognized dying declarations, prior testimony, business records, public records, excited utterances, statements made seeking medical treatment, and co-conspirator statements as "firmly rooted" exceptions to the hearsay rule. *See, e.g.*, Idaho v. Wright, 497 U.S. 805, 816, 820, 821 (1990) (recognizing co-conspirator statements, excited utterances, dying declarations, medical treatment, and prior testimony); Bourjaily v. United States, 483 U.S. 171, 183 (1987) (recognizing co-conspirator statements); Ohio v. Roberts, 448 U.S. 56, 66 n.8 (1980) (recognizing dying declarations, prior testimony, business records, and public records).
12. Maryland Rule 5-803(b)(24) provides that:

> Under exceptional circumstances, the following are not excluded by the hearsay rule, even though the declarant is available as a witness: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. 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, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

MD. RULE 5-803(b)(24).

Maryland Rule 5-804(b)(5) provides that:

> Under exceptional circumstances, the following are not excluded by the hearsay rule, even though the declarant is unavailable as a witness: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted

II. THE HISTORICAL ORIGIN OF THE RULE AGAINST HEARSAY

Evidence scholar John H. Wigmore heralded the rule against hearsay as the "most characteristic rule of the Anglo-American law of evidence—a rule which may be esteemed, next to jury trial, [as] the greatest contribution of that eminently practical legal system to the world's methods of procedure."[13] As a matter of both federal[14] and state[15] law, hearsay is generally inadmissible unless it falls within an exception to the hearsay rule. The hearsay rule emerged during the 1600s along with the development of the jury trial system and the practice of calling witnesses as the principal source of proof at trial.[16]

> In criminal cases in the 1500's and down to the middle 1600's the main reliance of the prosecution was the use of . . . 'depositions' to make out its case. As oral hearsay was becoming discredited, uneasiness about the use of 'depositions' began to take shape . . . in the form of a limitation

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> 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, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

MD. RULE 5-804(b)(5).

13. 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1364 at 28 (James H. Chadbourn ed. 1974).
14. Federal Rule 801 provides the following definitions:
    > (a) Statement. A "statement" is
    > (1) an oral or written assertion or
    > (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
    > (b) Declarant. A "declarant" is a person who makes a statement.
    > (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

    FED. R. EVID. 801.
15. Maryland Rule 5-801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MD. RULE 5-801(c).
16. 5 WIGMORE, *supra* note 13, at 15. Another commentator traces the development of the right to jury trial to the "reign of Henry IV [1399-1413] . . . [when] [a]ll evidence was required to be given at the bar of the court, so that the judges might be able to exclude improper testimony." *See* J.E.R. Stephens, *The Growth of Trial by Jury in England*, 10 HARV. L. REV. 150, 159 (1896). James B. Thayer notes in this period, in 1349, at least one judge ruled that a witness could testify to "nothing but what they knew as certain . . . what they see and hear." James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 304-05 (1892).

that they could only be used when the witness could not be produced at the trial.[17]

The conviction and execution of Sir Walter Raleigh, in 1603, was important to the development of the hearsay rule.[18] Raleigh's conviction was based almost exclusively on two items of hearsay testimony.[19] A witness testified at the trial that he overheard an unknown Portuguese gentleman in a tavern state: "[Y]our king shall never be crowned for Don Cobham and Don Raleigh will cut his throat before he comes to be crowned."[20] The only other item of evidence against Raleigh was a written confession obtained from, and later recanted by, Lord Cobham.[21]

After Raleigh's execution, public concern developed about the injustice of using the unknown hearsay declarant's accusation and the recanted confession as the basis for Raleigh's conviction.[22] Judges began to criticize hearsay as a "tale of tale," and a "story out of another man's mouth."[23] The rule prohibiting hearsay was recognized by the end of the seventeenth century.[24]

The principal reason to exclude hearsay evidence is to safeguard against unreliable second-hand accusations.[25] Live testimony is preferable to hearsay evidence for two reasons. First, a declarant testi-

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17. CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 244, at 425 (John W. Strong ed., 4th ed. 1992).
18. JOHN KAPLAN ET AL., CASES AND MATERIALS ON EVIDENCE 83 (7th ed. 1992).
19. *See id.* at 83-84.
20. *Id.* at 84.
21. *Id.*
22. Frank M. Tuerkheimer, *Convictions Through Hearsay in Child Sexual Abuse Cases: A Logical Progression Back to Square One*, 72 MARQ. L. REV. 47, 49 (1988). "The case, however, is generally considered to be the beginning of the end of such use of hearsay evidence." *Id.*
23. *See* WIGMORE, *supra* note 13, § 1364, at 18 n.32 (quoting Gascoigne's Trial, 7 How. St. Tr. 959, 1019 (1680), and Colledge's Trial, 8 How. St. Tr. 549, 663 (1681)).
24. KAPLAN, *supra* note 18, at 51. In tracing the historical development of the hearsay rule, one historian described the origin of the rule and its relationship to the jury trial in this way:

> In medieval times, the jury had been a panel of neighbors—knowing busy-bodies, who perhaps had personal knowledge of the case. When the function of the jury changed to that of an impartial panel of listeners, the law of evidence underwent explosive growth. The rules began to exclude all shaky, secondhand, or improper evidence from the eyes and ears of the jury. Only the most tested, predigested matter was fit for the jury's consumption . . . . The general rule was that juries should not hear second-hand evidence: they should hear Smith tell his story, not Jones' account of what Smith had said.

LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 135 (1973).
25. *See* Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497 (1990).

fying in person is required to take an oath against perjury.[26] Second, a declarant testifying in person is available to be cross-examined.[27] The more important of these safeguards is the ability to cross-examine the declarant.[28] Cross-examination of the witness reiterating the hearsay is a poor substitute. The "person who relates a hearsay, is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities: he entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author."[29]

Despite the concerns that allowing hearsay statements into evidence may compromise the integrity of the adversarial process, it is difficult to contemplate an absolute prohibition against hearsay. In fact, immediately after courts began to recognize the hearsay rule, they also recognized the equally compelling need for exceptions to the rule. Some early exceptions included involuntary utterances,[30] regular entries into shopbooks,[31] and dying declarations.[32]

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26. *See* California v. Green, 399 U.S. 149, 158 (1970).
27. *Id.*
28. Although the Supreme Court has never held that there is an absolute right to face-to-face confrontation even in criminal cases, *see* Maryland v. Craig, 497 U.S. 836, 844 (1990), the value of cross-examination in the fact finding process has long been recognized by the Supreme Court. *See* Mattox v. United States, 156 U.S. 237 (1895). Cross-examination provides a vehicle "not only of testing the recollection and sifting the conscience of the witness, but of compelling him 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.
29. Coleman v. Southwick, 9 Johns 50 (N.Y. 1812). In Donnelly v. United States, 228 U.S. 243 (1913), the Supreme Court articulated the rationale for excluding hearsay:

> Hearsay evidence, with a few well recognized exceptions, is excluded by courts that adhere to the principles of the common law. The chief grounds of its exclusion states, that the reported declaration (if in fact made) is made without the sanction of an oath, with no responsibility on the part of the declarant for error or falsification, without opportunity for the court, jury, or parties to observe the demeanor and temperament of the witness, and to search his motives and test his accuracy and veracity by cross-examination, these being most important safeguards of the truth, where a witness testifies in person, and as of his own knowledge; and, moreover, he who swears in court to the extra-judicial declaration does so (especially where the alleged declarant is dead) free from the embarrassment of present contradiction and with little or no danger of successful prosecution for perjury.

Id. at 273.
30. FRIEDMAN, *supra* note 24, at 136.
31. *Id.*
32. *Id.*

Hearsay exceptions save time and give the court flexibility. Consider the example of a large retail store suing a defendant who purchased some furniture but did not pay for it. To prove that the store had not been paid, the clerk who sold the furniture to the defendant, the delivery people who delivered it to the defendant, and the store's bookkeeping personnel would be necessary witnesses. Trials would be protracted if evidence rules demanded the in-court testimony of such a vast number of witnesses.

The need to recognize exceptions to the rigid application of the hearsay rule was obvious, but the development of hearsay exceptions was by no means organized. Professors Morgan and Maguire observed that hearsay exceptions were developed like "an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists."[33] The exceptions to the general rule against hearsay were necessary to provide flexibility to the courts, but the unique combination of harsh applications of the rule and liberal exceptions to the rule have created controversy.[34] Mason Ladd pointed out the irony in the need to exclude hearsay while at the same time creating multiple exceptions to its exclusion:

> The practically universal condemnation of hearsay would lead to the conclusion that everyone is well informed and has clear-cut notions on just what this perversion of the truth is and what the reasons for its exclusion are. To some extent at least, hearsay is a vague monster with a bad name; but just what color it is, what shape it has, and whether its danger consists of sharp teeth or long claws is not known. Nevertheless everyone is sure that it is bad. However, no one is particularly disturbed when hearsay escapes the exclusionary rules through one of the many exceptions. Although testimony may be admitted under an exception it is still hearsay, and the exception could not cleanse it of all of its impurities.[35]

Indeed, the problems inherent in developing hearsay exceptions one case at a time[36] were the primary reasons for state and federal

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33. Edmund M. Morgan & John M. Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937).
34. *See* RICHARD LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 497 (2d ed. 1982) (stating that "the most common criticisms have been that the exclusion of hearsay evidence hampers the search for truth too often to be tolerated in a rational system of evidence law and the proliferation of hearsay exceptions has created a system of unnecessary and unmanageable complexity").
35. MASON LADD, CASES AND MATERIALS ON THE LAW OF EVIDENCE 325 (1949) (footnotes omitted).
36. *See* Mason Ladd, *A Modern Code of Evidence*, 27 IOWA L. REV. 213, 214,

movements to codify the rules of evidence.[37]

The origins of the federal residual hearsay exceptions probably owe their present formulations and methodology to the Fifth Circuit's decision in *Dallas County v. Commercial Union Assurance Co.*[38] The case involved the 1957 collapse of a clock tower at the Dallas County courthouse in Selma, Alabama.[39] The tower fell and telescoped through the roof and into the empty courtroom below.[40] Following the incident, Dallas County filed a claim with its insurance company for over $100,000 in damages.[41] The insurance company refused to pay because they believed the collapse was caused by faulty design and poor workmanship.[42] The County filed suit against its insurers alleging that the collapse of the clocktower was caused by a lightning bolt which had struck the courthouse five days earlier.[43] The County pointed to charred timbers in the tower debris to support its position.[44] The insurance company, on the other hand, alleged that the charring on the timbers was not caused by lightning, but by a fire in the courthouse roof, which occurred over fifty years before the collapse.[45] To prove its defense, the insurance company offered the June 9, 1901 issue of a defunct weekly newspaper, the *Morning Times of Selma*, that contained an unsigned front page article about a fire at the courthouse which was then under construction.[46] The trial judge admitted the fifty-eight year old newspaper despite the plaintiff's objections that the article was hearsay and did not fall within the exceptions for business records or ancient documents.[47] The jury found in favor of the insurance company.[48]

The sole issue on appeal was the propriety of the admission of the 1901 newspaper.[49] Judge (John Minor) Wisdom, writing for the

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218 (1942) (describing the development of the law of evidence as spotted, accidental, and unsound); *see also* Edmund M. Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence*, 14 VAND. L. REV. 725 (1961) (examining several causes of the "glacier-like" reform of evidentiary rules at common law).

37. *See* Harlan F. Stone, *Some Aspects of the Problem of Law Simplification*, 23 COLUM. L. REV. 319, 329 (1923); Spencer A. Gard, *Why Oregon Lawyers Should Be Interested in the Uniform Rules of Evidence*, 37 OR. L. REV. 287, 298 (1958).
38. 286 F.2d 388 (5th Cir. 1961).
39. *Id.* at 390.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 391.
48. *Id.* at 390.
49. *Id.*

Fifth Circuit, could have invented a new exception to the hearsay rule, perhaps describing the exception as "the defunct newspaper exception." Instead, he did something much more significant. He stated simply and succinctly that the newspaper "is admissible because it is necessary and trustworthy, relevant and material, and its admission is within the trial judge's exercise of discretion."[50] Prior to reaching this conclusion, Judge Wisdom noted: "There is no procedural canon against the exercise of common sense in deciding the admissibility of hearsay evidence."[51] As stated by the court, the newspaper article was "more reliable, more trustworthy, [and] more competent evidence than the testimony of a witness called to the stand fifty-eight years later."[52] The *Dallas County* case is the embodiment of what is now the federal residual exception to the hearsay rule.[53]

Federal Rule 803(24) and its counterpart, Rule 804(b)(5), list five general factors, borrowed from the *Dallas County* case, that must be met in order to admit hearsay evidence that does not fall within any enumerated hearsay exception:

(1) The hearsay statement must be trustworthy;
(2) the hearsay must be offered to prove a material fact;
(3) the hearsay must be shown to be more probative on the point than any other evidence reasonably available to the proponent;
(4) the general purpose of the rules, and the interests of justice must be served by admitting the hearsay; and
(5) the proponent must give reasonable, advance notice that the hearsay will be offered.[54]

The residual hearsay exceptions were designed to give the federal courts flexibility and to allow them to admit hearsay statements that are as trustworthy as those allowed under the existing hearsay exceptions.[55]

The codification of the Federal Rules of Evidence began with the appointment of a special committee on evidence by Supreme Court Chief Justice Earl Warren in 1961. A drafting committee was appointed in 1965. A draft of the Federal Rules of Evidence was

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50. *Id.* at 398.
51. *Id.* at 397.
52. *Id.*
53. *See* FED. R. EVID. 803 (advisory committee note).
54. FED. R. EVID. 803(24), 804(b)(5). *Cf. Dallas County*, 286 F.2d at 397.
55. *See* FED. R. EVID. 803(24) (advisory committee note) ("It would . . . be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued . . . .").

completed in 1969.[56] Under the proposed rules, a hearsay exception was provided for statements "not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness."[57] The committee cautioned, however, that the exception does "not contemplate an unfettered exercise of judicial discretion."[58]

This early draft of the rules is described by one commentator as "the high-water mark of judicial discretion to admit reliable hearsay under a set of federal rules."[59] The Supreme Court approved the draft of the rules, but Congress intervened and delayed their implementation.[60] Congress then embarked upon its own review of the rules.

Initially, the residual exceptions were omitted from the House Judiciary Committee's original version of the Federal Rules of Evidence. The Committee explained that the exceptions introduced "too much uncertainty into the law of evidence and impair[ed] the ability of practitioners to prepare for trial."[61] The Senate, however, reinstated the exceptions, concluding that they were not intended to be a broad grant of power to the trial courts, but rather, "the residual hearsay exceptions [were intended to] be used very rarely, and only in exceptional circumstances."[62]

Ultimately, the residual exceptions were adopted in the form that exists today.[63] In practice, the residual exceptions have become more of a general rule than an exception, as indicated by the amount of litigation that has been generated by Federal Rules 803(24) and 804(b)(5) and their state equivalents. By the early 1990s more than 140 federal cases and ninety state cases had been reported regarding the residual exceptions.[64] Several of these cases concern the proper interpretation and use of the residual exceptions. One controversy

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56. *See* Ray Yasser, *Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule*, 11 TEX. TECH L. REV. 587, 587-89 (1980).
57. REVISED DRAFT OF THE PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES FEDERAL RULES OF EVIDENCE (Revised Draft) 51 F.R.D. 315, 422, 439 (1971).
58. *Id.* at 437, 445.
59. Joseph W. Rand, *The Residual Exceptions to the Federal Hearsay Rule: The Futile and Misguided Attempt To Restrain Judicial Discretion*, 80 GEO. L.J. 873, 877 (1992).
60. *Id.* at 878.
61. H.R. REP. No. 650, 93d Cong., 1st Sess. 6 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7079.
62. S. REP. No. 1277, 93d Cong., 2d Sess. 4 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7066.
63. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 1975 U.S.C.C.A.N. (88 Stat.) 1926 (adoption of the residual exception in FED. R. EVID. 803(24) and 804(b)(5)).
64. James E. Beaver, *The Residual Hearsay Exception Reconsidered*, 20 FLA. ST. U. L. REV. 787, 790 (1993).

surrounding the residual exceptions has been termed the "near miss" debate.[65] The debate centers on whether the residual exceptions should ever be used to admit near miss hearsay—especially trustworthy hearsay that is very close to a specific exception but does not quite fit that exception. For example, a particularly trustworthy looking nineteen year old document will not be covered by the ancient document rule, which requires that the document be at least twenty years old.[66]

One argument against admitting a near miss under the residual exceptions is that hearsay admitted under the exceptions must have guarantees of trustworthiness *equivalent* to that of enumerated exceptions.[67] Advocates of this position argue that if the offered hearsay does not fit within an enumerated exception, it cannot be *equivalent* to that exception.[68]

Those who favor the admission of near miss hearsay under the residual exceptions argue that counsel seeking to offer hearsay into evidence should not face a Hobson's choice; counsel should be allowed to argue, in the alternative, that a hearsay statement is

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65. Thomas Black, *Federal Rules of Evidence 803(24) & 804(b)(5) - The Residual Exceptions - An Overview*, 25 HOUS. L. REV. 13, 26-27 (1988); Lizbeth A. Turner, *Admission of Grand Jury Testimony Under the Residual Hearsay Exception*, 59 TUL. L. REV. 1033, 1042-43 (1985) (stating that by using the near miss approach, some courts admit under a residual exception a statement that almost falls within an enumerated section); 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, 460-61 (1986) (stating that the near miss problem concerns the treatment under a residual exception of "hearsay that narrowly fails to gain admission under a specific provision of the hearsay rules"); Sang W. Oh, *Garbage, Near Misses, and Glass Slippers: The Scope of Admissibility Under Maryland's Residual Hearsay Exceptions*, 25 U. BALT. L.F. 6, 12-13 (1994) (the near miss problem deals with the admissibility of evidence that is of the type covered by a specific hearsay exception, but fails to meet all of the requirements of that exception); Rand, *supra* note 59, at 900 (pursuant to the near miss theory, evidence of a type governed by a specific hearsay exception, which fails to meet the exception's requirements, cannot be admitted under a residual exception).

66. FED. R. EVID. 803(16).

67. United States v. Kim, 595 F.2d 755, 765 (D.C. Cir. 1979). "The purpose of [the] residual exception rule is to allow trial judges to admit certain hearsay statements that do not fall within any of the specific exceptions, but which have 'equivalent circumstantial guarantees of trustworthiness.'" *Id.*

68. *See* Turner, *supra* note 65, at 1043-44 (noting the Fifth Circuit's assertion that a statement failing to meet Federal Rule 804(b)(3)'s corroboration standards must also fail the equivalent trustworthiness standards of Federal Rule 804(b)(5)); Rand, *supra* note 59, at 900 (because the residual exception requires guarantees of trustworthiness "equivalent" to the hearsay exceptions, by definition, hearsay that explicitly fails under the enumerated exception cannot be equivalent in trustworthiness to the nearly missed exception).

admissible either under a specific exception or under a "catch all" exception.[69] The theory underlying this argument is that attorneys should not have to put their clients at risk by gambling on one rule over another. Hearsay that comes close to meeting the requirements of an existing exception is admissible under the residual exceptions, in most courts, if it is particularly trustworthy.[70] Nevertheless, courts have held that near miss hearsay is not admissible under either existing exceptions or under the residual exceptions.[71]

Other litigation regarding the residual exceptions has concerned the criteria that should be used to assess the trustworthiness of proffered hearsay. Courts "will generally interpret the broadly worded trustworthiness requirement to allow consideration of corroborating evidence to determine trustworthiness, intrinsic to the making of the statement."[72] For example, in *Idaho v. Wright*,[73] the Supreme Court determined that for Confrontation Clause purposes, trustworthiness must be shown by the "totality of the circumstances."[74] Furthermore, the relevant circumstances supporting a statement's trustworthiness include "only those [statements] that surround the making of the statement" and not corroborating evidence.[75]

Several factors were addressed in *Wright* to determine whether hearsay statements made by a child witness in a sexual abuse case

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69. For an excellent article discussing the dilemma created by the near miss problem see Sang W. Oh, *supra* note 65, at 12-15.
70. *See, e.g.*, Idaho v. Wright, 497 U.S. 805, 817 (1990) (quoting Lee v. Illinois, 476 U.S. 530, 543 (1986) (explaining that certain hearsay evidence may be admissible even for Confrontation Clause purposes if "it is supported by a 'showing of particularized guarantees of trustworthiness'")).
71. *See, e.g.*, United States v. Furst, 886 F.2d 558, 571-74 (3d Cir. 1989) (rejecting hearsay statements both under Federal Rule 803(24), a residual hearsay exception, and Federal Rule 806(b), the exception for business records).
72. Rand, *supra* note 59, at 899.
73. 497 U.S. 805 (1990).
74. *Id.* at 820.
75. *Id.* Although the Confrontation Clause has been recognized as the vehicle to permit a party in a criminal case to test the trustworthiness of a hearsay statement, the Supreme Court has rejected a literal interpretation of the constitutional provisions as a bar to all out of court statements even in cases where the declarant may be unavailable. *See* Bourjaily v. United States, 483 U.S. 171, 182-83 (1987) (finding co-conspirators' statements sufficiently reliable to be "outside the compass of the general hearsay exclusion"). A recent example of the Supreme Court's rejection of the literal interpretation of the Confrontation Clause can be found in Maryland v. Craig, 497 U.S. 836 (1990). In *Craig*, the Court acknowledged that face-to-face confrontation heightens the adversarial nature of the fact finding process, but, nevertheless, concluded that "the [Confrontation] Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial." *Id.* at 847-48.

were reliable.[76] Those factors included spontaneity, mental state of the defendant, and lack of motive to fabricate.[77] Despite the *Wright* opinion, most courts seem to judge trustworthiness by both the circumstances at the time the hearsay statement was made and by subsequent corroboration of the content of the statement.[78]

Another question concerning the use of the residual exceptions is the correct interpretation of the requirement that the hearsay must be more probative than any other reasonably available evidence. For example, in an automobile accident case, if the plaintiff testifies that the light was red and the defendant testifies that the light was green, should a hearsay statement of an unavailable witness about the color of the light ever be admitted under the residual exceptions? The

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76. *Wright*, 497 U.S. at 821-22. In *Wright*, the declarant/child was too young to be cross-examined, *id.* at 809, and thus, the reliability of her statement depended largely upon these factors. However, it has been noted that only cross-examination can fully satisfy the fact finding mission of an adversarial proceeding. As Francis L. Wellman argues in his classic legal work, *The Art of Cross-Examination*:

> If the witnesses on one side deny or qualify the statements made by those on the other, which side is telling the truth? Not necessarily which side is offering perjured testimony,—there is far less intentional perjury in the courts than the inexperienced would believe. But which side is honestly mistaken,—for, on the other hand, evidence itself is far less trustworthy than the public usually realizes. The opinions of which side are warped by prejudice or blinded by ignorance? Which side has had the power or opportunity of correct observation? How shall we tell, how make it apparent to a jury of disinterested men who are to decide between the litigants? Obviously, by the means of cross-examination.
>
> If all witnesses had the honesty and intelligence to come forward and scrupulously follow the letter as well as the spirit of the oath, to tell the truth, the whole truth, and nothing but the truth, and if all advocates on either side had the necessary experience, combined with honesty and intelligence, and were similarly sworn to *develop* the whole truth and nothing but the truth, of course there would be no occasion for cross-examination, and the occupation of the cross-examiner would be gone. But as yet no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions.
>
> The system is as old as the history of nations.

FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 7 (1923).

77. *Wright*, 497 U.S. at 821-22.

78. *See, e.g.*, Washington v. Whelchel, 801 P.2d 948, 955-57 (Wash. 1990). Though the court mentions the principle of *Idaho v. Wright*—that the circumstances relevant to a finding of a statement's trustworthiness are only those surrounding the utterance of the statement itself, and not corroborating evidence—it applied the customary "9-point set of guidelines to determine whether the reliability required of inculpatory statements under ER 804(b)(3) and the Confrontation Clause [were] satisfied." *Id.* at 955. Some of these nine points look to subsequent corroboration. *Id.* at 955-57.

hearsay, a second-hand statement, is slightly less probative than the direct testimony of either available eyewitness, but many courts have construed the "more probative" requirement liberally and have admitted such evidence. Although it is not necessarily more probative than the other two eyewitnesses' testimony, it is, at least, more probative than any reasonably available corroborative evidence.[79]

The residual exceptions have opened the courtroom door for some new forms of hearsay in both civil and criminal trials. Several courts have admitted, under the residual exceptions, the grand jury testimony of a witness who had died or had been murdered before the trial where the circumstances indicated that the witness was trustworthy and had no motive to lie.[80] In *United States v. Wright*,[81]

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79. *See generally* United States v. Shaw, 824 F.2d 601, 610 (8th Cir. 1987) ("Even though the evidence may be somewhat cumulative, the 'more probative' requirement can not be interpreted with cast iron rigidity"), *cert. denied*, 484 U.S. 1068 (1988); United States v. Curro, 847 F.2d 325, 327-28 (6th Cir.) (the "more probative" requirement is designed only to prevent "an unnecessary shortcut"; thus, the fact that hearsay evidence is merely corroborative is not "fatal to [its] admission"), *cert. denied*, 488 U.S. 843 (1988); United States v. St. John, 851 F.2d 1096, 1099 (8th Cir. 1988) (although "the prosecution should not always be allowed to shore up its case by using hearsay statements, . . . it [is] appropriate to allow the use of . . . hearsay statements where the victim is unwilling or unable to testify"); United States v. Marchini, 797 F.2d 759, 764 (9th Cir. 1986) (hearsay admitted under Federal Rule 804(b)(5) even though "the importance of the substance of [the] testimony was cumulative"), *cert. denied*, 479 U.S. 1085 (1987).

80. *See* United States v. Walker, 696 F.2d 277, 281 (4th Cir. 1982) (finding grand jury testimony admissible under Federal Rule 804(b)(5) because it had "strong indicia of truthfulness" and because it was corroborated by the testimony of other witnesses), *cert. denied sub nom.*, Bashlor v. United States, 464 U.S. 891 (1983); *see also* United States v. Thomas, 705 F.2d 709, 711-12 (4th Cir.), *cert. denied*, 464 U.S. 890 (1983) ("The grand jury testimony of an unavailable witness may be introduced under certain conditions without violating the Constitution or the Federal Rules of Evidence."); United States v. West, 574 F.2d 1131, 1136-38 (4th Cir. 1978) (finding that an admission at a trial of slain informant's prior grand jury testimony does not violate the defendants' rights under the Confrontation Clause, despite lack of cross examination, because "surrounding circumstances . . . give assurance of reliability"); United States v. Garner, 574 F.2d 1141, 1146 (4th Cir.) (admitting grand jury testimony of alleged co-conspirator, who refused to testify at trial, because of reliable corroborating testimony), *cert. denied sub nom.*, McKethan v. United States, 439 U.S. 936 (1978); *cf.* United States v. McCall, 740 F.2d 1331, 1337-40 (4th Cir. 1984) (holding the admission of an affidavit of a deceased Federal Protective Service officer, and the admission of the hearsay testimony of a fellow officer, explaining the affidavit, erroneous under Federal Rule 804(b)(5)). The court distinguished the results in *West*, *Garner*, and *Murphy* because the hearsay evidence involved in those cases was a grand jury transcript rather than an affidavit. *Id.* at 1340-41. The court stated that "grand jury proceedings with their attendant formalities—official recording of testimony, protection against witness abuse, and official supervision—afford greater protection for

entries made by a witness in her diary were found to be particularly trustworthy and were admitted under the residual exception, after her death.[82]

An interesting case involving the application of Federal Rule 803(24) is *State v. Knowles*,[83] a 1989 New Hampshire opinion written by Justice David Souter when he was on the Supreme Court of New Hampshire. In *Knowles*, the defendant drove his car into a telephone pole located less than a block from his house.[84] He was convicted of driving under the influence of alcohol and of leaving the scene of an accident.[85] An important item of evidence proving that the defendant was the driver of the car was the hearsay statement of the defendant's mother, who approached the police officers immediately after the accident and said that although she tried to persuade her son not to drive drunk, he "drove off and hit the pole."[86] Aside from the defendant's mother, the officer did not question any other witnesses as to the identity of the driver.[87] By the time of the trial, the defendant's mother had not only recanted the statement, she denied even having seen the accident.[88] The trial court admitted the statement by the defendant's mother.[89] On appeal, the Supreme Court of New Hampshire affirmed the lower court's ruling, finding that the officer used "reasonable efforts" to obtain evidence of the driver's identity to satisfy the New Hampshire version of Rule 803(24).[90]

Some writers have criticized the decision in *United States v. Medico*[91] because *double* hearsay was admitted under the federal residual exception.[92] In *Medico*, the defendant was on trial for bank robbery. A critical element of the government's case was the license plate number of the car that the robber used, which matched the license plate number of the car the defendant was in when he was arrested.[93] The trial court permitted a security guard of the bank to

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the accuracy of the truthfinding process than does the taking of *ex parte* affidavits." *Id.* at 1341. For a comprehensive survey of how Federal courts have dealt with grand jury testimony see Turner, *supra* note 65.

81. United States v. Wright, 826 F.2d 938 (10th Cir. 1987).
82. *Id.* at 954-56.
83. 562 A.2d 185 (N.H. 1989).
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 186.
90. *Id.*
91. 557 F.2d 309 (2d Cir. 1977).
92. *Id.* at 316.
93. *Id.* at 313.

testify that an unidentified customer had given the guard the license plate number, which the guard then supplied to the police.[94] The customer had apparently obtained the number from an unidentified young man who had been sitting in a car outside the bank and who had watched the getaway car speed away.[95] The guard related that he watched the customer obtain the number from the young man outside the bank and then report the number to the guard.[96] Neither the customer nor the young man could be located by the government to testify at trial.[97] The guard was permitted to testify to the double hearsay concerning the license number because the judge found that the hearsay was trustworthy and that it met the requirements for admissibility under the residual exceptions.[98]

Obviously, not all proffered residual hearsay is sanctioned by appellate courts.

In *United States v. Mandel,*[99] the Fourth Circuit rejected the trial court's admission of certain hearsay statements under the residual exception in Federal Rule 803(24).[100] In *Mandel,* former Maryland Governor Marvin Mandel and several other co-defendants[101] were convicted of racketeering and mail fraud.[102] The convictions stemmed from their allegedly fraudulent activities concerning the proposed construction of the Marlboro race track.[103] At trial, the evidence focused on alleged misrepresentation and concealment by Governor Mandel and his co-defendants regarding legislation related to the race track.[104] Several hearsay statements uttered by Maryland senators about the Governor's motives behind the handling of the race track legislation were admitted under the federal residual hearsay exception.[105] The government argued that Governor Mandel would receive undisclosed financial benefits in exchange for favorable legislative action on the bills regarding the race track[106] and that the personal financial relationships existing between Mandel and his co-defendants

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94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 313.
98. *Id.* at 315-16.
99. 591 F.2d 1347, *on reh'g*, 602 F.2d 653, *reh'g denied*, 609 F.2d 1076 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).
100. *Id.* at 1369.
101. The other co-defendants tried with Mandel were W. Dale Hess, Harry W. Rodgers, III, William A. Rodgers, Irvin Kovens, and Ernest N. Cory. *Id.* at 1353.
102. *Id.* at 1352.
103. *Id.* at 1352-53.
104. *Id.* at 1354-55.
105. *Id.* at 1367.
106. *Id.* at 1354-55.

"constituted a scheme to defraud the citizens and the State of Maryland."[107]

The Fourth Circuit reversed the convictions on other grounds,[108] but also addressed the lower court's use of the residual hearsay exception.[109] The court explained that the admission of the hearsay under the residual exception was improper because many of the statements testified to by the legislators were from unknown sources.[110] Thus, the Fourth Circuit said that it would have been impossible for the government to establish that it had complied with the notice requirement of Federal Rule 803(24).[111] The court clearly could have invalidated the evidence on that ground alone but, rather than conclude its analysis on the technical notice infirmity inherent in the government's evidence, the court went on to analyze whether the evidence in question possessed the guarantees of trustworthiness also required to establish admissibility under the federal residual exception.[112]

The court rejected the government's argument that the evidence was reliable because it was confined to the hearsay of state senators as a result of their unique expertise.[113] The court similarly disposed of the government's arguments that such corruption cases are inherently difficult to prove and that the hearsay evidence was crucial to the case.[114] In rebutting the government's theory of admissibility, the court noted the dangers presented by admission of such hearsay.[115] It stated:

> First, the senators who testified all say that someone else said that Governor Mandel did not care whether his veto was overridden. No senator seems to have testified that Governor Mandel told him that the Governor did not care.

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107. *Id.* at 1357.
108. *See id.* at 1364-66. The court reversed the convictions because the trial judge refused to give jury instructions proffered by the defense regarding mail fraud, bribery, and whether the Governor had knowledge of who owned the mailbox race track. *Id.* The Fourth Circuit also noted that it was error for the trial court to introduce certain portions of the Maryland Code of Ethics as circumstantial evidence of intent to defraud. *Id.* at 1366-67. The appellate court reasoned that the ethics code was inapplicable to the Governor and thus it could not be used to define his duties. *Id.*
109. *Id.* at 1369.
110. *Id.* at 1368-69.
111. *Id.* at 1369. The notice requirement of the residual exception rule requires that the proponent of the hearsay supply the names and addresses of the declarant. FED R. EVID. 803(24).
112. *Mandel*, 591 F.2d at 1369.
113. *Id.*
114. *Id.*
115. *Id.*

> Important also is the whole setting from which this testimony is drawn. We are dealing with a purely legislative political scene. Some of the most damaging hearsay statements were repeated by long-time political enemies of the Governor. Further, the statements were made on and around the senate floor in the heat of political battle, where rumors, opinion and gossip abound. We are not dealing with an objectively observable factual event. We are dealing with circumstantial proof of the position a governor took on two pieces of legislation. Evidence based on rumors and general discussions is the worst type of hearsay. Such testimony, especially from unidentified declarants, does not possess the requisite guarantees of trustworthiness to justify a new exception to the hearsay rule. We also do not feel that the purposes behind the Federal Rules of Evidence or the interests of justice justify admitting this evidence. In a criminal case we must be careful that a conviction is not based on speculation.[116]

By rejecting the government's argument that the multi-level hearsay regarding information that was "common knowledge" among legislators should be admissible, the court upheld the standard that the residual exception should not become the vehicle to admit hearsay that is patently unreliable.[117]

Despite the Fourth Circuit's reluctance to admit the hearsay testimony offered in *Mandel*, it demonstrated a willingness to admit residual hearsay under circumstances where greater reliability can be established.[118] In *United States v. Ellis*,[119] another case involving a race track and politicians, the Fourth Circuit admitted hearsay statements under the residual exception.[120] The appellant, Ellis, was a limited partner in Tri-State Greyhound Park Incorporated, a West Virginia corporation that conducted pari-mutuel betting on greyhound races.[121] Under West Virginia law, Tri-State was allowed to keep a specific percentage of the revenue generated by public betting.[122] Because of unexpected financial shortfalls in 1986, Tri-State's owners

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116. *Id.*
117. *Id.* at 1368-70. *See* United States v. Mathis, 559 F.2d 294, 299 (5th Cir. 1977) (stating that "tight reins must be held" on the residual exceptions so that provisions do not "emasculate" the well-developed hearsay case law).
118. *See, e.g.*, United States v. Clark, 2 F.3d 81 (4th Cir. 1993); United States v. Ellis, 951 F.2d 580 (4th Cir. 1992).
119. 951 F.2d 580 (4th Cir. 1992).
120. *Id.*
121. *Id.* at 582.
122. *Id.*

supported a bill that would increase their percentage.[123] Although the bill passed both houses of the West Virginia legislature, it was vetoed by the Governor.[124] The owners made efforts to get a similar bill passed in 1987.[125] To support its efforts, Tri-State promised to pay Ellis $500,000 if the bill became law.[126] Ellis, working through lobbyist Samuel D'Annunzio, allegedly provided cash and amenities to various state legislators.[127] The bill passed and was signed by the Governor.[128] A subsequent corruption investigation led to a plea agreement from D'Annunzio, who detailed the corruption scheme and his relationship with Ellis.[129] D'Annunzio also gave the government tapes, which he had secretly recorded, of conversations with Ellis and other participants in the scheme.[130] In December of 1988, in the midst of the continuing investigation, D'Annunzio committed suicide.[131]

At Ellis's mail fraud, racketeering, and obstruction of justice trial, the government sought to admit statements of the deceased D'Annunzio which implicated Ellis.[132] The United States District Court for the District of West Virginia admitted the statements over Ellis's objection that his right to confrontation was violated because D'Annunzio's statements did not bear "sufficient indicia of reliability."[133] On appeal to the Fourth Circuit, the admission of the hearsay was upheld.[134] The court reasoned that the statements provided strong indications of reliability because:

> First, D'Annunzio issued the statements voluntarily in the presence of two government agents *and* both of his attorneys. Second, D'Annunzio made the statements in accordance with a plea agreement which required him to be truthful with federal investigators. Third, the government agents were taking notes in the presence of D'Annunzio as the statements were made. Fourth, D'Annunzio could be deemed to know, in view of the plea agreement, that what he was saying would be the subject of further investigation-and confirmation-by the government. Fifth, though the plea agreement did not require him to do so, D'Annunzio agreed

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 583.

> to record subsequent conversations with the individuals he had implicated, . . . suggesting that he was willing to have the truthfulness of these statements tested.[135]

The court further reasoned that, considering the circumstances in which the statements were made, "cross-examination [of D'Annunzio] would have had only 'marginal' value in [the] case."[136]

Ellis established, in the Fourth Circuit, a potential basis for admitting government investigators' hearsay, even if preserved only by interview notes, as long as the witness (1) has become unavailable, (2) has agreed to assist in the investigation against others, and (3) has his attorneys present when he makes his statements and agreements.[137] A legitimate question regarding such hearsay is whether statements such as those offered in *Ellis* are or can ever be as reliable as statements made before the grand jury under oath. Indeed, grand jury testimony is commonly admitted under Federal Rule 804(b)(5).[138]

III. RESIDUAL EXCEPTIONS: THE MARYLAND EXPERIENCE AND THE NEWLY ADOPTED RULES

For the last several hundred years, the Court of Appeals of Maryland has been following the common-law development of the hearsay rules.[139] At common law, new rules of evidence were adopted as cases were litigated. In Maryland, this practice has produced new exceptions to the traditional rule against admitting hearsay,[140] but, at the same time, it has produced a healthy reluctance on the part of the Maryland appellate courts to extend the common law beyond its somewhat conservative limits.[141] The prerogative to create more

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135. *Id.*
136. *Id.* at 584.
137. *Id.* at 583.
138. Rand, *supra* note 59, at 902 & n.130.
139. *See* McLAIN, *supra* note 2, at 269.
140. Recently, the Court of Appeals of Maryland extended an exception to the rule against hearsay by holding that certain prior inconsistent statements, which had been reduced to writing or made before the grand jury, were admissible so long as the declarant was available for cross-examination. Nance v. State, 331 Md. 549, 571, 629 A.2d 633, 644 (1993). In *Nance*, the court reasoned that the prior identification need not be excluded from substantive evidence merely because the witness later recanted the prior out-of-court statement. *Id.* at 562, 629 A.2d at 639. The court extended the hearsay exception without specific support from Maryland precedent, though it did cite much supporting case law from other circuits and state courts. *Id.* at 562-64, 629 A.2d at 639-40; *cf.* FED. R. EVID. 801(d)(1)(a) (providing for admission of testimony at another proceeding that is under oath).
141. *See* Cassidy v. State, 74 Md. App. 1, 8, 536 A.2d 666, 669 (1988) ("Maryland, in the common law tradition, is more rigorous and orthodox in its approach to hearsay exceptions.").

liberal exceptions to the traditional hearsay rules has been left to the legislative process.[142] While reluctant to adopt any dramatic extension of the common law, the court of appeals has, on occasion, acknowledged that courts are free to create additional hearsay exceptions and, indeed, are sometimes required to admit hearsay not falling within any recognized hearsay exception.[143] In *Brown v. State*,[144] Judge McAuliffe, writing about the residual exceptions prior to their codification in the Maryland Rules, stated that "[t]he proposition that hearsay evidence may be sufficiently reliable to justify its admission . . . even though it does not fall within a recognized hearsay exception, is not new."[145]

For example, in *Foster v. State*[146] the Court of Appeals of Maryland reversed the trial judge for his failure to admit hearsay that did not fall within any recognized hearsay exception but was "critical to the defense and bore persuasive assurances of trustworthiness."[147] In *Foster*, the defendant, Doris Ann Foster, was convicted of felony murder.[148] The evidence at issue was a statement made by the victim to his friend that Foster's husband had threatened to kill the victim.[149] The court held that, as a matter of due process, evidence that is both critically important to the defense and that carries certain indicia of reliability must be admitted even though it does not meet the requirements of any common-law exception.[150] Although the admission of the statement was based in part on constitutional considerations, it demonstrated the circumstances that make residual exceptions occasionally necessary. Occasional recognition of the power of a court to create residual exceptions, however, could give way to comprehensive change.

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142. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 9-103.1 (Supp. 1994) (admitting out of court statements of child abuse victims).
143. *See, e.g.*, Brown v. State, 317 Md. 417, 564 A.2d 772 (1989); Foster v. State, 297 Md. 191, 464 A.2d 986 (1983).
144. 317 Md. 417, 564 A.2d 772 (1989).
145. *Id.* at 426, 564 A.2d at 776 (citing G. & C. Merriam Co. v. Syndicate Pub. Co., 207 F. 515 (2d Cir. 1913)).
146. 297 Md. 191, 464 A.2d 986 (1983), *cert. denied*, 464 U.S. 1073 (1984).
147. *Id.* at 212, 464 A.2d at 997 (citing Chambers v. Mississippi, 410 U.S. 284, 300-02 (1973)).
148. *Id.* at 192, 464 A.2d at 987.
149. *Id.* at 209, 464 A.2d at 996. Although the court of appeals extended the hearsay exceptions to permit Foster an opportunity to present hearsay evidence in support of her defense, the court rejected a similar claim in Powell v. State, 324 Md. 441, 453, 597 A.2d 479, 485 (1991). In *Powell*, the court concluded that the out-of-court declarations differed from those in *Foster* since the uncorroborated statements were neither critical to the defense nor particularly reliable. *Id.* at 451-53, 597 A.2d at 484-86.
150. *Id.* at 210-12, 464 A.2d at 996-97.

Ultimately, Maryland decided to codify its rules of evidence rather than to continue to permit those rules to be fashioned through occasional court decisions.[151] The codification process was initiated in 1976 with the Rodowsky Report, authored by the Court of Appeals Standing Committee on Rules of Practice and Procedure (the Rules Committee).[152] The Rodowsky Report "recommended the adoption of a code derived from the Federal Rules of Evidence."[153] The Court of Appeals of Maryland chose not to proceed with the codification at that time.[154]

The project was rejuvenated in October of 1988, when Chief Judge Robert C. Murphy of the court of appeals charged the Rules Committee to propose a total codification of Maryland's evidence rules based on the Federal Rules.[155] After several committee and subcommittee meetings, at which drafts of the proposed rules were reviewed, and after several public hearings, the Court of Appeals of Maryland voted, on December 15, 1993, to adopt the proposed codification of the rules by a vote of six to one.[156] Judge Eldridge, dissenting from the adoption of the rules, explained his concerns about the wisdom of codifying evidence rules in Maryland:

> There has long been a movement in this country towards codifying all areas of the law and away from the common law approach. While in some areas this may be justified, in others the flexibility and strengths of the common law system are lost. The existing Maryland law of evidence, consisting of a few statutes and rules but largely of common law principles, has worked well, with both stability as well as flexibility to meet new circumstances and changed conditions. I am unconvinced that existing Maryland evidence law should be jettisoned in favor of this new code.[157]

Judge Chasanow, the co-author of this Article, was joined by Judge Bell in his endorsement of the codified rules subject to a partial dissent.[158]

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151. MD. RULES 5-101 to 5-1008 (Title 5).
152. MCLAIN, *supra* note 2, at 6.
153. *Id.*
154. *Id.* at 7. Rather than recommend that the Rules Committee proceed with full scale codification consistent with the Federal Rules of Evidence as the report had suggested, the court decided to wait. *Id.* The primary motivation for the court's reluctance to proceed was a desire to "wait until the federal rules were seasoned." *Id.*
155. *Id.* at 7.
156. *Id.* at 10-11.
157. *Id.* at 43.
158. *Id.* at 43-48. While enthusiastically supporting the codification of the Rules of Evidence, Judges Chasanow and Bell expressed concerns regarding whether it

During the process of drafting and adopting the new rules, one of the more difficult decisions for the court was whether to adopt some form of the residual hearsay exceptions.[159] The evidence subcommittee, by an almost equally divided vote, decided not to recommend the adoption of the residual exceptions.[160] The Rules Committee, also by an equally divided vote, ratified the subcommittee recommendation.[161]

In Committee, several arguments were advanced *against* admitting hearsay under residual exceptions. These arguments were predominantly concerned with eliminating the flexibility from which courts had benefitted for hundreds of years.[162] Several arguments were also advanced *favoring* the admission of hearsay under residual exceptions. Proponents of the residual hearsay exceptions were predominantly concerned with the unrealistic and unnecessarily rigid restraints on judicial discretion by the Rules.[163] Perhaps the best argument in favor of the application of the residual exception is this statement by the Federal Advisory Committee: "It would . . . be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system."[164]

The vigorous debate regarding the wisdom of adopting residual exceptions fostered a desire on the part of the Rules Committee to proceed with caution on this controversial issue. The Rules Committee ultimately did adopt residual hearsay exceptions but placed into the text of both Rule 5-803(24) and Rule 5-804(5) the introductory limiting language that the residual exceptions should be used only "[u]nder exceptional circumstances."[165] A Committee note, which was prepared by the court of appeals, left little doubt that the

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was necessary to modify "over 80% of the Federal rules." *Id.* at 43. Although some of their concerns related to the adoption of certain hearsay exceptions—Rule 5-801 classifying of admissions as non-hearsay, Rule 5-802.1 including prior statements by witnesses as a hearsay exception under circumstances when the declarant is a testifying witness subject to cross-examination, and Rule 5-803 noting numerous changes from the federal rules to the business records hearsay exceptions that may cause confusion for lawyers and judges—the adoption of the modified version of the residual exception was not among those concerns.

159. Judge Howard S. Chasanow, Address to the Wrangler's Law Club (Oct. 21, 1993) (on file with authors); McLAIN, *supra* note 2, at 268.

160. McLAIN, *supra* note 2, at 268.

161. *Id.*

162. *See* McLAIN, *supra* note 2, at 268.

163. *See id.* at 268-69; Rand, *supra* note 59, at 907-08.

164. FED. R. EVID. 803(24) (advisory committee note); *see* JOHN W. STRONG, McCORMICK ON EVIDENCE 538-40 (4th ed. 1992).

165. MD. RULES 5-803(24), 5-804(5); *see* McLAIN, *supra* note 2, at 268.

residual exceptions to the Maryland Rules of Evidence would receive only a lukewarm welcome into Maryland's courts:

> The residual exceptions provided by Rule 5-803(b)(24) and Rule 5-804(b)(5) 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. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 5-102.
>
> It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 5-803 and 5-804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by amendments to the Rule itself. It is intended 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.[166]

The exceptional circumstances requirement, fortified by the extensive Committee note, leaves no doubt that the Maryland residual exceptions are more restrictive than their federal counterparts.[167] The rules may lead the Maryland courts to admit many kinds of hearsay that clearly would have been inadmissible under the common law. On the other hand, the "catch all" exceptions may be used by the courts only as a tool to assist and to support the fact-finding process.

IV. CONCLUSION

Maryland has made a sound decision to codify its rules of evidence and to follow the trend of the majority of jurisdictions that

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166. MD. RULE 5-803(24) (advisory committee note).

167. The Maryland Rules, which require the presence of exceptional circumstances in order to admit hearsay under the residual exceptions, would logically require a more persuasive showing of necessity than their federal counterparts that do not require a showing of exceptional circumstances. *Compare* MD. RULE 5-803(24) *with* FED. R. EVID. 803(24) *and* MD. RULE 5-804(b)(5) *with* FED. R. EVID. 804(b)(5).

enjoy the clarity and simplicity of a comprehensive evidence code.[168] The adoption of the residual hearsay exceptions in the Maryland Rules was both timely and necessary. The Maryland version of the residual hearsay exceptions manifests appropriate caution in introducing the residual hearsay concept to the Maryland courts. It permits careful development of the exceptions in appropriate cases, while limiting the possibility that the exceptions will be casually or thoughtlessly invoked by advocates seeking only to obscure an appellate record or to frustrate an adversary. Maryland's version of the residual exceptions appropriately delegates the responsibility to make major changes to the recognized hearsay exceptions to the Rules Committee, while providing judges with the flexibility that is necessary in exceptional situations. This should reduce the divergent and inconsistent interpretations of the rule that have plagued the federal courts. Judges and lawyers alike should treat our new residual exception as a package containing fragile yet important contents—marking it with "caution" and handling it with care.

168. *See, e.g.*, ALA. CODE §§ 12-21-1 to 12-21-285 (1994); N.Y. CIV. PRAC. L. & R. 4501 - 4546 (Consol. 1994); VA. CODE ANN. §§ 8.01-385 to 8.01-420.4 (Michie 1994).