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State v. Gremillion: The Constitutional and Evidentiary Elasticity of the Louisiana Residual Hearsay Exception in Criminal Cases

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NOTES

State v. Gremillion: The Constitutional and Evidentiary Elasticity of the Louisiana Residual Hearsay Exception in Criminal Cases

I. FACTS

In *State v. Gremillion* the Louisiana Supreme Court turned to the then recently-enacted Louisiana Code of Evidence[1] in an attempt to reconcile constitutional and evidentiary standards regarding admissibility of evidence that, although falling outside the exceptions to the rule against hearsay, bears *some* quantum of reliability and necessity.

The defendant Gremillion was involved in a barroom altercation with Dupuy, the former husband of Gremillion's companion, in which Gremillion struck Dupuy, rendering him unconscious, and then stomped on his chest and abdomen.[2] Dupuy admitted himself to a hospital several hours after the incident, and later died, allegedly from the beating administered by Gremillion.

On trial for manslaughter, Gremillion sought to establish that Dupuy's death was not the result of the injuries received at the bar. Rather, Gremillion contended, Dupuy's demise was the direct result of the injuries incurred during a beating, administered hours after the barroom altercation, by Swain and Swain's two companions. Dupuy owed Swain $800;[3] the defendant contended that this debt motivated Swain to kill Dupuy. To support his theory, Gremillion called Swain as a witness. The evidence established that Swain and his two companions were present at the bar the night of the incident, and that Dupuy had threatened Swain.

Gremillion also attempted to elicit testimony from the police officer who interrogated Dupuy at the hospital that Dupuy had described his

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1. 1988 La. Acts No. 515.

2. State v. Gremillion, 542 So. 2d 1074, 1076 (La. 1989). The defendant, Gremillion, claimed that he struck Dupuy after Dupuy threatened his life and reached into his coat pocket as if to pull out a gun.

3. Id. at 1077. Swain had purchased an automobile from Dupuy for $800, but due to a community property dispute between Dupuy and his former wife, he could not give Swain the proper title. Although the car was returned to Dupuy, he had not yet returned the $800 purchase price to Swain.

attackers as "three white males." However, the State's hearsay objections were sustained by the trial court.[4] The jury convicted Gremillion of manslaughter, and the third circuit court of appeal affirmed.[5] The Louisiana Supreme Court reversed and remanded,[6] ruling that although Dupuy's statement to the police officer describing his attackers as "three white males" did not qualify under the res gestae,[7] excited utterance,[8] dying declaration,[9] or business records[10] exceptions to the hearsay rule, the statement was otherwise trustworthy and reliable. Thus, apparently finding that the statement would be admissible under a residual exception, if the Louisiana Code of Evidence had a residual exception applicable in criminal cases,[11] the supreme court concluded that failing to admit the statement violated Gremillion's constitutional right to present a defense.[12]

II. SCOPE OF NOTE

The Louisiana Code of Evidence, unlike the Federal Rules of Evidence, conspicuously lacks a residual hearsay exception applicable in

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4. Id. at 1076. The state's objections came only after the police officer had related Dupuy's statement regarding the description of his attackers. Nevertheless, the objection was sustained, and the jury was later instructed to disregard the statement.

5. State v. Gremillion, 529 So. 2d 497 (La. App. 3d Cir. 1988).

6. *Gremillion*, 542 So. 2d at 1074.

7. Id. at 1077. La. R.S. 15:447, repealed by 1988 La. Acts No. 515, § 8, stated: "Res gestae are events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants, and not the words of the participants when narrating the events. What forms any part of the res gestae is always admissible in evidence." (Dupuy's statement was made 19 hours after the incident and was thus too far removed to be considered part of the res gestae.).

8. Id. "[T]he statement is also not admissible as an excited utterance since it was made after Dupuy had time to contemplate the event, and not while he was still under the influence of a startling event."

9. Id. "Dying declarations are admissible if made when the declarant is fully conscious of his condition and under a sense of impending death, after having abandoned all hope or expectancy of recovery." The court concluded that Dupuy was not aware of his impending death.

10. Id. at 1078. Although the statement was recorded by the police officer in the course of his employment, "[t]he contents of the report are based on hearsay, and are not admissible as a business record."

11. La. Code Evid. art. 804B(6), the residual exception, is limited to *civil* cases while Fed. R. Evid. 804(b)(5), the federal residual exception, is applicable to civil *and* criminal cases. Nevertheless, comment (d) to Article 804B(6) states that although the exception is limited to civil cases, a similar result, as that authorized by the exception, may be mandated in criminal cases by the right of compulsory process in certain circumstances.

12. *Gremillion*, 542 So. 2d at 1079. La. Const. art. I, § 16 states, in pertinent part: "An accused is entitled to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, *to present a defense*, and to testify in his own behalf." (emphasis added).

this criminal case. The *Gremillion* court, however, ruled that testimony that was not otherwise admissible under any of the hearsay exceptions was nonetheless admissible as exculpatory evidence in this case. In rendering the court's opinion, Chief Justice Dixon relied on three factors: the supposed reliability and trustworthy nature of the statement, the Louisiana Code of Evidence residual hearsay exception for civil cases, Article 804B(6) and the comments thereto, and the accused's constitutional right to present a defense.

The court's holding in *Gremillion* raises critical issues for future criminal cases. First, what quantum of reliability and/or necessity must be reached to admit evidence pursuant to *Gremillion*? Second, is the standard of admissibility articulated in *Gremillion* based on evidentiary standards, constitutional standards, or both? Finally, may *Gremillion* be cited by the *prosecution* in a criminal case as authority for allowing the introduction of otherwise inadmissible hearsay evidence that possesses some measure of reliability and necessity? A discussion of these questions and others resulting from the *Gremillion* decision form the scope of this note.

This note will first present a brief historical overview of hearsay and its codification by the Federal Rules of Evidence and the Louisiana Code of Evidence, focusing on the similarities and differences between the respective residual exceptions. Next, the impact of the constitutional right to present a defense upon evidentiary standards will be evaluated. Specifically, it will be determined whether the threshold for admissibility of "reliable" evidence is lower under constitutional standards than under evidentiary exceptions. An analysis of the *Gremillion* decision and an attempt to clarify the parameters of its holding in terms of evidentiary and constitutional principles follows. Finally, the rationale for limiting the Louisiana Code of Evidence residual exception to civil cases will be examined in light of possible confrontation clause violations.

III. HEARSAY

A. Historical Overview

Although hearsay is the most frequently occurring evidentiary problem,[13] its frequency has not dulled its complexity. Characterized as the "single most important evidentiary rule in American Common Law,"[14]

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13. P. Rothstein, Federal Rules of Evidence: An Update 170 (1981) [hereinafter Rothstein]. Hearsay encompasses more than 60% of the evidence questions raised at trial.

14. Lilly, Notes on the Confrontation Clause and *Ohio v. Roberts*, 36 U. Fla. L. Rev. 207, 209 (1984) [hereinafter Lilly].

the hearsay rule has given rise to innumerable definitions and criticisms.[15]

Standing guard against the admission of evidence precategorized as "unreliable," the hearsay rule recognizes that, lacking the declarant's presence in court, the jury must grapple with evidence without benefit of oath, demeanor, and cross-examination, and without the probative value inherent in assessing the in-court declarant's perception, memory, and narration.[16] However, while the prohibition generally excludes unreliable evidence and thus safeguards the accused's Sixth Amendment right to confront witnesses,[17] this same prohibition has a contrary effect on the defendant's right to present a defense by denying admission of evidence from which the jury might infer the defendant's innocence.

Historically, each of the hearsay exceptions has been based on the reliability of the evidence, factoring in the necessity of its admission. It is this correlative relationship between reliability (trustworthiness) and necessity that is the cornerstone of the residual or omnibus hearsay exception.[18]

B. The Residual Exception: Comparing and Contrasting the Federal Rules of Evidence and the Louisiana Code of Evidence

The hearsay rule is phrased in terms of inadmissibility, with evidence allowed only under delineated exclusions[19] and exceptions,[20] including a

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15. See, e.g., State v. Johnson, 438 So. 2d 1091 (La. 1983); Fed. R. Evid. 801(c); La. Code Evid. art. 801C. See generally Imwinkelried, The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence, 15 San Diego L. Rev. 239, 262 (1978) [hereinafter Imwinkelried], in which he states, "Rather than ensuring extraordinary reliability, the traditional exceptions permit the admission of hearsay of frankly dubious reliability."

16. J. Weinstein & M. Berger, Weinstein's Evidence Manual ¶ 14.01[01] (1988) [hereinafter Weinstein, Evidence Manual]. See also J. Maguire, Evidence: Common Sense and Common Law at 17 ff. (1947). Cross-examination permits the jury to determine the witness' willingness and ability and thus assess sincerity, comprehension, communicative skills, and perception.

17. U.S. Const. amend. VI. See State v. Thompson, 331 So. 2d 848, 849 (La. 1976), where in addressing the admission of hearsay evidence, the Louisiana Supreme Court stated, "The traditional exclusion of hearsay in Anglo-American jury trials is based upon historic considerations of unreliability and of potential unfairness to an accused to permit into evidence damaging out-of-court statements which cannot be tested as to their basis in fact, or by cross-examination of the out-of-court declarant."

18. See Senate Committee on Judiciary, Fed. R. Evid., S. Rep. No. 1277, 93d Cong., 2d Sess. 18 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 7051, 7065. See also Dallas County v. Commercial Union Assoc. Co., Ltd., 286 F.2d 388 (5th Cir. 1961). For other cases recognizing the admissibility of hearsay possessing the requisite necessity and reliability but falling outside other exceptions, rendered prior to enactment of the Federal Rules of Evidence and the Louisiana Code of Evidence, see Burley v. Louisiana Power & Light Co., 319 So. 2d 334 (La. 1975); Francis I. duPont & Co. v. McMikle, 230 So. 2d 677 (La. App. 2d Cir. 1970); Salley Grocer Co. v. Hartford Accident and Idem. Co., 223 So. 2d 5 (La. App. 2d Cir. 1969).

19. Fed. R. Evid. 801(d)(1)-(2); La. Code Evid. art. 801D(1)-(4).

20. The Federal Rules of Evidence have 27 exceptions: 803(1)-(23), 804(b)(1)-(4), and

residual category. Both the federal and Louisiana courts, under their respective rules of evidence, lack authority to create hearsay exceptions beyond those enumerated, despite the frequent, although erroneous, characterization of the residual exception as a "catch-all" category.[21]

The newly enacted Louisiana Code of Evidence is the first unified, comprehensive approach to state evidentiary problems available to the Louisiana bar and bench.[22] The Code is based substantially on prior Louisiana case law and statutes, as well as the Federal Rules of Evidence.[23] Louisiana courts, however, are bound neither by the federal courts' interpretations of the Federal Rules nor by prior statutory interpretations rendered by Louisiana courts.[24]

The redactors of the Louisiana Code of Evidence deviated from the federal provisions on occasion. For the purpose of this note, the most significant of these deviations was in the drafting of the residual exception. This author assumes that the differences in wording between the federal and state residual exceptions are purposeful and warrant careful consideration in comparison and interpretation.

Generally, the codification of the residual exceptions in the Federal Rules of Evidence (the "Rules") represents a compromise between a rigid exclusionary rule and a rule permitting admission of all hearsay merely upon a showing of unavailability of the declarant.[25] The Rules maintain two residual exceptions, one in which availability of the declarant is immaterial (803(24)), and one requiring a demonstration that the declarant is unavailable (804(b)(5)). Both are applicable in criminal *and* civil cases. The redactors of the Federal Rules clearly avoided a distinction between the civil and criminal rules of evidence, apparently believing that the provisions of the sixth amendment, as well as other

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two residual exceptions, 803(24) and 804(b)(5). The Louisiana Code of Evidence has 29 exceptions: 803(1)-(24), 804B(1)-(5), and one residual exception, 804B(6).

21. See Rothstein, supra note 13, at 219. The author states, "The intention of the rule as finally drafted was most assuredly not to catch 'all' or even 'most.'" Rothstein goes further to say that "Congress clearly meant to leave the vast majority of over-the-back-fence or on-the-street or in-the-halls statements inadmissible hearsay." See also La. Code Evid. art. 804B(6) comment (b) which states that "the exception is not to be used to emasculate the hearsay rule, as its counterpart in the federal rules is sometimes said to be employed."

22. See Pugh, Force, Rault, & Triche, The Louisiana Code of Evidence—A Retrospective and Prospective View, 49 La. L. Rev, 689 (1989) (a detailed history of the codification of the Louisiana Code of Evidence), reprinted in G. Pugh, R. Force, G. Rault, & K. Triche, Handbook on Louisiana Evidence Law (1989).

23. La. Code Evid. art. 101 comment (a).

24. La. Code Evid. art. 102 comment (a).

25. See Pugh, Foreword—Symposium, The Federal Rules of Evidence, 36 La. L. Rev. 59 (1975), for a thorough account of the evolution of the Federal Rules of Evidence.

provisions in the Rules, would provide adequate protection to the criminal defendant.[26]

In contrast, the sole residual exception in the Louisiana Code of Evidence, 804B(6), is, on its face, limited to *civil cases* where the declarant is unavailable. Thus the Louisiana residual exception is purposefully narrower than its federal counterpart.[27] The Louisiana Code of Evidence, in which the redactors clearly articulate a preference for live witness testimony,[28] is unique in this limitation on the residual exception.[29]

C. *Elements of Admissibility Under the Residual Provisions*

There is an obvious reluctance to allow the judiciary unlimited discretion in the application of the hearsay exceptions. Otherwise, predictable rulings would fall prey to extensive evidentiary uncertainties, causing the failure of practitioners' strategic courtroom planning.[30] For hearsay evidence to be admissible under the residual exception, certain prerequisites, aimed at assuring reliability and measuring necessity, must be satisfied. These prerequisites differ markedly between the Federal Rules of Evidence and the Louisiana Code of Evidence.[31]

Federal Rule 804(b)(5) requires that, for testimony to be admitted, the declarant be unavailable and that the statement possess circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions (804 (b) (1-4)).[32] The statement must also: (a) be offered as evidence of

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26. 4 J. Weinstein, Weinstein's Evidence ¶ 800[02] (1988).

27. La. Code Evid. art. 804B(6) comment (b).

28. 1988 La. Acts No. 515, § 1 at Article 804B(6) original comment (f).

29. Eleven states adopted the Federal Rules' residual exceptions verbatim: Alaska, Arizona, Arkansas, Colorado, Idaho, Iowa, Mississippi, New Mexico, Utah, West Virginia, and Wyoming. Nevada adopted the version set forth in the 1969 Preliminary Draft of the Rules. Nonsubstantive word changes were made by Nebraska, South Dakota, and Hawaii, while the requirements regarding notice were varied in Minnesota, New Hampshire, North Carolina, North Dakota, Oklahoma, and Oregon. Delaware, finding the residual exceptions repetitive, adopted only the Article 803(24) provision, and seven states—Florida, Maine, Michigan, Ohio, Texas, Vermont, and Washington—chose not to enact *any* residual exception. See generally G. Joseph, S. Saltzburg, & the Trial Evidence Committee of the American Bar Association Section of Litigation, Evidence in America: The Federal Rules in the States (1987) [hereinafter Joseph].

30. But see Rothstein, supra note 13, at 221, in which he states that "even under the current limited version of the power [granted by the Federal Rules of Evidence], there are widely divergent interpretations of its reach."

31. Of course, to be deemed admissible, hearsay evidence must not only satisfy the requirements of the applicable residual exception but must also meet the criteria established by the rules on relevancy, personal knowledge, authentication, best evidence, opinion, and privilege.

32. See Joseph, supra note 29, at 85-90; see also Black, Federal Rules of Evidence 803(24) & 804(b)(5)—The Residual Exceptions—An Overview, 25 Hous. L. Rev, 13 (1988) (factors the court will consider in assessing the trustworthiness of the statement).

a material fact; (b) be more probative on the point in issue than other evidence which could be procured through reasonable means; and (c) serve the general purposes of the rules and the interests of justice. Requirements (a)-(c) are thus essentially reiterations of both the requirement of relevancy and the general guidelines for interpretation of the rules.[33]

In drafting the Louisiana Code of Evidence, the redactors deemed requirements (a) and (c) unhelpful and therefore deleted those provisions.[34] The redactors then restructured requirement (b), the requirement of probative value, to "give greater guidance to the courts as to what should be required for admissibility."[35] Specifically, the Louisiana provision requires that the proponent adduce or make a reasonable effort to adduce "all other admissible evidence to establish the fact to which the proffered statement relates."

The requirement of trustworthiness in the Louisiana Code of Evidence imposes a more rigorous standard on litigants than its federal counterpart.[36] The Louisiana version is more stringent because trustworthiness is not demonstrated through the comparison to the other enumerated hearsay exceptions, which exceptions vary enormously in the guarantee of trustworthiness required for admission.[37] Rather, under the Louisiana Code of Evidence, the evidence must satisfy the requirement of "trustworthiness" independent of any comparison with the hearsay exceptions. Specifically, the Louisiana court must "consider all pertinent circumstances in the particular case" and examine "matters both intrinsic and extrinsic to the statement itself."[38] The Federal Rules only require, at the least, the proof of a level of "trustworthiness" equivalent to the lowest common denominator of the enumerated exceptions, and, at the most, a "consensus average."[39]

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33. Joseph, supra note 29, at 85, 90. Requirement (a) is essentially a restatement of the relevancy requirements found in Federal R. Evid. 401-412; requirement (c) is virtually an identical requirement to that enunciated in Fed. R. Evid. 102.

34. 1988 La. Acts No. 515, § 1 at Article 804B(6) original comment (e).

35. Id. at original comment (d).

36. Id. at original comment (c). "[T]his Subparagraph imposes a much more rigorous trustworthiness requirement than its counterparts in the federal rules."

37. C. McCormick, McCormick on Evidence § 324.1, at 908 (1984) [hereinafter McCormick] ("the range in degree of trustworthiness among the specific exceptions is admittedly considerable"). For an overview of the application of the Federal Rules' residual exceptions see generally Imwinkelried, supra note 15; and Sonenshein, The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule, 57 N.Y.U. L. Rev. 867 (1982).

38. 1988 La. Acts No. 515 at Article 804B(6) original comment (c).

39. McCormick, supra note 37, § 324.1, at 908.

IV. *STATE v. GREMILLION*: HEARSAY AND THE CRIMINAL TRIAL

The redactors of the Louisiana Code of Evidence did not limit the residual exception to civil cases in an attempt to make it more difficult for a criminal defendant to introduce evidence in his favor. Rather, the exception was limited to prevent prosecutors from introducing evidence of dubious reliability *against* the defendant, possibly violating the defendant's right to confrontation. The exception was also limited to prevent courts from construing federal and state evidentiary rules interchangeably and applying decisions under the former to the latter.

Regardless of the lack of a theoretical distinction between the common law rules of evidence in the criminal and civil trial,[40] the scope of the hearsay exceptions are more restrictive in the criminal trial[41] because of the inherent differences in the goals of the criminal and civil proceedings.[42] Further, Louisiana's reluctance to admit hearsay falling outside an established hearsay exception recognizes that the reasons for excluding hearsay are more critical in a criminal trial where the accused's freedom, and possibly his life, are at stake, and where constitutional concerns are paramount.[43]

It is not surprising, therefore, that there are no reported cases in Louisiana in which otherwise reliable evidence falling outside an established exception was admitted under the residual exception *against* the defendant in a criminal trial.[44] But what about when that same evidence

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40. Comment, Were the Louisiana Rules of Evidence Affected by the Adoption of the Louisiana Code of Criminal Procedure, 14 La. L. Rev. 568 (1954), reprinted in G. Pugh, Louisiana Evidence (1974).

41. R. Lempert & S. Saltzburg, A Modern Approach to Evidence 382 (1982) [hereinafter Lempert]. Cf. id. at 382 n.49, stating,

> In some cases it might be so unreasonable for a civil jury to base a judgment on certain hearsay that the use of the evidence would violate the due process clause of the fifth or fourteenth amendment. Thus, there might be constitutional limitations on the admissibility of hearsay evidence even in civil cases.

42. For an explanation that the criminal trial is not so much a "truth-determining process" as "a probability of guilt-determining process," see generally Pulaski, Criminal Trials: A "Search for Truth" or Something Else?, 16 Crim. L. Bull. 41, 45 (1980). For an overview of the critical differences in a criminal trial—including the factors resulting from restrictions on discovery, the in-custody status of witnesses, the impact of the exclusionary rules, the risk of prejudice to the accused and the confrontation clause—see generally 4 J. Weinstein, supra note 26, at ¶ 800[04].

43. See, e.g., State v. Monroe, 345 So. 2d 1185, 1189 (La. 1977) ("In criminal trials . . . the accused's constitutional rights to confront and cross-examine the witnesses against him are of paramount concern.").

44. In what is the only mention of a residual exception in a criminal case prior to the enactment of the Louisiana Code of Evidence, Justice Lemmon, who also authored a concurring opinion in *Gremillion*, dissented in State v. Martin, voicing a reluctance to admit hearsay under a residual exception absent specific legislation. Justice Lemmon said, "Arguably, if the Legislature had enacted an 'omnibus' hearsay exception such as Fed.

is offered *by* the defendant? While a residual exception could be utilized unfairly by the prosecution, denying the *defendant* use of hearsay not falling under an established exception may "amount to a denial of due process if the declarant is unavailable and the evidence is *reasonably* reliable."[45]

The supreme court in *Gremillion* realized that in balancing the defendant's constitutional rights against the State's interest in excluding unreliable evidence, the rule against hearsay *must*, in some cases, yield to constitutional concerns. Certainly, the more reliable the evidence, the more the scale tips in favor of admissibility. But the question remains: what quantum of reliability and/or necessity is required to render the evidence "reasonably reliable?" This writer believes that in *Gremillion*, where hearsay evidence was admitted pursuant to constitutional principles of "fairness," rather than under evidentiary principles, the threshold of reliability required for admission fluctuates—and may even be lowered further than in *Gremillion*—depending upon how critical the evidence is to the defendant's defense. Thus, where the hearsay is the *only* evidence the defendant offers to exculpate himself, as Gremillion attempted to do by introducing Dupuy's statement, the critical nature of the evidence, rather than its reliability, is the deciding factor that determines admissibility.

In *Gremillion*, tension existed between the state evidentiary rule against hearsay and Gremillion's constitutional right to present a defense. This tension will not be reduced in future cases because the Louisiana Supreme Court did not articulate distinct and separate standards applicable to evidentiary admissions and to constitutional admissions. The court opined that Gremillion's constitutional right to present a defense mandated that "while the statement does not fit into any of the recognized exceptions to the hearsay rule, it should have, nevertheless, been admitted into evidence due to its reliability and trustworthy nature."[46] The court further compounded the confusion by defining reliability and trustworthiness according to the guidelines established in the civilly-limited residual exception, an evidentiary standard, instead of defining the terms under a constitutional standard.

R. Evid. 803(24) and 804(b)(5), leaving to the courts the perogative [sic] to admit hearsay *not* falling within the traditional exceptions but having equivalent circumstantial guarantees of trustworthiness and reliability, such a statement *might* qualify as admissible hearsay." State v. Martin, 458 So. 2d 454, 464 (La. 1984) (Lemmon, J., dissenting). See also Proposed La. Code Evid. art. 804(B)(6) comment (a); L. Westerfield, Westerfield's Louisiana Evidence § 9-42, at 229 (1986).

45. 4 J. Weinstein, supra note 26, at ¶ 803-(24)[01], citing Comment, The Criminal Defendant and Hearsay Evidence: Time for a Change, 47 Tex. L. Rev. 250, 265 (1969) (emphasis added).

46. State v. Gremillion, 542 So. 2d 1074, 1078 (La. 1989).

Even if the residual exception for civil cases provided in the Louisiana Code of Evidence was stretched by a broad reading of *Gremillion* to include admissibility of evidence in criminal cases when offered by the defendant, Dupuy's statement to the police officer should still not have been admissible under the residual standard. This author believes that the statement lacked the quantum of reliability required under even the civil residual exception. The residual civil exception expressly requires that the court consider *all* pertinent circumstances in making a determination as to the statement's trustworthiness. Dupuy's statement lacked spontaneity, a traditional measure of reliability, and the circumstances of its utterance indicate that the statement may have been affected by his emotional and intellectual condition. Having been rendered unconscious during the altercation with Gremillion, Dupuy's perception and memory may have been distorted as well. Further, Dupuy's sincerity is questionable; since Dupuy's wife was involved in the barroom incident, Dupuy's statement may have been motivated by a desire to protect her from criminal charges.[47]

Since the evidence was admitted under a constitutional standard, although it would not have met an evidentiary standard, the Louisiana Supreme Court's standard for reliability must be less strenuous under the constitutional right to present a defense than it is under the residual exception for civil cases. It should also be noted that had Dupuy's statement been proffered by the *prosecution*, it would have been inadmissible, since the prosecution lacks a right to present evidence that is correlative to the defendant's constitutional right to present a defense.

Would Dupuy's statement have been admissible under the Federal Rules of Evidence? Yes, Dupuy's statement would be admitted since it satisfies the requirements of comparative reliability established by the Rules residual exception, whether offered by the defendant or by the prosecution. As discussed earlier, the federal residual exception requires that the evidence have "equivalent circumstantial guarantees of trustworthiness," that its admission is in the interests of justice, and that it is material and highly probative. Dupuy's statement has characteristics of reliability that would certainly measure up to some, but not all, of the recognized hearsay exceptions.[48]

V. The Right To Present A Defense

Evidentiary rules and constitutional safeguards for the criminal defendant do not stand on equal footing. Whereas evidentiary rules focus

47. See generally 4 J. Weinstein, supra note 26, at ¶ 800[01], for an overview of the hearsay rule and the problems encountered in analyzing testimonial proof.

48. See Imwinkelried, supra note 15, at 262 ("The hearsay statements admitted under the orthodox exceptions vary greatly in their reliability."); Weinstein, Evidence Manual, supra note 16, at ¶ 14.04[01] (A lesser showing of trustworthiness is sufficient when evidence is admitted under Federal Rule 804 rather than 803.).

on the reliability of the proffered evidence, the constitutional principle embodied in the right to present a defense "focus[es] judicial attention on the *fairness* of the rule . . . to the accused."[49] United States Supreme Court decisions over the last 20 years have indicated that, under certain circumstances, the constitutional right to place relevant evidence before the trier of fact, in developing a defense, will preempt contrary state evidentiary rules.

In *Gremillion*, since Dupuy's statement fell outside the enumerated hearsay exceptions, including the civilly-limited residual exception, the hearsay rules would preclude admission of the statement. The Louisiana Supreme Court, however, ruled that the accused's constitutional right to present a defense, as embodied in Louisiana Constitution Article I, Section 16, overrode the absence of an applicable hearsay exception, citing as authority the case of *Chambers v. Mississippi*,[50] among others.

Chambers v. Mississippi, which broke new constitutional ground, is essential in a discussion concerning the relationship between evidentiary principles and constitutional guarantees.[51] In *Chambers*, the Supreme Court ruled that denying the defendant's right to present three witnesses who would exculpate him, even though such evidence was inadmissible under Mississippi evidentiary rules,[52] was a violation of the defendant's right to due process under the sixth and fourteenth amendments. The Court stated, "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses in one's own behalf have long been recognized as essential to due process."[53]

This decision paved the way for the constitutionally-mandated admission of otherwise inadmissible hearsay offered by a criminal defendant despite Justice Powell's admonishment that the Court did not intend creation of new principles of constitutional law.[54] Consequently, the *Chambers* decision has forced courts to admit critical evidence that state evidentiary laws would have prohibited.[55] The *Chambers* Court succinctly

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49. Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee In Criminal Trials, 9 Ind. L. Rev. 711, 797 (1976) [hereinafter Clinton].

50. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038 (1973).

51. See generally Churchwell, The Constitutional Right to Present Evidence: Progeny of Chambers v. Mississippi, 19 Crim. L. Bull. 131 (1983) [hereinafter Churchwell]; Clinton, supra note 49; Pugh & McClelland, Evidence, The Work of the Louisiana Appellate Courts for the 1973-74 Term, 35 La. L. Rev. 525, 544 (1975).

52. Mississippi did not recognize the declaration against penal interest as an exception to the hearsay rule. A second issue in *Chambers* involved the unconstitutionality of Mississippi's "voucher rule" as applied under the circumstances. The discussion of that issue is beyond the scope of this note.

53. *Chambers*, 410 U.S. at 294, 93 S. Ct. at 1045.

54. Id. at 303, 93 S. Ct. at 1049.

55. Churchwell, supra note 51, at 139.

defined the relationship between the hearsay and the accused's constitutional guarantees: "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."[56]

Chambers, as well as its predecessors and progeny,[57] recognize that the right to present a defense is an essential feature of the defendant's right to a fair trial.[58] But how far does the right to present a defense extend? Is it a quantifiable guarantee? Specifically, what evidence must be admitted under the right to present a defense? Certainly, not all the

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56. *Chambers*, 410 U.S. at 303, 93 S. Ct. at 1049.

57. See, e.g., Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920 (1967). Although the issue in *Washington* was based on the narrower right of compulsory process, it is significant in that the unconstitutionally excluded testimony lacked any particular indicia of reliability. Defendant had the right to compel the attendance of a witness whose testimony would have been favorable to him despite a state statute which "arbitrarily" denied him the right. As with the right to present a defense, compulsory process is not without its parameters; compulsory process does not embrace such "rights" as finding missing witnesses or paying for defense witnesses at government expense. See B. Schwartz, Constitutional Law § 7.13 (2d ed. 1979) [hereinafter Schwartz]; State v. Vaughn, 448 So. 2d 1260, 1262 (La. 1983) (On original hearing the court stated that a rule of evidence "cannot be mechanistically applied to deny admission of highly reliable and relevant evidence critical to an accused's defense." On rehearing, the statement regarding the rape complainant's reputation was excluded as irrelevant.); State v. Jones, 363 So. 2d 455, 457 (La. 1978) (Defendant was deprived of his constitutional right to compel the attendance of witnesses and "in some measure" of his constitutional right to present a defense when co-perpetrator, who had not invoked the fifth amendment privilege against self-incrimination, did not testify based on fear of reprisal.); State v. Browning, 290 So. 2d 322 (La. 1974), discussed in Pugh & McClelland, supra note 51, at 545 (If defendant had succeeded in "lay[ing] a predicate sufficiently linking a third person to the crime in question, Chambers v. Mississippi might well have necessitated a relaxation of traditional evidentiary rules."); State v. Drumgo, 283 So. 2d 463, 469 (La. 1973) (The Louisiana Supreme Court upheld a decision prohibiting defense counsel from questioning defense witness, a police officer, regarding description of armed robbers by other complainants. Although the trial court's decision was grounded in irrelevancy and immateriality, hearsay was also implied as a basis for the ruling. The court stated, "Perhaps in different circumstances [where fairness and reason dictate] we would not find strict adherence to the hearsay rule required. However, in the instant case we do not find that the trial court abused its discretion in excluding the hearsay testimony sought by defense counsel."); State v. Rabbas, 278 So. 2d 45, 47 (La. 1972) (The Louisiana Supreme Court ordered a new trial on other grounds, but, in dicta, stated that the defendant's right to introduce evidence in support of his defense of entrapment should, in the future, carefully consider Chambers v. Mississippi.). Cf. State v. Smith, 400 So. 2d 587 (La. 1981) (Hearsay testimony of a witness regarding a third party's confession which would exculpate the defendant was not a violation of the defendant's right to present a defense where the declarant's unavailability was not shown and the statement did not qualify as a declaration against penal interest.). See generally W. Freedman, The Constitutional Right to a Speedy and Fair Criminal Trial 17 (1989) (The defendant may only introduce evidence that is "material and favorable to his defense.").

58. Clinton, supra note 49, at 857. See generally Schwartz, supra note 57, at § 7.12.

evidentiary rules that limit the defendant's introduction of evidence in his behalf are "unconstitutional obstructions."[59] Some commentators have interpreted *Chambers* to allow the defendant a fair opportunity to defend against the State's accusations by developing "all available, reasonably reliable evidence in his defense."[60] Others have read *Chambers* more broadly, stating that "even where the defendant is prevented from developing only a single piece of evidence in his defense, no one but the trier of fact can say whether the additional bit of evidence in conjunction with the other evidence would have been sufficient to exculpate the defendant."[61] Still other commentators interpret *Chambers* narrowly, holding only that a defendant in a criminal case cannot be convicted without *any* defense.[62] These views can be reconciled by focusing on the critical nature of the evidence: where the evidence is critical to the accused's defense, as where it is the only exculpatory evidence available, hearsay evidence that lacks even "extrinsic indicia of reliability might be constitutionally compelled."[63] This result is rooted in the very concept of a fair and impartial trial. Thus, as under the residual exception, courts must proceed on an *ad hoc* basis when determining if otherwise inadmissible hearsay evidence is admissible under the constitutional right to present a defense as guaranteed by the sixth and fourteenth amendments. Rather than focusing exclusively on the reliability of the hearsay statement, the courts should focus on the interests protected by the accused's right to present a defense.[64]

In achieving this focus, the *Chambers* Court and subsequent cases employed a balancing test to determine the admissibility of evidence, with the outcome dependent on the subtle facts and circumstances of each case. However, if the hearsay possesses a minimum of reliability, the question then becomes, is justice better served by its admission or its exclusion?[65] The Louisiana Supreme Court answered this question in

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59. Clinton, supra note 49, at 793.

60. Schwartz, supra note 57, at § 7.15 (Even allowing legislative authority over rules of evidence, the defendant in a criminal trial has a due process right to introduce "any evidence" so long as it is competent, relevant, and material.); Comment, Chambers v. Mississippi: The Limits of Due Process—The "Voucher" Rule and the Exception for Hearsay Declarations Against Interest, 4 N.Y.U. Rev. L. & Soc. Change 191, 206 (1974) [hereinafter Chambers v. Mississippi: The Limits of Due Process].

61. Chambers v. Mississippi: The Limits of Due Process, supra note 60, at 205-06.

62. Note, Chambers v. Mississippi: Due Process and the Rules of Evidence, 35 U. Pitt. L. Rev. 725, 738 (1974). But see Green v. Georgia, 442 U.S. 95, 100, 99 S. Ct. 2150, 2152 (1979) (Rehnquist, C.J., dissenting) ("[T]he United States Constitution must be strained to or beyond the breaking point to conclude that all capital defendants who are unable to introduce all of the evidence which they seek to admit are denied a fair trial.").

63. Clinton, supra note 49, at 809.

64. Id. at 807.

65. Lempert, supra note 41, at 506.

Gremillion, finding justice better served by admission of evidence. This results from the supreme court's finding that the proffered evidence must, at the very least, possess relevancy and, at most, *some* reliability.[66] The question of how much reliability is needed is unanswered.

Although the redactors of the Louisiana Code of Evidence chose to keep constitutional and evidentiary standards separate,[67] the *Gremillion* decision confuses these issues. The *Gremillion* court may have stretched the residual exception beyond its limits, reading into that case indicia of reliability that, from an objective examination of the facts and circumstances surrounding the utterance of Dupuy's statement, were lacking. *Gremillion* may be interpreted as establishing a threshold of reliability and necessity under the residual exception that parallels the threshold for constitutionally mandated admission established by *Chambers* and its progeny.[68] As discussed earlier, the evidentiary standard of

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66. See supra note 57. See also State v. Ludwig, 423 So. 2d 1073, 1079 (La. 1982) (Defendant, on trial for murder, attempted to introduce police report and testimony of police officer regarding the fact that victim's wife had shot victim six months earlier, thus inferring that victim's wife, rather than defendant, was guilty. The Louisiana Supreme Court stated, "[State and Federal] constitutional guarantees do not, however, require a trial court to permit introduction of evidence that is irrelevant or which has so little probative value that it is substantially outweighed by other legitimate considerations in the administration of justice."); State v. Glaze, 439 So. 2d 605 (La. App. 1st Cir. 1983) (In dicta, the first circuit stated that an exculpatory statement made to police officer during custodial interrogation was of slight probative value and thus denying admissibility did not violate defendant's right to present a defense.).

67. La. Code Evid. art. 102 comment (b).

> The rules and procedures embodied in the Articles of this Code do not represent an attempt to interpret the Federal or Louisiana constitution. Constitutional questions should be resolved by the principles and rules of constitutional law. [Citations omitted] In criminal matters especially the Articles of this Code must be interpreted and applied in light of and within the confines mandated by the Louisiana and federal constitutions.

68. Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150 (1979) (Defendant sought to introduce witness's testimony at a sentencing hearing that co-defendant had admitted he killed the victim while defendant was on an errand. The Court found the evidence reliable, due to circumstances surrounding its utterance. The United States Supreme Court gave weight to the fact that the state had found the witness's testimony sufficiently reliable to support the co-defendant's conviction.); State v. Webb, 424 So. 2d 233 (La. 1982) (Two men were accused of murder and the pretrial hearing indicated that the co-defendant's defense was based on lack of specific intent. Under such circumstances, denial of motion to sever impaired defendant's right to present a defense, where motion made by co-defendant inured to other's benefit. A second violation of the right to present a defense occurred when co-defendant was not permitted to cross-examine police detective regarding the other defendant's confession, from which evidence the jury could have inferred a lack of intent.); State v. Washington, 386 So. 2d 1368, 1373 (La. 1980) (The constitutional violation occurred when evidence was declared inadmissible, not on the basis of hearsay, but on the grounds of relevancy. Defendant, on trial for rape, was prohibited from interrogating prosecution witness concerning other child rapes in the area, violating his

reliability should continue to require a showing of trustworthiness that is higher than that established under the balancing test for constitutional admissions.

Simply stated, if *Gremillion* establishes the standard of trustworthiness under the constitutional right to present a defense, the standards for evidentiary and constitutionally mandated admission of "trustworthy" evidence will be impermissibly merged into one standard. That is because the *Gremillion* court used an evidentiary standard, the civil exception, to evaluate a constitutional principle, the right to present a defense. Therefore, what would have been admitted under a constitutional standard of trustworthiness will now be excluded by the more rigorous evidentiary standard found in the residual exception. This result is the very one the redactors of the Louisiana Code sought to avoid by not codifying a residual exception applicable in criminal cases. Although the *Gremillion* court may not have desired such a result, the Louisiana Supreme Court's reference to Article 804B(6),[69] and the apparent weighing of Dupuy's statement using the residual evidentiary scale, has created the possibility for this interpretation of the decision at the lower court level.

VI. *STATE V. GREMILLION*: ANALYSIS

A. Applying Chambers *to* Gremillion

Generally, where evidentiary and constitutional principles clash, the latter will prevail. However, it may be unclear whether a particular decision is based on constitutional or evidentiary principles. For example, Justice Powell's opinion in *Chambers* did not state whether that decision was rooted in constitutional or evidentiary principles,[70] although the substantial emphasis placed on assuring the reliability of the hearsay evidence[71] might suggest evidentiary principles. Regardless, *Chambers* was constitutionally sound. The mechanistic application of a hearsay exclusionary rule, where the defendant sought to admit evidence critical to his defense, i.e. the confession of another to the crime for which the defendant was on trial, and where the declarant was available for cross-examination, violated a basic tenet of constitutional law—the right to a fair trial.[72]

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constitutional right to present a defense. The Louisiana Supreme Court characterized such a situation as "fundamentally unfair.").

69. State v. Gremillion, 542 So. 2d. 1074, 1078 (La. 1989).

70. Clinton, supra note 49, at 787.

71. Id.

72. See Id. at 792 (*Chambers*' holding is a "ringing endorsement of the right to defend."); See also Churchwell, supra note 51.

It is likewise unclear whether the *Gremillion* decision is based on constitutional or evidentiary standards. The basis of the decision is important as it defines the scope of the holding, of which there are three possibilities: (1) Article 804B(6) allows the introduction of evidence in a criminal trial both by the prosecution and the defense, if the statement meets the criteria established in the decision;[73] (2) otherwise inadmissible hearsay, may be admitted by the *defendant* in a criminal trial, only if denial of admission would infringe upon the defendant's constitutional right to present a defense; or (3) evidence admitted pursuant to (2) requires reliability and necessity as measured by Article 804B(6), as opposed to a constitutional standard.

Although the court cited the constitutional right to present a defense as the impetus for its decision, the *Gremillion* court, as did the *Chambers* Court, focused on assessing the reliability and the trustworthiness of the evidence. In *Chambers*, the United States Supreme Court, faced with Mississippi's lack of a hearsay exception for a declaration against penal interest, devoted much of the decision to an explanation of the requirements of the newly created exception and the application of the exception to the proffered evidence.[74] In *Gremillion*, the Louisiana Supreme Court was faced with a different problem—the lack of a residual exception in criminal cases. The *Gremillion* court focused on comment (d) to Article 804B(6), which states:

> Although the exception set forth in this Subparagraph is limited to civil cases, under certain circumstances results similar to those authorized by this exception may be mandated by the right of compulsory process when an accused in a criminal case offers reliable trustworthy evidence not fitting within the contours of a legislatively recognized exception to the hearsay rule.[75]

Thus, both *Gremillion* and *Chambers* measured the reliability of the proffered statements against unenacted hearsay exceptions.[76] The *Grem-*

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73. See State v, Gremillion, 542 So. 2d 1074, 1080 (La. 1989) (Marcus, J., dissenting). Justice Marcus interpreted *Gremillion* as extending the Article 804B(6) residual exception to criminal cases, questioning "the majority's conclusion that the statement . . . was admissible under La. Code of Evidence, article 804B(6)." Most likely in response to Justice Marcus' conclusion, Justice Lemmon stressed in his concurring opinion that *Gremillion* was an unusual case which "necessitate[d] an exception to the usual rules of evidence on the basis of the Louisiana constitutional right to present a defense," a right unavailable to the state. Id. at 1079 (Lemmon, J., concurring) (footnote omitted).

74. Chambers v. Mississippi, 410 U.S. 284, 299-301, 93 S. Ct. 1038, 1047-1049 (1973).

75. La. Code Evid. art. 804B(6) comment (d) is didactic in nature and does not have the force of law (citations omitted).

76. In *Chambers*, Mississippi did not recognize a hearsay exception for declaration against penal interest. In *Gremillion*, Louisiana does not recognize a residual exception to the hearsay rule in criminal cases.

illion court used the comment as authority, attempting to apply the residual exception to Dupuy's statement.

The *Chambers* and *Gremillion* decisions are similar in several respects. In *Gremillion*, as in *Chambers*, the dispute centered around a state evidentiary rule rendering the hearsay evidence inadmissible. In both decisions the right of the defendant to present a defense was also an issue. Further, in both cases, the defendant was not prevented from calling the witness, but the testimony he sought to introduce from that witness was excluded as hearsay. The *Gremillion* court followed *Chambers* in holding that, while the state evidentiary rule at issue was itself constitutional, the application of the evidentiary rule violated the defendant's right to present a defense under the specific circumstances of the case.[77]

In *Chambers*, the proffered evidence was deemed trustworthy enough to admit under the due process right to present a defense. The Court considered that the evidence was (1) necessary to Chambers' defense, (2) reliable due to its spontaneity and self-incriminating nature, (3) corroborated by three witnesses, and (4) the declarant was in court and available for cross-examination.[78] Of these four factors, the Court attributed the most significance to the declarant's availability for cross-examination.[79] Each of these four elements will be examined as they relate to the *Gremillion* decision.

1. Necessity

The evidence Gremillion sought to establish was critical to his defense. However, unlike in *Chambers*, the evidence in *Gremillion* was not totally withheld from the jury on the basis of hearsay objections. The statement describing Dupuy's description of his attackers as "three white males" *was* put before the jury on three different occasions. First, the trial court permitted the victim's hospital records, which contained the victim's statement to his physician that he had been beaten and kicked by "several others," to be read into evidence by the medical expert.[80] Second, the objection by the State to the police officer's testimony regarding Dupuy's statement was raised after the statement had been heard by the jury. The jury was later instructed to disregard the statement. Finally, defense counsel, in closing arguments, referred to

77. See, e.g., *Chambers*, 410 U.S. at 303, 93 S. Ct. at 1049; *Gremillion*, 542 So. 2d at 1078.

78. Chambers v. Mississippi—The Limits of Due Process, supra note 60, at 203.

79. Id.

80. State v. Gremillion, 542 So. 2d 1074, 1077 (La. 1989) (Dupuy's treating physician testified from his records, reciting Dupuy's statement to the jury. The Louisiana Supreme Court acknowledged the "hearsay nature" of the statement.).

the statement.[81] As Justice Watson articulated in his dissent, defense counsel admitted that "the jury was well aware of the 'three white males' theory of defense."[82]

2. Reliability

The reliability of Dupuy's statement is neither as high as the majority suggests nor as low as the dissent maintains. The majority opinion considered factors intrinsic and extrinsic to the hearsay statement in assessing its reliability, an evidentiary procedure suggested by Article 804B(6).[83] Yet, if the statement was admitted pursuant to a constitutional standard, the use of an evidentiary standard to evaluate the statement's reliability was inappropriate.

In assessing the reliability of the evidence, the court considered the relationship between the speaker, Dupuy, and the recipient, the police officer, implicitly suggesting that: (1) Dupuy had no motive to lie to the police officer investigating the incident; and (2) the police officer, who was trained in questioning crime victims, was not likely to misinterpret or inaccurately remember the statement.[84]

The court considered it noteworthy that the victim, although lacking an apparent desire to protect Gremillion from prosecution, failed to identify Gremillion as the culprit to either the police officer or admitting physician, despite the fact that Dupuy and Gremillion were close friends.[85] Finally, it *was* possible that Dupuy could have received the fatal injuries between the time of his confrontation with Gremillion at the bar and the time he admitted himself to the hospital, eight hours later.

Hence, the court, in evaluating the statement, considered the relationship between Dupuy and the police officer, Dupuy's motivation and credibility, the circumstances under which the statement was made, Dupuy's first-hand knowledge, the lapse of time between the event and the uttering of the statement, and the consistency of Dupuy's behavior with the statement. The court found a sufficient quantum of reliability to merit admission—an amount greater than that inherent in the simple making of the statement, but less than an absolute guarantee of reliability.

Justice Lemmon, in his concurring opinion, emphasized that the statement "nearly qualifie[d]" as a declaration against pecuniary in-

81. Id. at 1080 (Watson, J., dissenting).

82. Id.

83. 1988 La. Acts No. 515, § 1 at Article 804B(6) original comment (c).

84. *Gremillion*, 542 So. 2d. at 1078.

85. Id. The majority maintained that there was no support in the record for the state's contention that Dupuy's friendship with Gremillion was a factor in Dupuy's failure to identify the defendant as his attacker. Id. at 1079.

terest,[86] thus finding the statement reliable. Contrary to Justice Lemmon's assurance that the statement "could not have been more trustworthy and reliable,"[87] Justice Watson urged in his dissent that there was "not a shred of evidence"[88] to support Gremillion's theory that Dupuy was attacked by "three white males." The dissent questioned the reliability of the evidence, noting that although Gremillion denied stomping Dupuy, his testimony was contradicted by the eyewitness testimony of three disinterested observers.[89] This author finds Justice Watson's reasoning more persuasive, primarily because one indicator of reliability—spontaneity—was lacking in Dupuy's statement. Additionally, while the majority stated that Dupuy lacked a motive to lie, they glossed over the fact that Dupuy and Gremillion had been long-time acquaintances. Thus, Dupuy could have been motivated by a misguided sense of loyalty or even a desire to seek redress on his own. Further, Dupuy also knew Swain, owed Swain money, and argued with Swain the night of the incident at the bar. Yet, Dupuy did not identify his attackers, nor describe their clothing. If Dupuy was attacked by Swain and his two friends, as Gremillion maintained, then why did Dupuy fail to identify *Swain* as his attacker? The court failed to address this question. This unanswered question weighs on the side of the evidence's unreliability.

3. Corroboration

The majority opinion emphasized that Dupuy's statement to the police officer regarding the "three white males" was corroborated by his statement to the admitting physician that he was attacked by "several others." The majority downplayed the differences in the two statements, stating that although the two statements were not identical, "they [were] similar in nature since in neither one did Dupuy specifically identify the defendant."[90]

The court's reasoning is problematical in that there is no evidence that the "several others" referred to in one statement are the same "three white males" described in the other statement. Evidence was presented at the trial that Dupuy, after being knocked unconscious by Gremillion, was also kicked by his former wife, Gremillion's companion. The possibility exists, then, that the "several others" to which Dupuy

86. Id. at 1079 n.1 (Lemmon, J., concurring). A statement against pecuniary interest is defined in La. Code Evid. art. 804B(3), in its pertinent part, as "[a] statement which was at the time of its making so far contrary to the declarant's pecuniary . . . interest . . . or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true."

87. Id. at 1079.

88. Id. at 1080 (Watson, J., dissenting).

89. Id. at 1079 (Watson, J., dissenting).

90. Id. at 1077.

referred were actually Gremillion and Dupuy's former wife. This is at least as plausible as Gremillion's contention.

4. Declarant's (Un)availability

While the *Chambers* court relied heavily on the declarant's availability for cross-examination in admitting the evidence, in *Gremillion* the declarant, Dupuy, was unavailable.[91] In *Gremillion*, then, the need for the evidence was greater than in *Chambers*, as there was no way to admit the evidence other than as hearsay. The residual exception implicitly recognizes the correlative relationship between necessity and reliability or trustworthiness. Where the reliability of evidence is high, the quantum of necessity required for admission of the evidence can be correspondently lower. However, where, as in *Gremillion*, the reliability of the evidence is low, then the necessity must be correspondingly higher. Finally where the need far outweighs reliability, as this writer maintains occurred in *Gremillion*, the court's analysis is more proper under the constitutional right to present a defense.

B. Gremillion's Constitutional Balancing Test

This author believes, based on the previous analysis, that the Louisiana Supreme Court used a constitutional basis in deciding *Gremillion*, stretching the evidentiary standards of reliability, trustworthiness, and necessity enunciated in Article 804B(6) to determine if the evidence satisfied the threshold for admissibility. The decision would have been more persuasive if the court had more clearly applied a balancing test, balancing the defendant's interests in introducing the exculpatory evidence against the State's interest in assuring the integrity of the evidence. In the balancing equation, the more critical the nature of the evidence, the less reliable it would need to be to satisfy the threshold of admission. Under this equation, Dupuy's statement would have satisfied the lower threshold of reliability established under the right to present a defense. Thus, Gremillion's need for the evidence, along with the traditional considerations of fairness toward the criminal defendant, would outweigh the State's interest in excluding unreliable evidence, and the statement would be admissible.

In the balancing equation, a residual criminal exception under Federal Rule 805(b)(5) may be superfluous when used to admit evidence *by* the defendant. If the hearsay evidence is inadmissible under the traditional

91. The definition of unavailability includes exemption due to privilege, refusal to testify, testifying to a lack of memory, *death*, illness, or absence if the declarant's testimony can not be procured by reasonable means. See Fed. R. Evid. 804(a) and La. Code Evid. art. 804A.

exceptions, and lacks the equivalent circumstantial guarantees of trustworthiness mandated by Rule 804(b)(5), it cannot be admitted under any federal evidentiary rule. The evidence, however, could be introduced under the defendant's right to present a defense. Thus, if the evidence satisfies the residual exception, a higher standard, it would also automatically satisfy the lesser standard of reliability mandated by the right to present a defense. Because evidence critical to the defendant's defense theory will be admitted under the right to present a defense, a residual criminal exception should be unnecessary. Further, eliminating the federal residual exception for criminal cases where the declarant is unavailable would also safeguard the defendant's right to confrontation. Whether such confrontation clause challenges are justified will be discussed in the following section.

The same argument, however, cannot be made for the Louisiana residual exception. Because that exception recognizes the distinction between constitutional and evidentiary standards, and has established a standard of trustworthiness and reliability that is more rigorous than its federal counterpart, the constitutional and evidentiary standards for admissibility stand on more distinct planes. This is the reason that the residual exception in Louisiana is applicable only to civil cases—i.e. cases in which the constitutional right to present a defense is not a consideration. Thus, although evidence that satisfies the Article 804B(6) evidentiary standard also meets the lower constitutional threshold for admissibility, the opposite is not necessarily true. Evidence admitted under the constitutional right to present a defense would not necessarily meet the Article 804B(6) standard of reliability, which is a higher standard. The redactors of the Louisiana Code of Evidence were careful to keep these principles separate,[92] and it is hoped that *Gremillion* will not stand as authority for the merger of the two principles.

The Louisiana Code of Evidence is superior to the Federal Rules of Evidence in protecting the criminal defendant, because the Louisiana Code prohibits admission of evidence against a criminal defendant unless it falls within a non-residual exception. But it is not clear if such protection is necessary. Although the Federal Rules have a residual criminal exception, it is not often utilized for that purpose, perhaps fearing confrontation clause challenges.[93] The following section will explore whether or not such fears are justified. This note will then conclude with a suggestion to amend Louisiana Code of Evidence article 804B(6)

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92. See supra note 67.

93. See Stern, The Residual Exceptions to the Hearsay Rule: A Reappraisal, 13 Colo. Law. 1818, 1823 (1984) ("[T]he National Institute of Trial Advocacy has confirmed that hearsay evidence is only infrequently admitted under FRE Rules 803(24) and 804(b)(5).") (footnote omitted).

to permit hearsay evidence when it is offered *by* the defendant in a criminal case, a recommendation based on maintaining the critical balance between the prosecution and defense, which balance characterizes the criminal trial process.[94]

VII. Right to Confrontation

The redactors of the Louisiana Code of Evidence sought to avoid confrontation clause problems by limiting the residual exception to civil cases. In this section, this note will explore whether that fear was justified, and further, the results of reading *Gremillion* as Justice Marcus did in his dissent: as authority for applying Article 804B(6) to criminal cases whether the evidence is offered *by* or *against* the defendant.[95]

The right to confrontation,[96] recognized nearly 100 years after the hearsay rule was woven into the judicial fabric,[97] has always allowed certain hearsay exceptions to transcend its guarantee,[98] despite the ban against all hearsay that would result from a literal application of the confrontation clause. If the defendant's right to confront his accusers at the trial was absolute, then no hearsay statement, regardless of its purported reliability, need, or relevance, would be admissible against the defendant.

Although the right to confrontation and the hearsay rule were conceived in a spirit of fairness to the criminal defendant, they remain, because of their different functions, "similar but distinct."[99] The right

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94. For an explanation of why the balance of advantage lies with the state in criminal cases, see generally Lempert, supra note 41, at 521.

95. State v. Gremillion, 542 So. 2d 1074, 1080 (La. 1989) (Marcus, J., dissenting).

96. U.S. Const. amend. VI states in its pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."; see also La. Const. art. I, § 16.

97. The sixth amendment was ratified in 1789. However, the actual right to confrontation dates from early Western legal culture and may have existed even under Roman Law. Coy v. Iowa, 108 S. Ct. 2798, 2800 (1988).

98. See Schwartz, supra note 57, at § 7.14; see also Ohio v. Roberts, 448 U.S. 56, 63, 100 S. Ct. 2531, 2537 (1980).

99. See J. Cook, Constitutional Rights of the Accused § 18:12 (1986) [hereinafter Cook]; see Epps, Passing the Confrontation Clause Stop Sign: Is All Hearsay Constitutionally Admissible?, 77 Kent. L. J. 7, 11 (1988); Lilly, supra note 14, at 213 (The confrontation clause is not simply the embodiment of the hearsay rule); see also Dutton v. Evans, 400 U.S. 74, 86, 91 S. Ct. 210, 218 (1970) (plurality opinion) ("It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now. [footnotes omitted]"); California v. Green, 399 U.S. 149, 90 S. Ct. 1930 (1970). The overlap between the confrontation clause and hearsay rules is not complete.

to confrontation may require the court to override federal or state evidentiary rules and policies designed to limit hearsay.[100] Although the hearsay rule may be satisfied in a particular case, the right to confrontation may not, and conversely, satisfaction of the confrontation clause does not immunize evidence from a hearsay challenge.[101] Practically speaking, however, once the evidence qualifies under a hearsay exception, it is rarely excluded by a confrontation clause challenge.[102] Further, the right to confrontation is not absolute and, as the Court recognized in *Chambers*, "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[103]

In grappling with the uneasy relationship between the hearsay rule and confrontation clause guarantees, the redactors of the Louisiana Code of Evidence recognized the separateness of the two principles.[104] Louisiana decisions concerning the confrontation clause have paralleled federal interpretations.[105] For example, in *State v. Collier*, the Louisiana First Circuit Court of Appeal stated that the confrontation clause guarantees that

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The Court in *Green* stated that,

> [W]e have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. [citations omitted] The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied [footnote omitted].

Id. at 155-56, 90 S. Ct. 1934.

100. Rothstein, supra note 13, at 182 (The United States Constitution can override particular applications of the FRE). See, e.g., Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105 (1974) (State policy protecting the identities of juvenile offenders fell within ambit of the defendant's constitutional right to confrontation where defendant wished to cross-examine witness to reveal probationary status and possible bias. The right to confrontation also includes the opportunity to cross-examine.).

101. See, e.g., *Green*, 399 U.S. at 156, 90 S. Ct. at 1934; Weinstein, Evidence Manual, supra note 16, at § 14.03, at 14-15.

102. McCormick, supra note 37, at §§ 252, 752.

103. Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 1046 (1973).

104. Both the federal and Louisiana rules of evidence chose to leave constitutional interpretation to the judiciary, respecting judicial supremacy in constitutional interpretation. See Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972); La. Code Evid. art. 102 comment (b).

105. The Louisiana courts have interpreted the rights granted by article I, section 16 as interchangeable with those granted under the sixth amendment. Note, Hearsay and The Confrontation Guaranty, 38 La. L. Rev. 858, 859 (1978). See, e.g., State v. Rankin, 465 So. 2d 679, 681 (La. 1985), where the court stated,

> The defendant's right to confront and cross-examine witnesses, found in the Sixth Amendment to the United States Constitution, is a fundamental right and applicable to the states through the Fourteenth Amendment . . . [T]his right to confrontation is found in the Louisiana Constitution of 1974.

> before hearsay is used against an accused, there must be sufficient indicia of reliability as to the statement, the prosecution must have made a good faith effort to obtain the declarant at trial; and, where possible, the defendant must be provided with an adequate opportunity to fully and fairly cross-examine the witness against him.[106]

Similarly, Louisiana courts are unlikely to find a violation of the confrontation clause where the hearsay is admitted under a recognized exception,[107] or where the statute creating an exception to the confrontation clause guarantees "procedurally accommodate(s) the competing interests . . . involved."[108] The decisions also clearly indicate that the courts will not hesitate to exclude otherwise admissible hearsay upon finding a constitutional violation.[109]

In *Gremillion*, because the proponent of the evidence was the defendant, the supreme court had no occasion to consider the applicability of the confrontation clause. Nevertheless, the holding may impact the confrontation right if the lower courts construe *Gremillion* as expanding Article 804B(6) to encompass evidence offered by the prosecution or the defense. The question then to consider is whether Dupuy's statement would violate the confrontation clause if the proponent of the evidence was the *prosecution* rather than the defense.

In answering this question, one must consider *Ohio v. Roberts*.[110] There, the United States Supreme Court ruled that there was no violation of the right to confrontation where the introduction of the unavailable witness's prior testimony bore an "indicia of reliability," due to the cross-examination of the witness at a previous hearing. The Court said, "Reliability can be inferred without more in a case where the evidence falls within a *firmly rooted hearsay exception*. In other cases, the evidence

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106. 522 So. 2d 584, 592 (La. App. 1st Cir. 1988), rev'd on other grounds, 553 So. 2d 815 (1989). See also State v. Cade, 539 So. 2d 650 (La. App. 5th Cir. 1989); State v. Monroe, 345 So. 2d 1185, 1189 (La. 1977).

107. See, e.g., State v. Nix, 327 So. 2d 301, 332 (La. 1975). The court found no confrontation clause violation where evidence was admitted pursuant to res gestae exception to the hearsay rule. The court stated, "We find the case remarkably similar to the *Dutton* case . . . in which the United States Supreme Court found no violation of defendants' right to confrontation."

108. State v. Roberts, 533 So. 2d 1071, 1072 (La. App. 3d Cir. 1988). The court did not find that Coy v. Iowa precluded all exceptions to the confrontation clause. But, said the court, "if there is to be an exception to the exercise of these fundamental rights, it must be created by a statute designed to procedurally accommodate the competing interests which are involved. . . ."

109. See, e.g., State v. Brown, 428 So. 2d 438, 442 (La. 1983), in which the court stated that "all evidence, regardless of the rule under which it is admitted, is subject to constitutional guarantees of due process and a fair trial before an impartial jury."

110. 448 U.S. 56, 100 S. Ct. 2531 (1980).

must be excluded, absent a showing of particularized guarantees of trustworthiness."[111] The test of admissibility is thus met one of two ways: either a showing that the evidence falls within a firmly rooted hearsay exception or that the evidence possesses "particularized guarantees of trustworthiness."

More recently, in *United States v. Inadi*,[112] the United States Supreme Court held that neither cross-examination nor personal presence of the witness is indispensable to satisfying the confrontation clause. In *Inadi*, however, the reliability of the statement was not at issue.[113] Rather, the sole issue before the Court was whether the confrontation clause requires a demonstration of unavailability to admit statements of a non-testifying co-conspirator. The Court held that where the statements satisfied Federal Rule of Evidence 801(d)(2)(E),[114] and where the burden imposed by requiring a showing of unavailability was substantial, and the benefits slight, the confrontation clause did not require a showing of unavailability.

Finally, in *Bourjaily v. United States*,[115] the *Inadi* holding regarding the satisfaction of the confrontation clause where the non-testifying co-conspirator's statements were admitted against the defendant was upheld. The United States Supreme Court stated that the confrontation clause does not require an independent indication of reliability. Rather, in determining if the evidence meets the *Roberts* requirement of a "firmly rooted hearsay exception," the first test, the Court must "see how 'firmly rooted' the exception is." That inquiry suggested to the majority that the exception must be "steeped in our jurisprudence,"[116] and to the dissent "that, through experience in its use, the exception has proved to promote the 'accuracy of the factfinding process.'"[117]

This writer believes that Dupuy's statement would not survive a confrontation clause challenge. First, the residual exception can hardly

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111. Id. at 66, 100 S. Ct. at 2359.

112. 475 U.S. 387, 106 S. Ct. 1121 (1986).

113. Id. at 391 n.3, 106 S. Ct. at 1124 n.3. Weinstein suggests that *Inadi* limits *Roberts* to when the declarant is unavailable. Weinstein thus maintains that *Roberts* applies to Federal Rule 804 but probably not to 803. Weinstein, Evidence Manual, supra note 16, at ¶ 14.03[02] n.8.

114. Fed. R. Evid. 801(d)(2)(E) excludes from the definition of hearsay "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

115. 438 U.S. 171, 107 S. Ct. 2775 (1987).

116. Id. at 183, 107 S. Ct. at 2783.

117. Id. at 200, 107 S. Ct. at 2791 (Blackmun, J., dissenting). Weinstein states that,

> *Bourjaily* suggests that statements admitted pursuant to [FRE] 803 exceptions, which all hinge on reliability, would automatically satisfy the Confrontation Clause. The need for such statements is much less, however, than in the case of Rule 804 exceptions grounded on the unavailability of the declarant. Accordingly, a particularized showing of reliability should be required.

Weinstein, Evidence Manual, supra note 16, at ¶ 14.03[02] (footnote omitted).

be considered a "firmly rooted hearsay exception," such that evidence falling within its reach would satisfy the criteria advanced in *Roberts*, *Inadi*, and *Bourjaily*. Although the components of the residual exception—necessity, reliability, and trustworthiness—are themselves "firmly rooted" in the Article 804 hearsay exceptions, it would be unpersuasive to state that the residual exception, an exception that authorizes only *ad hoc* determinations and that prohibits the creation of new class exceptions, is a "firmly rooted hearsay exception." Second, although Dupuy's statement was reliable enough to meet the constitutional right to present a defense threshold of admissibility, it falls short of the higher confrontation clause standard of "particularized guarantees of trustworthiness." Nothing in Dupuy's statement, other than the fact that it was made, lends any guarantee of trustworthiness. The statement lacked spontaneity, the victim's motivation in making the statement was questionable, and the defendant's testimony was contradicted by three eyewitnesses.[118]

Nevertheless, evidence that satisfies the residual exception's nonconstitutional standard, *would* satisfy the *Roberts* requirement of "particularized guarantees of trustworthiness" because both the Rules and the Code require some guarantees of trustworthiness. Thus, a residual exception in a criminal case would rarely violate the defendant's right to confrontation.[119] This nearly automatic satisfaction of the confrontation clause by the residual exception would, however, tread upon the very right it seeks to protect, rendering the defendant's right to present a defense "vulnerable to whatever modifications a particular jurisdiction chose to append as exceptions to the hearsay rule."[120]

Federal courts have thus cautiously applied the federal residual exception in allowing evidence *against* the defendant in a criminal trial.[121] In *United States v. Turner*,[122] a United States District Court urged "great

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118. See supra text accompanying notes 70-94, Section VI of this note, for a discussion concerning the reliability of Dupuy's statement.

119. See, e.g., United States v. West, 574 F.2d 1131 (4th Cir. 1978), discussed in 4 J. Weinstein, supra note 26, at ¶ 804(b)(5)[01] (Grand jury testimony admitted pursuant to Federal Rule 804(b)(5) satisfied the trustworthiness requirement of both the residual exception and the confrontation clause). But also see Weinstein, Evidence Manual, supra note 16, at ¶ 14.03[03] ("At this time it is not clear to what extent the Supreme Court would be willing to hold that any statement that satisfies Federal Rule 804 also satisfies the Confrontation Clause.").

120. Cook, supra note 99, at § 18:12.

121. See generally Note, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials, 113 U. Pa. L. Rev. 741 (1965) (Although dated, the discussion of the relationship between the right to confrontation and the degree of trustworthiness required for the various hearsay admissions is enlightening.).

122. 475 F. Supp 194, 203 (E.D. Mich. 1978) (Grand jury testimony and sworn written

caution" in utilizing Federal Rule 804(b)(5) to admit evidence against the criminal defendant, citing the uncertain relationship between the confrontation clause and the residual exception.[123] Any amendment to the Louisiana Code of Evidence residual exception must keep that warning in mind.

VIII. Amending Article 804B(6)

From the previous discussion, one can appreciate the redactors' rationale in limiting the residual exception to civil cases. Where the defendant's life is at stake, it is a matter of fundamental fairness to deny an unethical prosecutor the opportunity to admit otherwise unreliable evidence against a defendant.

However, there is no correlative rationale for not extending the residual exception to allow evidence when sought to be admitted *by* the defendant. As the Louisiana residual exception now stands, it neither harms *nor* helps the criminal defendant. This author therefore suggests amending Article 804B(6) to add the italicized words:

> Other exceptions. In a civil case, *and in a criminal case when offered by the defendant*, a statement not specifically covered by any of the foregoing exceptions if the court determines that considering all pertinent circumstances in the particular case the statement is trustworthy, and the proponent of the evidence has adduced or made a reasonable effort to adduce all other admissible evidence to establish the fact to which the proffered statement relates.

Comment (d) would need to be amended to state:

> Admissibility of hearsay evidence when offered by the defendant under the right to present a defense or the right of compulsory process will continue to be governed by the constitutional principles articulated in *Chambers v. Mississippi*. The threshold of admissibility will, in such cases, be determined on constitutional, rather than evidentiary, grounds.

By amending Article 804B(6) to encompass otherwise reliable and trustworthy hearsay falling outside of the class exceptions when offered *by* the defendant, several positive effects will accrue.

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statements of unavailable witness implicating the defendant in cocaine smuggling conspiracy not admissible by the prosecution under FRE 804(b)(5)).

123. Id. at 200, citing 4 J. Weinstein, supra note 26, at ¶ 804(b)(5)[02].

First, defense counsel, cognizant of the amended article, will have a visible reminder of an avenue by which he may admit such hearsay evidence on both nonconstitutional and constitutional grounds. In nonconstitutional areas, Article 804B(6) would occupy an area that, prior to amendment, was a "no man's land" in which evidence, regardless of reliability, could not be admitted by the criminal defendant under the residual exception absent a constitutional basis. In constitutional areas, the amended article would overlap with the defendant's constitutional right to present a defense. But, as explained previously, because the standard for admission under Article 804B(6) is more rigorous than the constitutional standard, the exception would also embrace a plane of trustworthiness and admissibility not reached by constitutionally mandated admissions. The requirement that evidence admitted on nonconstitutional grounds meet the rigorous standard of Article 804B(6) would minimize the possibility of the residual exception swallowing the rule against hearsay.

This leads to the second advantage, that is, evidence offered by a criminal defendant that falls short of satisfying the amended Article 804B(6) exception of trustworthiness would, nevertheless, be admissible if it satisfied the lower threshold of reliability and trustworthiness required by the constitutional right to present a defense. Consequently, the defendant's constitutional rights are also safeguarded. Comment (d) to Article 804B(6), if amended as suggested, would clearly indicate that the Article 804B(6) residual exception standard and the constitutional standard are distinct.

Third, although the amendment may be met with resistance by district attorneys and associated groups, predicated on the fear of unpredictable rulings regarding admission of evidence under the residual exception, the requirement of notice in Article 804B(6)[124] will provide ample opportunity for prosecutors to prepare for the proffered evidence.

Finally, because the Article 804B(6) exception would still not permit evidence when offered *against* a defendant in a criminal trial, the defendant's right to confrontation will be safeguarded. Further, it is very

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124. La. Code Evid. art. 804B(6) requires, in pertinent part, that:

> [T]he proponent of the statement [evidence] makes known in writing to the adverse party and to the court his intention to offer the statement and the particulars of it, including the name and address of the declarant, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it. If, under the circumstances of a particular case, giving this notice was not practicable or failure to give notice is found by the court to have been excusable, the court may authorize a delayed notice to be given, and in that event the opposing party is entitled to a recess, continuance, or other appropriate relief sufficient to enable him to prepare to meet the evidence.

unlikely that a court would interpret the clear wording of the amended article to permit evidence when offered against the criminal defendant.

IX. CONCLUSION

The redactors of the Louisiana Code of Evidence recognized the distinct standards applicable to constitutional and evidentiary principles. In codifying the evidentiary standards, the redactors left constitutional principals untouched. In *Gremillion*, the Louisiana Supreme Court exercised its discretion, pursuant to constitutional principles, to admit exculpatory hearsay evidence falling outside of an established exception, where such evidence, considering all pertinent circumstances, was deemed reliable and trustworthy. Although the *Gremillion* decision was constitutionally sound, the court should have more clearly applied a constitutional balancing test, rather than stretching the Article 804B(6) residual exception beyond its carefully defined limits.

The *Gremillion* court borrowed the evidentiary standards set forth in the Article 804B(6) exception and applied the standards in a constitutional equation. However, since the reliability standard under the constitutional right to present a defense is less strenuous than that advanced by the residual exception, the decision, although reaching a favorable outcome, used an inappropriate route.

Article 804B(6) should be amended to allow evidence meeting the requisite reliability and trustworthiness standards when offered *by* the criminal defendant. The amendment would better define the boundaries of admissibility of evidence under Article 804B(6) while safeguarding the defendant's right to confrontation.

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