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Garbage, near Misses, and Glass Slippers: The Scope of Admissibility under Maryland's Residual Hearsay Exceptions

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For the first time in its history, Maryland has adopted a code of evidence. The code, found in Title 5 of the Maryland Rules, went into effect July 1, 1994. Title 5 is derived largely from the Federal Rules of Evidence and from the federal rules' state counterpart model, the Uniform Rules of Evidence, as well as from the pre-Title 5 Maryland Law.

Much of Title 5 is consistent with the prior Maryland law, even if that law was inconsistent with the federal rules. In some instances, however, the rules in Title 5 follow the federal or uniform rules' model instead. In others, Title 5 adopts an approach which was thought to borrow the best from the federal and the state models.

One of the most controversial issues was whether to adopt the federal rules' residual hearsay exceptions, popularly known as the "catch-all" exceptions. In an effort not to freeze the hearsay doctrine from further development, ultimately the court of appeals adopted those exceptions. But the court approved a Committee Note with much cautionary language. The court's intention clearly was not to follow those federal courts which have used the hearsay catch-alls very liberally.

The following article, by my former student Sang Oh, presents a thoughtful analysis of Maryland's adoption of the residual hearsay exceptions, and offers guidance to the state's courts in applying them.

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GARBAGE, NEAR MISSES, AND GLASS SLIPPERS: THE SCOPE OF ADMISSIBILITY UNDER MARYLAND'S RESIDUAL HEARSAY EXCEPTIONS

Sang W. Oh

On July 1, 1994, the new Maryland Rules of Evidence as provided in Title 5 of the Maryland Rules became applicable in all trials and hearings.[1] Although much of Maryland's current law of evidence will remain intact under Title 5, the new evidence rules will create a number of substantive changes. Among these changes are Maryland Rules 5-803(b)(24) and 5-804(b)(5), collectively referred to as the residual or catch-all exceptions to the hearsay rule.[2]

Derived from Federal Rules of Evidence 803(24) and 804(b)(5), Maryland's residual exceptions allow a court to admit hearsay evidence not otherwise admissible if the evidence satisfies certain reliability and necessity standards. Part I of this article will provide a general background regarding the residual exceptions and Maryland's adoption of these hearsay exceptions. Part II will analyze and propose standards by which evidence should be introduced under these rules in a manner consistent with both the intent of the Court of Appeals of Maryland and the historical treatment of hearsay evidence. Part III will address the constitutional issues raised by the admission of hearsay under the residual exceptions against a criminal defendant. Part IV will define and discuss the categories of residual hearsay. Finally, Part V will discuss and analyze foreseeable issues.

I. BACKGROUND

In general, a jurisdiction's adoption of a residual exception is often accompanied by ambivalent expectations of increased judicial activism. Whereas some view the residual exceptions as a positive effort to free the law

of evidence from the "straightjacket" of the common law's rigorous treatment of hearsay,[3] others view the exceptions as "a 'Trojan Horse' that has been set upon the judiciary to wreak havoc and to emasculate the rule against hearsay."[4]

Despite the possibility of adverse consequences brought about by the residual exceptions, the court of appeals adopted Rules 5-803(b)(24) and 5-804(b)(5), evidencing its willingness to accept these risks in favor of what it perceived to be a greater necessity -- the need to infuse flexibility into the law of evidence and to aid its continual growth and development.[5] The Committee Note following Maryland Rule 5-803(b)(24), however, reveals that the court of appeals was not without reservations:

> 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, consistent 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.[6]

Some would assert that the committee's intent is "taut with internal conflict."[7] Along with an invitation to use the residual exceptions to admit reliable hearsay is a caveat to employ the exceptions sparingly.[8]

Against this backdrop, courts and practitioners are given the task of balancing the scales and shaping the character of Maryland's residual exceptions. At this point, the practical development of Maryland's residual exceptions remains an open question, but it is not a question without probable answers.

The residual exceptions are supported by almost nineteen years of case law from the federal courts and various state jurisdictions, many of which share the Maryland Rules Committee's intent that the residual exceptions be used only under exceptional circumstances. This fact, coupled with the notion that Maryland courts have traditionally been somewhat rigorous in their approach to the hearsay rule and its exceptions, evidences much in predicting Maryland's future treatment of the residual exceptions. In short, the future of the residual exceptions may have already been determined.

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II. THE SCOPE OF ADMISSIBILITY

Admissibility under Maryland's residual exceptions is conditional upon the fulfillment of five elements: (1) that the hearsay statement possess circumstantial guarantees of trustworthiness equivalent to those exceptions provided for in 5-803(b)(1) through (23) and 5-804(b)(1) through (4); (2) that the statement be offered as evidence of a material fact; (3) that the statement be more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; (4) that the general purposes of the Maryland Rules of Evidence and the interests of justice be best served by admission of the statement into evidence; and (5) that the opposing party be given advance notice of the intention to offer the statement along with the particulars of the statement. All five of these criteria must be met before a hearsay statement will be admitted pursuant to the residual exceptions.

When a statement is admitted under either of these exceptions, the court should make an on-the-record ruling that the requirements of the exception have been satisfied.[9] The appellate standard of review is ordinarily an abuse of discretion standard.[10]

A. Equivalent Circumstantial Guarantees of Trustworthiness

The element of trustworthiness is the heart of the admissibility analysis under the residual exceptions. It is not only the most important element, but also the most difficult to analyze.

Courts have employed a number of methods in determining the trustworthiness of a hearsay statement offered under the residual exceptions. One method is to compare the circumstances surrounding the utterance of the hearsay statement to underlying factors of recognized hearsay exceptions.[11] Although the comparison method is frequently employed with positive results, there is a significant possibility that this method could result in error. For this reason, the comparison method should not be used.

Courts that employ the comparison method as a matter of course often do so either haphazardly or perfunctorily.[12] In doing so, they demonstrate a lack of understanding of the nature of hearsay and why it is deemed inherently untrustworthy.

The problem with hearsay evidence can best be understood by analyzing testimonial proof:[13]

> When a witness testifies [in court] about an event, he is saying that he perceived a particular fact, remembered it up to the moment of testifying, and is now accurately expressing his memory in words. Error, deliberate or unconscious, can enter this process anywhere between the initial perception and the in-court narration. For instance, the witness may not have perceived the event at all, or he may have seen it without understanding, or his impression may have been affected by his emotional and intellectual condition at the moment, or he may have seen it so fleetingly that no accurate impression has remained. Or even if he accurately perceived the event when it occurred, the passage of time may have dulled his recollection or replaced the remembered facts with others. He may be deliberately lying in court, or be honestly mistaken, or be incapable of translating his memory into language that will have the same meaning to his listeners.[14]

These problems can be reduced into two salient questions: (1) Does the witness truly have the belief? and (2) Does the witness's belief genuinely reflect reality?[15] Only if both questions can be answered affirmatively will a court be justified in relying on the witness's statement for the truth of the matter asserted.

These two questions can be further reduced into four distinct factors.[16] The first question contains the factors of narration/ambiguity (Do the witness's words accurately express what he wants to convey?) and sincerity (Is the witness telling the truth as he understands it?).[17] The second question is comprised of perception (Did the witness actually perceive what he thinks he did?) and memory (Did the witness accurately remember what he had perceived?).[18]

It is for the purpose of ascertaining the existence of any inaccuracies in these four factors that a witness is required to testify at trial (1) under oath, (2) personally, so that the trier of fact can observe the witness's demeanor, and (3) subject to cross-examination.[19] Hearsay evidence is ordinarily excluded because an out-of-court statement cannot be subjected to these truth-encouraging requirements and, consequently, the strengths or weaknesses of any of the four factors cannot be determined.[20]

When hearsay is admitted pursuant to an exception, it is admitted because the circumstances surrounding the making of the statement provide sufficient answers to the relevant inquiries under the four factors such that the decalarant's appearance at trial is unnecessary. For example, under the excited utterance exception to the hearsay rule, a hearsay statement is admissible if the statement relates to a startling event or condition and was made while the declarant was under the stress of excitement caused by the event or condition.[21]

The pertinent questions are whether the declarant believed the statement to be true and whether the witness's belief reflected reality. Under the first prong, sincerity is sufficiently assured because the stress of excitement caused by the startling event would render any reflective capabilities inoperative.[22] Narration ordinarily would not be a problem unless the perceived event was complex or the out-of-court statement could be subject to differing interpretations.

The memory factor under the second prong is satisfied because the requirement that the statement be made while under the stress of the event assures a relatively short passage of time between the event and the utterance.[23] Arguably, the only remaining problem would be whether the declarant's perception was impaired by excitement.[24] For most courts, however, the perception factor is not problematic. Even if perception in an excited state may be less trustworthy than unexcited perception, the overall circumstances of trustworthiness surrounding an excited utterance is not under-

mined.[25] Hence, despite the fact that an excited utterance is a hearsay statement, it is not dependent upon an oath, a personal appearance by the declarant, or a cross-examination of the declarant to assure its trustworthiness.

The key result in this analysis of the excited utterance exception is that at least one factor from each prong is satisfied (sincerity for the first prong and memory in the second) and the remaining factors are not significantly dubious. Thus, an affirmative answer to the two overriding questions concerning the declarant's belief can be substantiated. Scrutinizing any of the other currently recognized or firmly-rooted exceptions using this test of the two questions and its four factors (the "trustworthiness test") produces similar results.[26]

Since admissibility under the residual exceptions requires circumstantial guarantees of trustworthiness equivalent to the firmly-rooted exceptions, it follows that only hearsay statements satisfying the trustworthiness test can be deemed sufficiently trustworthy.[27] In practical terms, this means that in order for a hearsay statement to be considered trustworthy, at least one factor from each prong must be sufficiently satisfied with the remaining factors not seriously in doubt.[28]

The trustworthiness test, and the results that it produces, is preferable to the comparison method because necessary consideration is given to all of the pertinent questions. A court that utilizes the comparison method risks the chance of admitting hearsay on primarily one factor or what it perceives to be the satisfaction of numerous factors, only to have all of the factors pertaining to one prong.[29] In other words, these courts often answer only one of the pertinent inquiries of a proper hearsay analysis. The result is that, occasionally, a hearsay statement admitted under a residual exception using the comparison method lacks the requisite circumstantial guarantees of trustworthiness equivalent to the firmly-rooted exceptions.

Some courts have modified the trustworthiness test by admitting residual hearsay when the declarant is available and subject to cross-examination, and the hearsay in question satisfies the perception, memory, and narration factors.[30] In essence, these courts substitute the hearsay declarant's demeanor at trial to determine sincerity at the time of the out-of-court statement.

This method may be problematic. First, admission of the hearsay statement may not demonstrate the necessity required under the residual exceptions since the live testimony of the declarant, especially if unbiased, is ordinarily considered to be more probative evidence.[31]

When hearsay is admitted pursuant to an exception, it is admitted because the circumstances surrounding the making of the statement provide sufficient answers to the relevant inquiries under the four factors such that the decalarant's appearance at trial is unnecessary.

Second, delayed cross-examination examines a witness's story only after it has had an opportunity to solidify, making it less vulnerable to probing.[32] Thus, sincerity problems, if they exist, will not be fully scrutinized.

Consider, for example, an automobile collision case in which an eyewitness utters an uncertain and erroneous statement that driver A was at fault. Ascertaining problems with the eyewitness's sincerity may be hindered by allowing driver B to introduce the eyewitness's prior statement as residual hearsay and consequently, as substantive evidence, to buttress the eyewitness's in-court testimony prior to any impeachment. Because these predicaments may exist, the preferred course is to adopt a strict application of the trustworthiness questions.

B. The Material Fact Requirement

The requirement that a hearsay statement proffered under the residual exceptions be probative of a material fact has not proven to be significant in the residual exceptions analysis. In general, courts have interpreted this requirement as a restatement of the general requirement that evidence must be relevant.[33]

The material fact requirement may justifiably take on a more significant meaning when it is interpreted as a requirement that the proffered hearsay statement be probative not only of a "material" issue, but one that is also "important" to the outcome of the case.[34] Courts are unlikely, however, to consider the argument that "material" means "essential," in the sense that without

the residual hearsay the proponent's case would fail.[35] The plain meaning of "material" is not synonymous with "essential."[36]

C. The Necessity Requirement

The third clause of the residual exceptions provides that the hearsay statement be more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts. Most often referred to as the necessity requirement,[37] this clause is "intended to insure that only statements which have high probative value and necessity may qualify for admission under the residual exceptions."[38]

The necessity requirement has proven to be significant in residual exceptions analysis, perhaps second in importance only to the trustworthiness requirement. It is the combination of necessity and trustworthiness which qualifies hearsay statements to create the exceptional circumstances that justify its admission under the residual exceptions.[39]

The necessity requirement precludes the admission of hearsay evidence if there is reasonably obtainable evidence more probative on the point for which it is offered than the hearsay statement and the proponent fails to procure that evidence for trial.[40] Residual hearsay should also be excluded if other evidence, which is more probative on the point for which the hearsay is offered, has already been admitted and the hearsay at issue possesses minimal probative value in light of the other evidence.[41] In that case, the hearsay should be excluded on the grounds that it would essentially amount to cumulative evidence.[42]

On balance, a proponent will satisfy the necessity requirement by showing that reasonable and diligent efforts could not have obtained evidence which is more probative than the proffered hearsay or that more probative evidence could not have been procured because of an unreasonable burden.[43] Hence, it is important that the court take into account the resources of the proponent and what is at stake in the litigation. "What amounts to 'reasonable efforts' by a corporate litigant in an enormous treble damage action is not the same as the 'reasonable efforts' which may be expected of an indigent defendant in a criminal prosecution."[44]

One last issue raised by the necessity requirement under Rule 5-803(b)(24) is whether the live testimony of an available witness, if reasonably obtainable, will always constitute evidence more probative on the point for which it is offered than a hearsay statement.[45] Most courts would hold that for the purposes of Rule 5-803(b)(24), the live testimony of an available witness would possess more probative value in establishing the truth than a bare hearsay statement since the jury would be able to observe the witness's demeanor and the witness's testimony would be subject to cross-examination.[46] However, if circumstances such as time, duration, or mental infirmity prevent a witness from rendering full and adequate testimony, the most probative evidence may well be the proffered hearsay.[47]

D. The Interests of Justice Requirement

The interests of justice requirement is a restatement of the principles contained in Md. Rule 5-102.[48] Rule 5-102 provides that the rules "shall be construed to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Undoubtedly, these are desirable goals, but it is precarious to utilize such words as a pragmatic touchstone for guidance in resolving specific issues.

The danger arises when courts interpret the interests of justice requirement as a discretionary power to decide issues based upon personal notions of justice. This interpretation is partially correct; courts do and should exclude hearsay evidence on the basis that admission does not serve the interests of justice. However, hearsay evidence should never be admitted under the residual exceptions solely upon this basis.[49]

The interests of justice requirement is but one criterion of admissibility under the residual exceptions. Admitting evidence solely on this basis would disregard the importance of the four other requirements. Courts have also made the mistake of interpreting the interests of justice requirement so as to blur the requirement with the necessity or trustworthiness requirement.[50]

E. Notice Requirement

The last requirement of the residual exceptions mandates that the proponent of the hearsay evidence provide the opponent with notice of the intent to offer the evidence "sufficiently in advance of the trial or hearing to provide the [opponent] with a fair opportunity to prepare to meet it." Facially, the clause appears inflexible, suggesting that if notice is not provided to the opponent prior to trial, hearsay evidence is barred under the residual exceptions.

Although some courts have enforced this provision

strictly,[51] most courts have adopted a flexible approach if the need for the hearsay statement arises shortly before or during the trial, provided that a continuance affords the opponent an adequate opportunity to prepare.[52] Some courts have dispensed with the notice requirement if the opponent either possessed the residual hearsay evidence for inspection prior to trial or failed to assert the need for a continuance.[53] Virtually all courts, however, hold that after a certain point in the trial process evidence cannot be admitted under the residual exceptions if notice has not been given to the opponent.[54]

Of these three approaches, the flexible approach is the most preferable.[55] Given the uncertain nature of the trial process, there will be occasions when even the most conscientious litigator will be faced with situations of genuine surprise.[56] In such a situation, the notice requirement should be interpreted to require that the court provide the opponent with a continuance sufficient to prepare to meet the belated proffer.[57] But courts should require the proponent to show the inability to have predicted the need to offer the hearsay in question under the residual exceptions in advance of trial.[58] The flexible approach satisfies the purpose of the notice requirement, which is to provide adequate time for the opponent to prepare,[59] and places the opponent in no worse a position than he would have faced had pretrial notice been given.[60]

III. CONSTITUTIONAL ISSUES RELATING TO CATCH-ALL HEARSAY

A. The Right of Confrontation

When a hearsay statement is to be admitted against a criminal defendant and the declarant is unavailable to testify at trial, there may be another consideration to admitting hearsay even after a court has made the determination that the statement satisfies the five requirements under the residual exceptions.

In *Idaho v. Wright*,[61] the United States Supreme Court considered whether the right of confrontation precludes a court from admitting as residual hearsay testimony from an unavailable child witness identifying the defendant and her co-defendants as the child's abusers.

Citing *Ohio v. Roberts*,[62] the Court held that in order to satisfy the Confrontation Clause, the proponent of incriminating hearsay not falling within a firmly-rooted hearsay exception[63] has the burden of proving that the statement possesses "particularized guarantees of trustworthiness."[64] To determine the existence of these particularized guarantees, a court must look at "the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief... [such that] adversarial testing would add little to [the statement's] reliability."[6]

The *Wright* Court held, however, that the existence of corroborating evidence could not be considered in evaluating the totality of circumstances. To hold otherwise would be to "permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial."[66] This result would be at "odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility."[67]

... a court must look at "the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief..."

Wright applies to the admission of incriminating hearsay evidence against a criminal defendant under Rule 5-804(b)(5). The court must consider and satisfy the requirements of the Confrontation Clause by finding particularized guarantees of trustworthiness without regard to corroborative evidence.

The *Wright* decision should not be an additional concern in 5-804(b)(5) analysis if the trustworthiness analysis as advocated above in section III.A. is followed. The trustworthiness test incorporates the considerations and rationale as mandated by the decision in *Wright*.[68]

B. Due Process Considerations

Unlike the Confrontation Clause, which may operate to heighten the standard of admissibility under Rule 5-804(b)(5), the Due Process Clause of the Fourteenth Amendment may serve to abate rigid adherence to one or more of the five requirements of the residual excep-

tions.

In *Foster v. State*,[69] the trial court rejected the defendant's proffer of an out-of-court statement in which a murder victim told a friend that she had been threatened by the defendant's husband. The Court of Appeals of Maryland held that the proffered testimony was critical to the defense's theory that the defendant's husband had committed the murder. The exclusion of the statement, on hearsay grounds, was held to have violated the defendant's due process rights because it deprived the defendant of a fair trial.[70] The court opined that the statement bore persuasive assurances of trustworthiness which would favor admissibility.[71] The defendant's husband's threat was both spontaneous and a statement against interest. The victim's statement was also made spontaneously, in an excited state, and under circumstances in which she had no reason to lie. There was also evidence to corroborate the truth of the statement as well as the presence of the accused's husband for cross-examination.[72]

The *Foster* decision stands for the principle that if a criminal defendant offers trustworthy hearsay evidence which is critical to a defense, such that exclusion of that evidence would amount to a denial of a fair trial, exclusion of that evidence may constitute a denial of due process.[73] Applying *Foster* to a criminal defendant's offer of hearsay evidence under the residual exceptions, if the hearsay statement is trustworthy and critical to the defense but fails to comply with, for example, the notice requirement, due process may demand that a flexible approach be employed to facilitate admission of the hearsay.[74]

IV. THE THREE CATEGORIES OF RESIDUAL HEARSAY

Evidence sought to be admitted under the residual exceptions can be delineated into three categories. In ascending order of legitimacy, they will be referred to as "garbage," "near misses," and "glass slippers."

A. Garbage

"Garbage" is evidence which should not be admitted under the residual exceptions because it fails one or more of the five required elements. Most significantly and most often, garbage hearsay will not possess equivalent circumstantial guarantees of trustworthiness.[75]

B. Near Misses

In *Zenith Radio Corporation v. Matsushita Electric Industrial Company, Ltd.*,[76] an opponent of hearsay evidence asserted that the residual hearsay exceptions could not be invoked to admit hearsay evidence if that evidence is generally of a type covered by another specific hearsay exception, but fails to meet the precise requirements of that specific exception. The issue raised by this contention has come to be known as the "near miss" problem.

Courts differ widely in their analysis of this issue. Some courts hold that the failure of hearsay evidence to qualify under the more particular exception is proof of the insufficient circumstantial guarantees of trustworthiness.[77] Other courts routinely admit near misses and even consider a near miss characteristic to be a positive factor, weighing in favor of admission under the residual exceptions.[78]

In *Zenith Radio Corporation*, Judge Becker authored an opinion for the United States District Court for the Eastern District of Pennsylvania presenting a novel middle-ground approach which has periodically received favorable reviews.[79] The court held that the residual exceptions should not be used to admit hearsay evidence when the evidence is more appropriately subject to scrutiny under another specific exception covering a clearly defined category of hearsay evidence.[80] The court reasoned, however, that most of the hearsay exceptions did not delineate a clearly defined category but, rather, applied to a relatively "amorphous category of evidence."[81] For near misses under these amorphous exceptions, the court opined that the residual exceptions could be invoked.[82] To proscribe the use of the residual exceptions for this type of hearsay evidence would be to "negat[e] the residual exceptions altogether."[83]

The *Zenith Radio Corporation* decision was reversed by the United States Court of Appeals for the Third Circuit.[84] Holding that all types of hearsay evidence may rightfully be considered under the residual exceptions even after failing admissibility standards under another applicable exception, the court criticized Judge Becker's theory on the grounds that it had no precedential support and would place the federal rules of evidence back into the "straightjacket" from which the residual exceptions were intended to be freed.[85]

The Maryland courts' position in the near miss debate is unknown at this point. In promulgating the Maryland Rules of Evidence, the Rules Committee did not explicitly state whether "near misses" would be

admitted under the residual exceptions. Given the choice of regarding a near miss characteristic of hearsay evidence as either a positive or negative factor, the Maryland courts would probably hold that a near miss is a negative factor in the admissibility analysis. A decision that a near miss is a positive factor would be a deviation from Maryland's traditionally strict treatment of hearsay exceptions.

Treatment of the near miss problem is not, however, reduced merely to this positive or negative determination. A prudent alternative approach to the near miss problem is to ignore it completely. The fact that hearsay evidence is a near miss should be construed to be neither a positive nor negative factor -- it simply is not relevant.

As outlined above, the admissibility of hearsay evidence under the residual exceptions is conditional upon the careful scrutiny and satisfaction of five requirements. This analysis should be done without regard to whether the evidence is a near miss.[86]

This may mean that certain near misses would be admitted under the residual exceptions while other near misses may be excluded.[87] This is all, however, beside the point. If the hearsay possesses equivalent circumstantial guarantees of trustworthiness based upon satisfaction of the trustworthiness test as advocated in section II.A. above, its status as a near miss should not deprive that evidence of its rightful admissibility.[88]

A "glass slipper" is . . . a hearsay statement that exhibits a perfect fit under the residual exceptions. . . . Glass slippers are the only evidence that should be admitted under the residual exceptions.

C. Glass Slippers

A "glass slipper" is the name the author has given to a hearsay statement that exhibits a perfect fit under the residual exceptions by satisfying all five requirements. Glass slippers are the only evidence that should be admitted under the residual exceptions.[89]

The case most frequently cited in relation to the residual exceptions is the Fifth Circuit Court of Appeals' decision in *Dallas County v. Commercial Union Assurance Company*.[90] In *Dallas County*, the plaintiff attempted to seek remuneration from an insurer for a collapsed courthouse tower, claiming that it was struck by lightning. The insurer attempted to avoid the plaintiff's claim by asserting that the tower collapsed as a result of a structural weakness. As proof of the structural weakness, the insurer offered a copy of a newspaper article published fifty years earlier which described a fire in the courthouse while it was under construction. The court found that the article did not fit within any recognized hearsay exception but admitted the evidence on the basis that it was necessary, more probative than any other evidence available, and contained sufficient circumstantial guarantees of trustworthiness.[91]

Dallas County is an exceptional case presenting unanticipated circumstances. It was in anticipation of such glass slipper cases that the residual exceptions were devised.[92]

There is dispute, however, as to whether residual hearsay must rise to the level of being "*Dallas County*-exceptional or unanticipated" to be admissible. In other words, in addition to satisfying the five expressed requirements contained in the residual exceptions, must residual hearsay also relate to a previously unaddressed subject?

There are valid arguments on both sides of the issue. The requirement that residual hearsay be "exceptional" is not an expressed requirement of the residual exceptions and it may be an ambiguous criterion.[93]

On balance, there is validity to the "exceptional" requirement. If the proffered hearsay relates to but fails the criteria of a specific and clearly defined hearsay exception, admitting the near miss hearsay under the residual exceptions would undermine the purpose of the specific exception.[94]

However, the "exceptional" rationale could also serve to exclude near miss hearsay relating to the relatively amorphous exceptions since those exceptions do anticipate specific subject areas. This result, besides being contrary to the majority of courts' decisions, may have the effect of excluding otherwise trustworthy and necessary hearsay.[95]

Whether the Maryland courts will impose the "exceptional" or "unanticipated" requirement as part of Rules 5-803(b)(24) and 5-804(b)(5) is unknown. However, incorporating this requirement in some manner would be consistent with the rigorous approach endorsed by the United States Court of Appeals for the Fourth Circuit's decision in *United States v. Heyward*.[96]

V. DISCUSSION AND ANALYSIS OF FORESEEABLE ISSUES

A. Grand Jury Testimony

Federal Rule 804(b)(5) has served as the avenue by which courts have allowed the introduction of grand jury testimony from unavailable witnesses. Accordingly, this issue is likely to arise under Maryland Rule 5-804(b)(5).

Arguably, grand jury testimony of an unavailable witness should never be admitted as residual hearsay. It is, in essence, a type of former testimony which should be governed by Rule 5-804(b)(1).[97] But grand jury testimony is a near miss under Rule 5-804(b)(1) because the party against whom the testimony is ordinarily offered did not have the opportunity to develop the testimony by direct, cross, or redirect examination.

As a near miss under an arguably specific and clearly defined hearsay exception, grand jury testimony should not be admissible under the residual exceptions.[98] Admitting such evidence would have the effect of altering and expanding the types of former testimony that are permissible under Rule 5-804(b)(1), a result that the residual exceptions are arguably not meant to accomplish.

This argument is persuasive. But it is not supported by the decisions of the courts which have considered the issue.

The federal circuits are currently divided regarding two concerns which are present in the context of admitting grand jury testimony against a criminal defendant as residual hearsay. The first concern is whether such evidence violates the rule against hearsay, or whether it can satisfy all of the requirements of the residual exceptions. The second issue is whether the admission of an unavailable witness's grand jury testimony violates the Confrontation Clause.

Some courts routinely allow the admission of grand jury testimony against a criminal defendant reasoning that neither the rule against hearsay nor the Confrontation Clause will be violated as long as surrounding circumstances and evidence corroborating the testimony provide a sufficient indicia of reliability.[99]

These decisions are not well reasoned. They erroneously merge the hearsay and Confrontation Clause analysis, deciding cases without any detailed distinction between the two principles.[100] Moreover, these result-oriented decisions often admit grand jury testimony evidencing only superficial guarantees of trustworthiness.[101] Lastly, these courts often determine the trustworthiness of the grand jury testimony by impermissibly "bootstrapping" on the existence of corroborating evidence.[102]

Other courts have taken a more restrictive approach to the admission of grand jury testimony as residual hearsay. These courts have clearly recognized and given effect to the distinction between the hearsay rule and the Confrontation Clause and conducted two separate inquiries.[103] Using this approach, courts will allow the admission of grand jury testimony only when the substance of the grand jury testimony satisfies both the requirements of the residual exceptions and the safeguards of the Confrontation Clause. In most of these cases, however, courts have allowed the admission of grand jury testimony from an unavailable witness under the particular facts because the opposing party was viewed to have "waived" the right to object under the Confrontation Clause.[104] Under this so-called "waiver theory," if a party, by its conduct, causes the unavailability of the declarant of the grand jury testimony, the party waives Confrontation Clause objections and, *a fortiori,* any hearsay objections because "[t]he law simply cannot countenance a defendant deriving benefits from murdering [or otherwise incapacitating] the chief witness against him."[105]

The waiver theory seems to present an acceptable median between routine admissions and strict exclusions of grand jury testimony in all cases.[106] Arguably, hindering a witness's testimony presents an exceptional situation warranting application of the residual exceptions.

Even if Maryland courts opt to take a restrictive approach to grand jury testimony, it may not serve the ends of justice or promote the growth and flexibility of the law of evidence to exclude grand jury testimony in such egregious circumstances.

B. Children's Statements

In recent years, the most prolific use of the residual exceptions has been in child abuse prosecutions where the child victim has been unable to testify at trial due to emotional distress or incompetence. In these cases, courts have routinely admitted the child victim's out-of-court statements to third parties as residual hearsay.[107]

In Maryland, courts traditionally have been reluctant, at best, to admit this type of hearsay.[108] As of July 1, 1994, however, this restrictive tradition may be

subject to change.

With the adoption of the residual exceptions, Maryland courts will no longer be able to exclude child abuse victim's statements merely because the statements do not fall under a recognized exception.[109] Instead, they will be forced to conduct a residual exceptions analysis to determine the trustworthiness and need for the child hearsay statements.

Whether the Maryland courts will follow the broad majority of jurisdictions and admit child hearsay under the residual exceptions is unknown. However, resistance to admit this type of evidence, if any, will be further undermined by §9-103.1 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code (out of court statements of child abuse victims) and its 1994 amendments.

Enacted in 1988, § 9-103.1 is a statutory hearsay exception which provides for the admission of an unavailable child victim's out-of-court statement to prove the truth of the matter asserted if 1) the child is under the age of 12 years; 2) the statement is not admissible under any other hearsay exception; 3) the statement possesses "particularized guarantees of trustworthiness"; 4) the statement is made to a licensed physician, psychologist, social worker, or teacher acting in the course of the individual's profession at the time of the statement; 5) there is corroborating evidence; and 6) notice is provided to the opponent at least twenty days before the statement is adduced.

During Maryland's 1994 legislative session, the statute was amended to allow for the admission of a child victim's hearsay statement regardless of whether the child is available for trial. The adoption of the newly-amended §9-103.1, along with the residual exceptions, bodes in favor of the proponents of child hearsay evidence. The two provisions will potentially function as powerful, alternative vehicles promoting the admission of child hearsay.[110]

CONCLUSION

Most would agree that the primary purpose of the hearsay rule and its exceptions, like any other evidentiary rule, is for the ascertainment of the truth. As long as Maryland Rules 5-803(b)(24) and 5-804(b)(5) contribute to this goal, they are valuable and worthwhile.

There is no way to determine in advance if the residual exceptions will actually serve their purpose and contribute to the judicial process in Maryland. In essence, it is an experiment.

Some are likely to disagree with this uncertain outlook. They would like to believe that the Maryland residual exceptions will be scrupulously limited with virtually no deviation from the common law. This, however, is unlikely to prove true.

This article has attempted to show in many respects that the interpretation of the residual exceptions is not an exact science; there are numerous issues subject to debate.

Each year the residual exceptions generate approximately fifty or more reported decisions. More than likely, Maryland courts will contribute to these numbers.

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However, the active integration of the residual exceptions into Maryland law should not be construed as the demise of the hearsay rule. Instead, a consistent and sound interpretation of the residual exceptions in conformity with the principles underlying the hearsay rule will result in a body of evidentiary law securing flexibility and fairness for the future.

ENDNOTES

[1] Title 5 of the Maryland Rules will not, however, be applicable (1) in any trial or hearing commenced prior to July 1, 1994, or (2) to admit evidence against a defendant in a criminal action whose crime was allegedly committed prior to July 1, 1994, unless such evidence would have been admissible under the law and Rules in effect on June 30, 1994.

[2] 5-803(b)(24) provides: "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 circum-

stantial 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 purpose of these rules and the interests of justice will be best 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."

5-803(b)(24) and 5-804(b)(5) differ only in that the latter requires a showing of the declarant's unavailability whereas the former is applicable without regard to the issue of availability. Most courts refer to the two sections interchangeably and analyze them without differences in application. *E.g., United States v. Kim*, 595 F.2d. 755, 765 n.45 (D.C. Cir. 1979). *See also* Emerging Problems Under The Federal Rules of Evidence (David A. Schlueter ed., 2d ed. 1991).

[3] *E.g., In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 302 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

[4] *E.g.*, James E. Beaver, *The Residual Hearsay Exception Reconsidered*, 20 Fla. St. U. L. Rev. 787, 794 (1993).

[5] Proponents of Rules 5-803(b)(24) and 5-804(b)(5) suggested to the Rules Committee that without these provisions, the law of hearsay and its exceptions would become detrimentally "frozen." It was explained that the now-existing exceptions to the hearsay rule were not conceived overnight but were rather formulated over hundreds of years of judicial experience. To suppose that all reliable and necessary exceptions to the hearsay rule have been determined and recognized by the courts would not only be presumptuous but erroneous. In the absence of the residual exceptions, Maryland courts would not have the vehicle to effectively deal with probable future cases which would present reliable and necessary hearsay evidence not specifically covered under the currently recognized exceptions. Interview with Lynn McClain, University of Baltimore Professor of Law and Special Reporter to the Court of Appeals Standing Committee on Rules of Practice and Procedure, in Baltimore, Maryland (March 4, 1994). When Colorado initially adopted an evidence code modeled after the federal rules, it did not include the residual exceptions. However, after the case of *W.C.L. v. People*, 685 P.2d 176 (Colo. 1984), the Colorado Rules of Evidence were amended. In reluctantly reversing a lower court's admission of a child's trustworthy hearsay statement identifying her abuser, the Supreme Court of Colorado opined that the facts in the case demonstrated the wisdom of including in the Colorado Rules of Evidence a residual hearsay exception such as that in Federal Rule 803(24). *Id.* at 178-82.

[6] Md. Rule 5-803(b)(24) Committee Note *derived from* Fed. R. Evid. 803(24) Advisory Committee's Note and Senate Judiciary Committee Report.

[7] 4 David W. Louisell & Christopher B. Mueller, Federal Evidence § 472, at 923 (1980).

[8] *Id.*

[9] "In order to establish a well-defined jurisprudence, the special facts and circumstances which, in the court's judgment, indicates [sic] that the statement has a sufficiently high degree of trustworthiness and necessity to justify its admission should be stated on the record." Fed. R. Evid. 803(24) Senate Judiciary Committee Report; *See also Huff v. White Motor Corp.*, 609 F.2d 286, 291-92 (7th Cir. 1979) (reviewing the trial court's ruling of rejecting the offering of a statement under the residual exception, the court noted that in reviewing discretionary findings it is "greatly aided when the record contains a statement of the reasons for the ruling and any findings made . . . .").

[10] *E.g., United States v. Bachsian*, 4 F.3d 796, 797 (9th Cir. 1993); *State v. Davi*, 504 N.W.2d 844, 853 (S.D. 1993); *Hall v. State*, 611 So.2d 915, 917 (Miss. 1992); *State v. Barger*, 810 P.2d 191, 193 (Ariz. Ct. App. 1990). For appellate review of residual hearsay on constitutional grounds, however, the standard of review is *de novo*. *But see* Lynn McLain, Maryland Rules of Evidence § 2.803.1 (JJ) (West 1994) (One court of appeals judge expressed an opinion that the standard for reviewing a trial court's decision on any residual hearsay should not be an abuse of discretion standard. Instead, the judge felt that by allowing residual hearsay, the trial court would, in effect, be creating a new hearsay exception applicable to the case before it. An error in this capacity would not only amount to an error as an evidentiary ruling but also on a matter of law. The judge, therefore, opined that *de novo* review should

apply to all evidence admitted under the residual exceptions.). *See also* Myrna S. Raeder, *The Hearsay Rule at Work: Has It Been Abolished De Facto By Judicial Discretion?* 76 Minn. L. Rev. 507, 517 (1992) ("[T]he appellate decisions [concerning the residual exceptions] are not offering an effective stopgap, in part, because they review an admission of such hearsay for abuse of discretion and harmless error. . .[which has] infected the review of evidentiary issues concerning questions of law which should be determined *de novo*.").

[11] *See e.g., United States v. McPartlin*, 595 F.2d 1321, 1350 (7th Cir. 1979) (holding that entries in a desk calendar appointment diary kept by a government witness were within Federal Rule 804(24) because "[a] number of factors combine to demonstrate the reliability of the entries: the highly self-incriminatory nature of the entries themselves, the regularity with which they were made, [and the witness's] need to rely on the entries. Where evidence complies with the spirit, if not the l[e]tter of several exceptions, admissibility is appropriate under the residual exception."); *See also United States v. Fernandez*, 892 F.2d 976, 981 (11th Cir.) (court compared grand jury testimony to the other four exceptions under 804(b)) *cert. dismissed,* 495 U.S. 944 (1989).

[12] *See id.*

[13] 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 800[01] at 800-9 to 800-10 (1984).

[14] *Id.*

[15] Laurence H. Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957, 959 (1974).

[16] *See* Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 218 (1948).

[17] *Id.*

[18] *Id.*

[19] Michael H. Graham, Handbook of Federal Evidence § 801.1, at 682 (2d ed. 1986).

[20] *Id.* at 682-83.

[21] Md. Rule 5-803(b)(2).

[22] *Mouzone v. State*, 294 Md. 692, 697, 452 A.2d 661, 664 (1982), *overruled on other grounds by Nance v. State*, 331 Md. 549, 569, 629 A.2d 633, 643 (1993).

[23] *See Cassidy v. State*, 74 Md. App. 1, 21, 536 A.2d 666, 676 (1988).

[24] Lynn McLain, Maryland Evidence § 803(2).1 (1987).

[25] *Hensley v. Rich,* 38 Md. App. 334, 341, 380 A.2d 252, 255 (1977).

[26] Note that the trustworthiness test is only relevant to the admissibility of hearsay statements. That is, only out-of-court statements offered to prove the truth of the matter asserted need satisfy this test. For example, an out-of-court statement offered as circumstantial evidence of the declarant's state of mind only answers the question of whether the declarant had the belief. However, because the statement is not offered to prove the truth, whether the statement reflects reality is irrelevant. The statement is admitted as non-hearsay.

[27] In an effort to determine the trustworthiness of a hearsay statement, some courts have examined whether other extrinsic evidence in the case corroborates the truthfulness of the hearsay statement. *E.g., United States v. Guinan*, 836 F.2d 350, 356-57 (7th Cir.), *cert. denied*, 487 U.S. 1218 (1988); *United States v. Barlow*, 693 F.2d 954, 962 (6th Cir.), *cert. denied*, 461 U.S. 945 (1982).

The corroboration factor, however, would seem to be inappropriate in light of the Supreme Court's decision in *Idaho v. Wright*, 497 U.S. 805, 822-23 (1990), in which the Court opined that the analysis of a hearsay statement should be restricted to the circumstances surrounding the making of the statement without consideration of corroborative facts establishing the accuracy of the statement. *See infra* part III.A.

[28] As a model in accordance with the trustworthiness test, the author proposes that a court should, at a minimum, ask the following questions to ascertain the trustworthiness of a hearsay statement:

Does the Declarant Have the Belief?

Narration/Ambiguity:

1) Is the statement subject to differing interpretations?

2) Is the event which the declarant spoke of so complex that mere words may not be able to accurately convey the nature of the event?

Sincerity:

1) Would the declarant have a motive to fabricate?

2) Was the statement a result of leading questions or any other type of suggestiveness?

Does the Declarant's Belief Reflect Reality?

Perception:

1) Did the declarant have a first-hand perception of the event being described?

2) Could the declarant have been honestly mistaken?

Memory:

1) Did the declarant have time for reflective thought between the event and the statement such that he or she could have been influenced by emotions or intellect?

2) Was the method of preserving the information contained in the statement subject to error?

[29] *E.g., United States v. Irish People, Inc.,* 595 F. Supp. 114, 120 (D.D.C. 1984) (letters obtained in search of defendant's files held to be admissible under Federal Rule 803(24) because the letters possessed an aura of credibility similar to that of business records since they were "internal letters" produced in the business setting and the authors had no reason to falsify its contents; no consideration given to memory factor), *rev'd on other grounds,* 796 F.2d 520 (1986).

[30] *See e.g., United States v. Leslie*, 542 F.2d 285 (5th Cir. 1976) (upholding the admission of inconsistent hearsay statements as substantive evidence under Federal Rule 803(24) because although the hearsay statements were not given under oath or in another proceeding, indicia of reliability was present in light of the fact that statements had been made shortly after the events occurred and the declarants were available to be cross-examined as to their sincerity); *Grimes v. Employers Mut. Liab. Ins. Co. of Wis.*, 73 F.R.D. 607 (D. Alaska 1977) ("There are no problems with perception, memory or meaning, and any sincerity problems can be solved by having the verifying witness and the plaintiff-actor subject to cross-examination.").

[31] *See infra* note 45 and accompanying text.

[32] Tribe, *supra* note 15, at 962.

[33] *E.g., Huff v. White Motor Corp.*, 609 F.2d 286, 294 (7th Cir. 1979). *See also* McCormick on Evidence § 324, at 366 (4th ed. 1992).

[34] *Cf. United States v. Iaconetti*, 406 F. Supp. 554, 559 (E.D.N.Y), ("This [materiality] requirement seems redundant since, if it did not tend to prove or disprove a material fact, the evidence would not be relevant and would not be admissible under Rules 401 and 402. What is probably meant is that the [residual] exception should not be used for trivial or collateral matters.") *aff'd,* 540 F.2d 574 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977); Graham, *supra,* note 19 § 803.24, at 925 ("The requirement that the statement be offered as evidence of a material fact probably means that not only must the fact the statement is offered to prove be relevant, Rule 401, but that the fact to be proved be of substantial importance in determining the outcome of the litigation.").

[35] *United States v. Boulahanis,* 677 F.2d 586, 588-89 (7th Cir.), *cert. denied,* 459 U.S. 1016 (1982).

[36] *See id.*

[37] *See e.g., United States v. Mathis,* 559 F.2d 294, 299 (5th Cir. 1977) (characterizing this requirement as a "built-in requirement of necessity.").

[38] Fed. R. Evid. 803(24) Senate Judiciary Committee Report.

[39] *See* Fed. R. Evid. 803(24) Senate Judiciary Committee Report ("The committee believes that there are certain exceptional circumstances where evidence which is found by a court to have guarantees reflected by the presently listed exceptions, and to have a high degree of prolativeness [sic] and necessity could properly be admissible.").

[40] *See e.g., Larez v. City of Los Angeles,* 946 F.2d 630 (9th Cir. 1991) (court held reversible error to admit quotations from three independent newspapers because the newspaper reporters would have provided better evidence of the statements and would have been subject to cross-examination); *Noble v. Alabama Dept. Of Envtl. Mgmt.*, 872 F.2d 361, 366 (11th Cir. 1989) (admission of letters was improper where proponent of evidence made no showing that reasonable efforts could not have produced the writers).

[41] *E.g., Marsee v. United States Tobacco Co.*, 866 F.2d 319, 325 (10th Cir. 1989) (excluding two published reports as hearsay not satisfying Federal Rule 803(24) because much of the information contained in the reports was otherwise admitted through the testimony of various experts). *Contra* Louisell et al., *supra* note 7, §472, at 936 (1980) ("A more constructive reading [of the necessity requirement] requires the proponent of a statement under the [residual] exception to introduce all evidence within his reasonable reach which is 'more probative' on the point in question than the statement . . . first. [T]his reading implies that a diligent party may resort to the [residual] exception even though 'more probative' evidence has already been received on the point in question. And this reading is the preferable one: It serves adequately the congressional purpose of preventing unnecessary resort to the [residual] exception while stopping short of excluding automatically those statements which are trustworthy and relevant on points which remain sufficiently in doubt to be resolvable either way by the trier of fact.").

[42] Md. Rule 5-403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . needless cumulative evidence."). *Cf.* Weinstein et al., *supra* note 11, ¶ 803(24)[01] at 803-379 ("Even though the evidence may be somewhat cumulative, it may be important in evaluating other evidence and arriving at the truth so that the 'more probative' requirement can not [sic] be interpreted with cast iron rigidity.").

The author would concur with the view of admitting hearsay evidence under the residual exception for such limited instances in which the probative value of the residual hearsay is clearly not minimal. *Cf. United States v. Hing Shair Chan*, 680 F. Supp. 521, 526 (E.D.N.Y. 1988) (admitting hearsay evidence to boost the credibility of a co-conspirator in the government's case-in-chief). *Cf. Hing Shair Chan with United States v. Belfany*, 965 F.2d 575 (8th Cir. 1992) (holding as harmless error the admission of a child's hearsay statement which was not more probative than other extensively available evidence).

The *Belfany* court's view of holding as harmless error the admission of cumulative hearsay under the residual exception if other more probative evidence could have sustained the verdict is widely shared. *Quaere*: Doesn't this rationale have the effect of nullifying the necessity requirement? Wouldn't the extraordinary purpose of the residual exceptions be better served by adopting a stricter approach in which the erroneous admission of evidence under the exception be viewed as more than harmless error? *See generally deMars v. Equitable Life Assurance Soc'y of the United States*, 610 F.2d 55, 61 (1st Cir. 1979) ("The requirements of [the necessity requirement] of the rule cannot be ignored.").

[43] *E.g., United States v. Simmons*, 773 F.2d 1455, 1459 (4th Cir. 1985) (necessity requirement met where the alternative to the admission of Bureau of Alcohol, Tabacco, and Firearms trace forms was to require the government to bring custodians of the manufacturer's records from across the country to testify to the simple fact that certain weapons were moved in interstate commerce); *United States v. Friedman*, 593 F.2d 109, 119 (9th Cir. 1979) (court allowed the admission of Chilean travel documents because the government could not obtain any other equivalent evidence). *See also* Weinstein et al., *supra* note 13, ¶ 803(24)[01], at 803-379 (1984) ("It should not be necessary to scale the highest mountains of Tibet to obtain a deposition for use in a $500 damage claim arising from an accident with a postal truck.").

[44] Louisell et al., *supra* note 7, § 472 at 936.

[45] Of course, this issue is inapplicable to a case in which hearsay is sought to be admitted under 5-804(b)(5) where the declarant is unavailable.

[46] *E.g. United States v. Mathis*, 559 F.2d 294 (5th Cir. 1977). *See also Parsons v. Honeywell*, 929 F.2d 901 (2d Cir. 1991).

[47] *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961) (hearsay was necessary because knowledgeable witnesses had either died or had faded memories).

[48] *See Robinson v. Shapiro*, 646 F.2d 734, 743 (2d Cir. 1981); Weinstein et al., *supra* note 13, ¶ 803(24)[01], at 379, n. 13 (1990).

[49] *Contra United States v. Williams*, 573 F.2d 284, 288-89 (5th Cir. 1978) (holding that a prosecution witness' pretrial affidavit which was inconsistent with his in-court testimony was properly received under 803(24), court reasoned that "the interests of justice were best served by providing the jury with as much information as possible" on the subject addressed in the affidavit).

[50] *Cf. Marsee v. United States Tobacco Co.*, 866 F.2d 319, 325 (10th Cir. 1989) (in excluding two published reports because much of the information contained in the reports was otherwise admitted through expert testimony, court held that the "interests of justice" did not require the admission of these reports into evidence; court should have reasoned that the reports were not more probative on the point for which they were offered than the expert testimony); *United States v. Mandel*, 591 F.2d 1347, 1369 (4th Cir. 1979) (statements made by unidentified legislators during "heat of political battle" held to be inadmissible under 803(24) because neither the purposes of the Federal Rules nor the interests of justice would be served by admitting this evidence: "In a criminal case we must be careful that a conviction is not based on speculation."; proper reasoning would have been to state that the out-of-court statements were not trustworthy).

[51] The United States Court of Appeals for the Second Circuit has adopted a strict approach to the notice requirement. In *United States v. Ruffin*, 575 F.2d 346, 358 (2d Cir. 1978), the court held that "[t]here is absolutely no doubt that Congress intended that the notice requirement be rigidly enforced." The fact that

the proponent first discovered the need for the evidence only after trial had commenced was deemed irrelevant. *Id.*

[52] *E.g., United States v. Bailey*, 581 F.2d 341, 348 (3d Cir. 1978) (court reasoned that since legislative purpose behind the notice requirement is to provide the adverse party with sufficient opportunity to counter the evidence, the purpose is satisfied when the proponent is without fault and the court allows a continuance in order to provide "a fair opportunity to prepare to contest the use of the statement"); *United States v. Leslie*, 542 F.2d 285 (5th Cir. 1976) (court reasoned that there must be flexibility in the notice requirement where the need to offer evidence under the residual hearsay exception does not become apparent until after the trial has begun); *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977) (court excused government's failure to give notice sufficiently in advance of trial where the government first learned on the eve of trial that its witness would disobey a court order and refuse to testify; defendant was acutely aware of the proffered evidence and its substance prior to trial).

[53] *E.g., United States v. Brown*, 770 F.2d 718, 771 (9th Cir. 1985); *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979).

[54] *E.g., United States v. Pelullo*, 964 F.2d 193 (3d Cir. 1992) (court refused to consider the admissibility of hearsay evidence under the residual exceptions where the argument was first raised on appeal); *United States v. Tafollo-Cardenas*, 897 F.2d 976 (9th Cir. 1990) (court refused to consider Federal Rule 803(24) as a basis for admissibility when the government first raised the issue in its amended jury instructions).

[55] 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, 904 (1982).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] 497 U.S. 805 (1990).

[62] 448 U.S. 56 (1980).

[63] Firmly rooted hearsay exceptions are exceptions which are "clearly identifiable and classically recognized." *Cassidy v. State*, 74 Md. App. at 8-9, 536 A.2d at 669-70. *See also Ohio v. Roberts*, 448 U.S. at 66 (1980).

[64] *Idaho v. Wright*, 497 U.S. at 816.

[65] *Id.* at 820.

[66] *Id.* at 823.

[67] *Id. Contra id.* at 827 (Kennedy, J., joined by Rehnquist, C.J., White, J., and Blackmun, J., dissenting: "It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence.").

[68] The trustworthiness test is aimed at determining particularized guarantees of trustworthiness such that cross-examination would be of marginal utility. The method is also employed without regard to corroborative evidence. *See supra* note 28.

[69] 297 Md. 191, 464 A.2d 986 (1983) (plurality opinion).

[70] *Id.* at 210, 464 A.2d at 996.

[71] *Id.* at 211, 464 A.2d at 997.

[72] *Id.*

[73] *But see Powell v. State*, 85 Md. App. 330, 343, 583 A.2d 1114, 1120 (stating that the *Foster* decision was obtained by only a plurality vote and therefore has no precedential significance), *aff'd on other grounds*, 324 Md. 441, 597 A.2d 479 (1991).

[74] McLain, *supra* note 24, § 803(24).2, n.6 and accompanying text.

[75] *E.g., Hancock v. Dodson*, 958 F.2d 1367 (6th Cir. 1992) (The wife of an arrestee brought a civil rights action against the city, county and several police officers. The wife alleged that the officers used excessive force in subduing her husband, causing him permanent disability. To prove that they were justified in using force against the arrestee, the defendants offered evidence of the husband's guilty plea to the misdemeanor of assault and battery stemming from the arrest in question. After admitting the hearsay evidence as an admission, the court held that the guilty plea could alternatively be admitted under 803(24) because it had equivalent circumstantial guarantees of trustworthiness. The court reasoned that the truth of the matter contained in the guilty plea was reliable because the arrestee was represented by counsel and had sufficient opportunity to challenge the guilty plea after it was entered.) (sub silentio); *Polansky v. CNA Insurance Co.*, 852 F.2d 626, 631 (1st Cir. 1988) (In this breach of contract suit, plaintiff sued insurer for unjustly refusing to reimburse owner for fire damage to apartment.

Insurer asserted that the fire was set deliberately by the plaintiff. To rebut the insurer's allegation, the plaintiff offered a letter written by plaintiff's public adjuster, and sent to the insurer, stating that it was both the plaintiff's and the adjuster's understanding that the insurer had told the plaintiff that he was not a suspect in the fire. The appellate court held as garbage the letter because it was "merely a self-serving statement written by a representative of the party who [sought] its admission . . . ."); *Cook v. Hoppin*, 783 F.2d 684, 690-91 (7th Cir. 1986) (A tenant sued a landlord for negligence after suffering injuries from a fall on a stairway. The landlord attempted to introduce statements contained in the plaintiff's medical records stating that the plaintiff had received injuries in a "shoving or wrestling match" prior to the fall. Reversing the trial court's admission of the statements, the court held that because the declarant of the statements was unknown, the circumstances under which the declarant made the statements lacked sufficient guarantees of trustworthiness.); *United States v. Rouco*, 765 F.2d 983, 993-94 (11th Cir. 1985) (In a prosecution for the murder of a government agent, the court held as garbage the admission of the murdered agent's statement through the agent's supervisor in which the agent allegedly told the supervisor of a sample received while conducting a cocaine deal with the defendant. The trial court allowed the hearsay, holding that the statements had circumstantial guarantees of trustworthiness; among other things, the agent's report was made within thirty minutes of the fact, and the agent's life, the lives of fellow agents, and the success of the investigation depended on the accuracy of the report.), *reh'g denied*, 772 F.2d 918 (11th Cir. 1985), *cert. denied*, 475 U.S. 1124 (1986).

[76] 505 F. Supp. 1190, 1262 (E.D. Pa. 1980), *rev'd sub nom. In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 302 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

[77] *E.g., United States v. Love,* 592 F.2d 1022 (8th Cir. 1979); *United States v. Kim,* 595 F.2d 755 (D.C. Cir. 1979).

[78] *United States v. Furst,* 886 F.2d 558, 573 (3d Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990); *United States v. Popenas*, 780 F.2d 545, 547 (6th Cir. 1985) ; *United States v. Frazier,* 678 F. Supp. 499, 503 (E.D. Pa.), *aff'd,* 806 F.2d 255 (3d Cir. 1986).

[79] *E.g.,* Gary W. Majors, Comment, *Admitting 'Near Misses' Under the Residual Hearsay Exceptions,* 66 Or. L. Rev. 599, 622 (1987) ("Judge Becker deserved a better hearing than he received. His analysis exposed the heart of the problem by acknowledging the folly of treating all near misses as alike in significance.").

[80] *Zenith Radio Corp.*, 505 F. Supp. at 1263. As an example, the court noted that the former testimony exception of Federal Rule 804(b)(1) applied to a clearly defined category of evidence, specifying the conditions of admissibility for evidence in this category. The court also indicated that the learned treatises and judgment of previous conviction exceptions covered clearly defined categories of evidence. *Id.* at 1264.

[81] *Id.* at 1264. In illustration, the court stated that the business records exception was amorphous because it could be applied to any "memorandum, report, record, or data compilation, in any form." *Id.* Likewise, the court cited declarations against interest, present sense impressions, and recorded recollection as other amorphous categories of exceptions.

[82] *Id.*

[83] *Id.*

[84] *In re Japanese Elec. Prods. Antitrust Litig.,* 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986).

[85] *Id.* at 302-03 ("Without doubt the [residual] exceptions were not intended to have broad application. This does not warrant, however, the creation of some new theory of limitation that seems more to complicate matters than to resolve them.").

[86] *E.g., United States v. York*, 1989 WL 69269 (N.D. Ill. 1989) (Rejecting the admissibility of a statement offered under Federal Rule 804(b)(5) which was also not admissible under 804(b)(3), the court did not analyze the issue in near miss terms. Instead, the court simply held that a statement which was not trustworthy enough to be a declaration against interest did not meet the trustworthiness requirement of the residual exceptions.).

[87] Viewing somewhat favorably the rationale underlying Judge Becker's theory, the author would advance that the theory be employed as a tool for guidance in deciding which types of near misses should be admitted. Guidance, however, is not tantamount to reliance. Strict reliance upon Judge Becker's theory would create other problems. For instance, Judge Becker's theory opens a Pandora's Box of judicial debate as to which hearsay exceptions would be regarded as being amorphous or clearly-defined.

[88] *Contra* Myrna S. Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and is Devoured*, 25 Loy. L.A. L. Rev. 925 (1992) (arguing that admission of near misses under the residual exception has the effect of nullifying the other exceptions).

[89] *E.g., Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513 (10th Cir. 1987) (In this trademark infringement case between two manufacturers of fishing equipment, plaintiff alleged that the defendant produced a fishing reel so similar as to confuse customers as to the source of the reels. As proof of the public's confusion, the plaintiff offered a consumer survey conducted in the shopping areas of five cities. The court held that it was not error for the trial court to have admitted the survey as possessing the requisite guarantees of trustworthiness.); *United States v. Cowley*, 720 F.2d 1037 (9th Cir. 1983) (Defendant objected to the admission of a letter bearing a postmark from Santa Barbara. The postmark was hearsay because it was offered to show that a letter had been mailed from Santa Barbara. The court reasoned, however, that unlike most hearsay, "the postmark is very reliable; there is very little risk of misperception on the part of the postal official. Even though it does not easily fit into any of the enumerated exceptions . . . the postmark's circumstantial guarantees of trustworthiness make it a perfect candidate for Federal Rule 803(24) . . . ." The postmark in this case, however, was excluded because the proponent failed to give advance notice. Otherwise, the postmark would have been a glass slipper.).

[90] 286 F.2d 388 (5th Cir. 1961).

[91] The evidence was deemed to be necessary because witnesses to the alleged fire, if any were still alive, were incapable of fully recalling the event. The trustworthiness of the evidence was assured in that a newspaper would be unlikely to falsify an event widely known and discussed in the community.

[92] Fed. R. Evid. 803(24) Senate Judiciary Committee Report ("Because exceptional cases like the *Dallas County* case may arise in the future, the committee has decided to reinstate a residual exception for rules 804 and 804(b).").

[93] *See United States v. American Cyanamid Co.*, 427 F. Supp. 859, 865-66 (S.D.N.Y. 1977) ("Rule 803(24) establishes sufficient express criteria which must be satisfied before an item of hearsay will be admissible. . . . There is no requirement that the Court find a case to be 'exceptional,' *whatever that means*, in order to receive any evidence.") (emphasis added).

[94] *Cf. supra* note 81 and accompanying text.

[95] *See supra* part IV.B.

[96] 729 F.2d 297, 299-300 (4th Cir. 1984) (residual hearsay exception should be "'used very rarely and only in exceptional circumstances'"), *cert. denied*, 469 U.S. 1105 (1985). It is noteworthy, however, that the Fourth Circuit is one of few circuits which routinely and liberally permits the introduction of grand jury testimony under Rule 805(b)(5). *See infra* part V.A. One could argue that the admission of grand jury testimony as residual hearsay is at odds with the restrictive decree in *Heyward*. It will be interesting to see if the Maryland courts can maintain consistency among their decisions in individual cases.

[97] Md. Rule 5-804(b)(1): Former Testimony - Testimony given as a witness in any action or proceeding or in a deposition taken in compliance with law in the course of any action or proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

[98] *See supra* note 81.

[99] *E.g., United States v. Barlow,* 693 F.2d 954 (6th Cir. 1982); *United States v. Boulahanis*, 677 F.2d 586 (7th Cir. 1982); *United States v. Garner*, 574 F.2d 1141 (4th Cir. 1978), *cert. denied*, 439 U.S. 936 (1978) (Stewart, J., and Marshall, J. dissenting); *United States v. West,* 574 F.2d 1131 (4th Cir. 1978).

[100] *E.g., United States v. West,* 574 F.2d at 1136-38.

[101] *See* Lizbeth A. Turner, Comment, *Admission of Grand Jury Testimony Under the Residual Hearsay Exception,* 59 Tul. L. Rev. 1033, 1067 (1985).

[102] *Compare United States v. Garner*, 574 F.2d at 1144-46 (admitting the grand jury testimony of an alleged co-conspirator under Federal Rule 804(b)(5) on the basis that such testimony possessed substantial guarantees of trustworthiness in that there was ample corroborative evidence) with *supra* note 66 and accompanying text. The existence of corroborating evidence would also seem to favor exclusion of the grand jury testimony in the sense that the hearsay would neither be necessary nor more probative.

[103] *E.g., United States v. Balarno*, 618 F.2d 624 (10th Cir. 1980).

[104] *E.g., id. See also United States v. Mastrangelo*, 693

F.2d 269 (2d Cir. 1982); *United States v. Thevis,* 665 F.2d 616 (5th Cir. 1982), *cert. denied sub nom., Evans v. United States,* 459 U.S. 825 (1982).

[105] *United States v. Thevis,* 665 F.2d at 630 (5th Cir. 1982). Some circuits require proof of waiver by a preponderance of the evidence; others require clear and convincing proof.

[106] *See* Judd Burstein, *Admission of an Unavailable Witness' Grand Jury Testimony: Can It Be Justified?* 4 Cardozo L. Rev. 263 (1983).

[107] *E.g., United States v. Grooms,* 978 F.2d 425 (8th Cir. 1992); *Doe v. United States,* 976 F.2d 1071 (7th Cir. 1992); *United States v. George,* 960 F.2d 97 (9th Cir. 1992).

[108] *Compare Cassidy v. State,* 74 Md. App. 1, 536 A.2d 666, *cert. denied,* 312 Md. 602, 541 A.2d 965 (1988) with *In re Rachel T.,* 77 Md. App. 20, 549 A.2d 27 (1988).

[109] *Cf. Cassidy,* 74 Md. App. at 8-9, 536 A.2d at 669-70 ("Unlike Federal Rule of Evidence 803(24), which creates a miscellaneous exception to the Hearsay Rule for other 'equivalent circumstantial guarantees of trustworthiness,' Maryland, in the common law tradition, is more rigorous and orthodox in its approach to hearsay exceptions. A proponent will not satisfy the rule by showing generalized indicia of trustworthiness but must qualify under one of the clearly identifiable and classically recognized exceptions.").

[110] Caveat: Application of both provisions must comply with the mandate of *Idaho v. Wright* that corroboration must not be a consideration in determining reliability. *See supra* note 66 and accompanying text.

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