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The Residual Exception to the Hearsay Rule—Has It Been Abused—A Survey Since the 1997 Amendment

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TABLE OF CONTENTS

I. INTRODUCTION

In our legal system of trial by jury, a good deal of the law of evidence is given to exploring hearsay and its exceptions. "The factors upon which the value of testimony depends, are: the perception, memory, narration, and sincerity of the witness."[1] In order to encourage witnesses to put forth their

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best efforts and to expose inaccuracies that might be present with respect to any of these factors, our trial system has developed what is known as the testimonial ideal. That is, witnesses are required to testify under oath, testify in person, and be subject to cross examination. The rule against hearsay is designed to insure compliance with these ideals. When one of them is absent, a hearsay objection becomes pertinent.[2] Hearsay evidence is often characterized as unreliable and untrustworthy. Nevertheless, courts constantly admit hearsay evidence under the numerous exceptions found in the common law and in latter day statutes. "Hearsay evidence exhibits a wide range of reliability. The effort to adjust the rules of admissibility [of hearsay evidence] to variations in reliability has been a major motivating factor in the movement to liberalize evidence law."[3]

The *Federal Rules of Evidence*, adopted in 1975[4] for use in the federal courts and adopted by many states, have helped liberalize the introduction of trustworthy hearsay evidence at trials.[5] The *Federal Rules of Evidence* recognize twenty-eight standard exceptions to the hearsay rule.[6] In addition to those exceptions and the "nonhearsay" exceptions,[7] Congress, in promulgating the *Federal Rules of Evidence*, adopted rules 803(24) and 804(b)(5), as residual hearsay exceptions. Such rules allowed the introduction of hearsay statements not specifically covered by any of the named exceptions but having circumstantial guarantees of trustworthiness if the court determined that certain stated conditions were met.[8]

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wishes to thank Professor Stephen Leacock of Barry University School of Law for reading and offering helpful insights to the preparation of this article.

1. MCCORMICK ON EVIDENCE § 245 (John W. Strong ed., 5th ed. 1999).
2. *Id.*
3. *Id.*
4. *See* GLEN WEISSENBERGER, FEDERAL RULES OF EVIDENCE: 1996 COURTROOM MANUAL (1995).
5. Rule 102 of the *Federal Rules of Evidence* provides that "these rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."
6. FED. R. EVID. 803(1)–(23), 804(b)(1)–(4), (6).
7. FED. R. EVID. 801(d).
8. FED. R. EVID. 803 (1997) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as witness:
>
> (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence

It was intended that the residual exceptions would be used sparingly by the courts and only in rare and exceptional circumstances.[9] The Advisory Committee cautioned that the residual exceptions "do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate trustworthyness within the spirit of the specifically stated exceptions."[10]

"Of all the exceptions [to the hearsay rule], the residual exceptions have probably generated the greatest amount of controversy."[11] One evidence scholar, James Beaver, who has examined the use of the residual exceptions, fears that the residual exceptions will swallow the hearsay rule.[12] Another scholar, Thomas Black, believes that the residual exceptions may be used in such a manner in the federal courts as to abuse traditional concepts of evidence.[13] As this article will demonstrate, such fears are totally unfounded.

In 1997, the residual exceptions of rules 803(24) and 804(b)(5), were amended and cast into one new rule, 807 of the *Federal Rules of Evidence*.[14] The amended rule provides:

> which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by the admission of statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including name and address of the declarant.

FED. R. EVID. 804(b)(5) (1997). Rule 804(b)(5) of the 1997 *Federal Rules of Evidence* is identical in language except for its preamble which states "the following are not excluded by the hearsay rule if the declarant is unavailable as a witness."

9. *See* Senate Comm. on Judiciary, S. Rep. No. 1277, 93d Cong., 2d Sess. 16 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 7051, 7065–66.

10. *See* James W. Moore et al., MOORE'S FEDERAL PRACTICE, FEDERAL RULES OF EVIDENCE § 803.12 (1997 ed.).

11. James E. Beaver, *The Residual Hearsay Exception Reconsidered*, 20 FLA. ST. U. L. REV. 787, 789 (1993).

12. *Id.* at 790; *but cf.* G. Michael Fenner, *The Residual Exception to the Hearsay Rule: The Complete Treatment*, 33 CREIGHTON L. REV. 265, 303 (2000) ("the residual exception is the safety valve of the hearsay rule.").

13. Thomas Black, *Federal Rules of Evidence 803(24) & 804(b)(5)—The Residual Exceptions—An Overview*, 25 HOUS. L. REV. 13, 56 (1988).

14. Rule 807, of the *Federal Rules of Evidence*, became effective on December 1, 1997. *See* FEDERAL RULES OF EVIDENCE HANDBOOK (Anderson Publ'g 1999).

> A statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.[15]

In amending the residual exception the Advisory Committee noted that "[t]he contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended."[16]

Prior to the 1997 amendment, the aforementioned scholar, James Beaver, surveyed the use of the residual exceptions and found that between 1975 and 1993, the residual exceptions and their state equivalents were reported in more than 140 federal cases and in more than 90 state cases.[17] He concludes that such figures suggest that the residual exceptions were being used more than just in rare and exceptional circumstances.[18] He also maintained that the residual exceptions weaken the hearsay rule and cautioned states to refuse to adopt the residuals on the ground that they were undesirable and unnecessary.[19] Another scholar, John Strong, the general editor of *McCormick on Evidence*, believes resort to the exception has been substantial and is surprised by its prominent use by prosecutors in federal courts.[20]

A review of recent cases reveals that the admission of residual hearsay pursuant to the exception is being used sparingly and only after a good deal of analysis by both the federal courts and by the courts of states which allow

15. FED. R. EVID. 807.
16. *Id.*
17. Beaver, *supra* note 11, at 790.
18. *Id.* at 791.
19. *Id.*
20. *See* MCCORMICK, *supra* note 1, § 324.

the exception.[21] In Beaver's survey, he found that the residual exception was reported in 140 federal cases and 90 state cases. He believes that this was abuse of the rule and that we better be careful. However, such analysis, relying solely on the number of reported cases, is flawed. Everything is relative. The use of the residual exception as reported in 140 cases over a 23 year period does not seem astounding, given there are 13 federal circuit courts of appeals in the country. Nor does it seem astounding that the residual exception was reported in 90 state cases during the same period. We have 50 state court systems, many with a two tier appellate court system consisting of a court of appeal and a higher state supreme court.

If Beaver had analyzed exactly how the residual exception was used in each case, he would have found no abuse. The purpose of this article is to survey and analyze the pertinent reported federal and state decisions addressing admission of residual hearsay since the 1997 amendment to the residual exception. Such survey and analysis reveal that there is little likelihood that the hearsay rule will be swallowed by the residual exception. A secondary purpose of this article is to provide civil trial lawyers, defense attorneys, prosecutors, and judges examples of how the circumstantial guarantees of trustworthiness of the residual exception have been argued and analyzed in federal and state courts in recent years.

II. HEARSAY, THE FEDERAL RULES OF EVIDENCE, AND THE STATES

In order to understand the residual exception, one must appreciate the definition of hearsay under the Federal Rules. The rules first define a statement as, "an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."[22] Thus, hearsay, under the rules, is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[23] The definition is an affirmative one, which says that "an out-of-court assertion offered to prove the truth of the matter asserted is hearsay."[24] "Exceptions to the hearsay rule usually are justified on the ground that evidence meeting the requirements of the exception possess special reliability and often special need, such as the unavailability of the

21. In May, 2001 the author, with assistance from the Barry University School of Law Library reference staff, undertook an on-line search of cited cases referencing the residual exception since 1997. The cases cited herein are a result of that search.

22. FED. R. EVID. 801(a).

23. FED. R. EVID. 801(c).

24. *See* MCCORMICK, *supra* note 1, § 246.

declarant."[25] That is, there is an objective guaranty of trustworthiness to such statements.[26]

The often cited examples of exceptions that exhibit such guarantees of trustworthiness are the excited utterance,[27] statements for purposes of medical diagnosis,[28] records of regularly conducted activity,[29] statements in ancient documents,[30] the dying declaration,[31] and, of course, statements against interest.[32]

Forty-one states, Puerto Rico, and the military have adopted the *Federal Rules of Evidence*.[33] The majority of these states adopted rules of evidence based on the final *Federal Rules of Evidence*.[34] As the *Federal Rules of Evidence* are amended, some states also promptly amend their corresponding rules to maintain similarity with the federal rules.[35] "The following states have not adopted rules of evidence based on the *Federal Rules of Evidence*:

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25. *Id.* § 254.
26. *Id.* § 256.
27. FED. R. EVID. 803(2).
28. FED. R. EVID. 803(4).
29. FED. R. EVID. 803(6).
30. FED. R. EVID. 803(16).
31. FED. R. EVID. 804(b)(2).
32. FED. R. EVID. 804(b)(3).
33. 6 WEINSTEIN'S FEDERAL EVIDENCE, T1 (2d ed. 2000)
34. *Id.* at T2–T7. The Alabama Rules of Evidence became effective 1/1/96; Alaska Rules effective 8/1/79; Arizona Rules effective 9/1/77; Arkansas Rules effective 7/1/76; Colorado Rules effective 1/1/80; Delaware Rules effective 1/1/80; Florida Rules effective 7/1/79; Hawaii Rules effective 1/1/81; Idaho Rules effective 1/1/85; Indiana Rules effective 1/1/94; Iowa Rules effective 1/1/83; Kentucky Rules effective 1/1/92; Louisiana Rules effective 1/1/89; Maine Rules effective 2/2/76; Maryland Rules effective 1/1/94; Michigan Rules effective 3/1/78; Minnesota Rules effective 7/1/77; Mississippi Rules effective 1/1/86; Montana Rules effective 7/1/77; Nebraska Rules effective 8/24/75; Nevada Rules effective 1/1/71 (based on Preliminary Draft of the Federal Rules); New Hampshire Rules effective 1/1/85; New Jersey Rules effective 1/1/93; New Mexico Rules effective 1/1/73 (amended 7/1/76 to conform to the changes made to the draft Federal Rules by Congress); North Carolina Rules effective 7/1/84; North Dakota Rules effective 2/15/77; Ohio Rules effective 7/1/80; Oklahoma Rules effective 10/1/78; Oregon Rules effective 1/1/82; Pennsylvania Rules effective 10/1/98; Puerto Rico Rules effective 10/1/79; Rhode Island Rules effective 10/1/87; South Carolina Rules effective 9/3/95; South Dakota Rules effective 7/1/78; Tennessee Rules effective 1/1/90; Texas Rules effective 3/1/98; Utah Rules effective 9/1/83; Vermont Rules effective 4/1/83; Washington Rules effective 4/2/79; West Virginia Rules effective 2/1/85; Wisconsin Rules effective 7/1/74 (based on Final Draft of the Federal Rules); Wyoming Rules effective 1/1/78. The Military Rules of Evidence are based on the Federal Rules and were adopted 3/12/80. *Id.* at T2–T7 (citations omitted).
35. *Id.* at T1.

California, Connecticut, the District of Columbia, Georgia, Illinois, Kansas, Massachusetts, Missouri, New York, Virginia, and the Virgin Islands."[36]

The forty-one states, Puerto Rico, and the military that have adopted the *Federal Rules of Evidence* have all adopted rules similar to the hearsay rule of 801.[37] However, not all of these states have adopted the residual exceptions.[38] Of the states that have adopted such residual exceptions, Colorado appears to be the only state to have already amended its rules to combine the 803(24) and 804(b)(5) into one rule 807 as have the *Federal Rules of Evidence*.[39] The states which have not adopted a residual exception are: Alabama, Florida, Indiana, Kentucky, Maine, New Jersey, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, and Washington.[40] Louisiana limits its residual exception to civil cases.[41] Nevada[42] and Wisconsin omit the notice requirement of the federal rule.[43]

Although Florida has not adopted a residual exception akin to rule 807, it has two sections of its evidence code[44] which speak to the kinds of circumstances where residual hearsay exceptions often are applied. These may be thought of as "quasi residual" exceptions. Section 90.803(23) of the *Florida Evidence Code*, allows the use of out-of-court statements of a child, eleven years old or less, describing child abuse, neglect, or sexual abuse against the child,[45] after the court holds a hearing to determine reliability of such statements.[46] The statute is applicable whether the child is available or unavailable to testify.[47] If the child is unavailable to testify and the statements are deemed to be reliable by the court, there must be other

36. *Id.* at T7.

37. *Id.* at T106–12.

38. WEINSTEIN, *supra* note 33, at T159–61. The states that have adopted residual exceptions are: Alaska, Arizona, Arkansas, Colorado, Delaware, Hawaii, Idaho, Iowa, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Puerto Rico, Rhode Island, South Dakota, Utah, West Virginia, Wisconsin, Wyoming, and the United States Military.

39. *Id.* at T159–61; *see also* COLO. R. EVID. 807, effective January 1, 1999.

40. *Id.* at T159–61.

41. *Id.* at T160.

42. The State of Nevada has no residual exception where the declarant is available. Nevada does provide a residual exception akin to rule 807 when the declarant is unavailable. However, the Nevada rule omits the notice requirement. *Id.* at T160.

43. WEINSTEIN, *supra* note 33, at T160, T162.

44. *See* FLA. R. EVID. § 90.803(23), (24) (2000).

45. FLA. R. EVID. § 90.803(23)(a) (2000).

46. § 90.803(23)(a)(1).

47. § 90.803(23)(a)(2)(a), (b).

corroborating evidence of the offense before such statement may be used.[48] There is also a ten day notice requirement that must be given to a defendant in a criminal case.[49] Finally, the court, under this statute must make specific findings of fact on the record as to the basis for its ruling to admit or exclude the statements.[50] Section 90.803(24) of the *Florida Evidence Code* is identical, except that it applies to elderly or disabled adults.[51]

Florida promulgated such hearsay exceptions for children in 1985.[52] The Florida exception was expanded to the elderly in 1995.[53] However, it was not until after 1990 that a number of other states were confronted with the need for such exceptions. This was as a result of the Supreme Court's ruling in *State v. Wright*.[54] In *Wright*, a child sexual abuse case, the Court was required to decide whether the admission at trial of certain hearsay statements admitted under Idaho's residual exception violated the defendant's rights under the Confrontation Clause of the Sixth Amendment.[55] The hearsay statements were made by a child declarant to an examining pediatrician.[56] At trial, the child was unavailable as a witness[57] and the pediatrician testified as to the child's statements concerning the abuse.[58]

The Supreme Court affirmed the Supreme Court of Idaho, which ruled that the defendant's right to confrontation had been denied by admission of the testimony.[59] The Court held that the State of Idaho could not use other evidence corroborating the truth of such a hearsay statement to support a finding that the statement bore "particularized guarantees of trustworthyness."[60] In other words, to be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.[61] The Court in *Wright* declined to endorse a mechanical

48. § 90.803 (23)(a)(2)(b).
49. § 90.803(23)(b).
50. § 90.803(23)(c).
51. § 90.803(24)(a)–(c).
52. *See In re Amendments to Florida Evidence Code*, 782 So. 2d 339 (Fla. 2000).
53. § 90.803(24).
54. 497 U.S. 805 (1990).
55. *Id.* at 808.
56. *Id.* at 809.
57. *Id.*
58. *Id.*
59. *Wright*, 497 U.S. at 827.
60. *Id.* at 823.
61. *Id.*

test for determining "particularized guarantees of trustworthiness,"[62] however, the Court alluded to a number of factors that might make the hearsay statements made by a child in an abuse case reliable, including spontaneity and consistent repetition, lack of motive to fabricate, mental state of the declarant, and use of terminology unexpected of a child of similar age.[63]

III. AN ANALYTICAL FRAMEWORK FOR EXAMINING THE RESIDUAL EXCEPTION

A. *Appropriate Indicia of Reliability*

All hearsay exceptions must exhibit an element of trustworthiness which derives from certain appropriate indicia of reliability. One often cited example of a trustworthy hearsay exception is the dying declaration.[64] It has long been considered reliable that a man would not go to his death with a lie on his lips. Obviously, fear of retribution in the afterlife provides the appropriate indicia of reliability to make the dying declaration trustworthy. So how do we find the appropriate indicia in the residual hearsay exception? Rule 807 provides that "a statement not specifically covered by 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule . . . ."[65] "In applying the residual exceptions, the most important issue is whether the statement offers 'equivalent circumstantial guarantees of trustworthiness' to those found in other specific hearsay exceptions."[66]

The factors supporting trustworthiness are varied, but a few recurring factors may be pertinent to the determination of admissibility. Among them would be: 1) whether the declarant had a motivation to speak truthfully; 2) the spontaneity of the statement; 3) the time lapse between the event and the statement; 4) whether the declarant was under oath; 5) whether declarant has been cross-examined; 6) whether the declarant has recanted or reaffirmed the statement; and 7) whether the declarant's first hand knowledge is clearly demonstrated.[67] A court may also consider whether an out-of-court statement was corroborated by the declarant, who was available and testified

62. *Id.* at 824–25.
63. *Id.* at 826.
64. *See* FED. R. EVID. 804(b)(2).
65. FED. R. EVID. 807.
66. MCCORMICK, *supra* note 1, § 324.
67. *Id.*

at trial.[68] Further, a court might look to circumstances surrounding the extrajudicial statement to determine trustworthiness.[69]

In an effort to determine whether circumstantial guarantees of trustworthiness exist, a court may look to: 1) matters that occur at trial; 2) extrinsic corroboration of the statement; 3) surrounding circumstances concerning the statement; or 4) all of these to determine trustworthiness.[70] Beaver is troubled by this approach. He complains that with respect to the residual exception "a court need not be consistent in its use of such standards."[71] "The standard used can very easily be changed to meet the necessities of current political expediency or judicial whim."[72] "We have a container into which anything can be poured."[73]

Such criticism of the standards for allowing statements pursuant to the residual exception is flaccid. The appropriate position with respect to the question of standards is that espoused by Fenner who maintains that "[w]ithout some residual exception, a statutory set of rules of evidence simply would not work."[74] "The pressure to admit hearsay evidence that does not fall under the fixed, specific exceptions would inevitably lead to one of two things: the evidence would not be admitted and injustice would be done, or one of the other exceptions would be misread to say that it does cover the evidence in question."[75] We should always remember that the *Federal Rules of Evidence* are to be construed to secure fairness in administration, and to help the development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.[76]

The standards for determining the circumstantial guarantees of the trustworthiness of residual statements must vary. In the cases reviewed herein, decided since the 1997 amendment to rule 807, we find courts that admitted residual hearsay because there was little likelihood of fabrication or inaccuracies with respect to the statements admitted.[77] We also find a court

68. *See* Beaver, *supra* note 11, at 797.

69. *Id.* at 797–98 (citing Karme v. Commissioner, 673 F.2d 1062 (9th Cir. 1982), where the court found that bank records bore circumstantial guarantees of trustworthiness because of the distant location of the bank and because there was no evidence to suggest the bank records were anything other than what they purported to be).

70. *See id.*

71. Beaver, *supra* note 11, at 798.

72. *Id.*

73. *Id.*

74. Fenner, *supra* note 12, at 303.

75. *Id.*

76. *See* FED. R. EVID. 102.

77. *See* Gonzalez v. Digital Equip. Corp., 8 F. Supp. 2d 194 (E.D.N.Y. 1998).

that admitted such out-of-court statements on the ground that they were business records produced by a defendant against his interest in litigation and thus trustworthy.[78] In the criminal area, we find courts that undertook extensive analysis to determine: whether the residual hearsay statements were sufficiently detailed so that they would have been difficult to fabricate; whether there was a lack of evidence of coercion; whether the declarants had personal knowledge of the events; and, how soon the statements were made after the event.[79]

Other courts examined whether the statements sought to be admitted pursuant to the residual exception were made under oath and subject to the penalty of perjury; whether such statements had been made voluntarily; and whether they contradicted previous statements by the declarants.[80] Finally, we find a criminal case in which the court examined: whether the declarant was offered leniency in exchange for his statement; whether the declarant attempted to shift blame from himself to the accused; whether the declarant took full responsibility for his role in the offense; whether the declarant was caught "red-handed" and merely tried to share his blame by implicating another; and, whether the declarant was given his *Miranda* rights.[81]

As Beaver notes, the courts need not be consistent in their use of standards.[82] What is most important with respect to any residual exception analysis is the determination that such evidence, which might meet the standard of circumstantial guarantees of trustworthiness, is evidence offered as evidence of a material fact; that the evidence is the most probative evidence available on the point for which it is offered; that the interests of justice will be served by admitting the evidence; and that there was notice of the evidence.[83] One must bear this analytical framework in mind as we survey the recent cases in an effort to determine whether the residual hearsay rule is being abused.

B. *Notice*

The notice requirement of rule 807 is very important. What does notice mean? When and how must notice be given? The residual exception is not

78. *See* John Paul Mitchell Sys. v. Quality King Distrib. Inc., 106 F. Supp. 2d 462 (S.D.N.Y. 2000).

79. *See* United States v. Gomez, 191 F.3d 1214 (10th Cir. 1999).

80. *See* United States v. Sanchez-Lima, 161 F.3d 545 (9th Cir. 1998).

81. *See* State v. Hallum, 585 N.W.2d 249 (1998).

82. Beaver, *supra* note 11, at 798.

83. FED. R. EVID. 807.

available unless offering counsel gives opposing counsel advance notice of his or her intention to offer the out of court statement, and the particulars of the statement, including the name and address of the out of court declarant.[84] Rule 807 does not require pretrial notice of an intention to use rule 807. All it requires is notice of an intention to offer the particular statement; not notice of an intention to use any particular hearsay exception. Once counsel has notified opposing counsel of an intention to offer the statement in question, then it can be offered under rule 807.[85] The notice may be formal or less formal. Fenner reminds us the pretrial notice may be a document filed with the court styled "Notice of Intention to Use Rule 807 Evidence," or it may be a letter sent to opposing counsel stating an intention to introduce particular statements, including the names and addresses of the proposed declarants.[86]

The timing of the notice has been problematic. Both Fenner and Beaver note that prior to the 1997 amendment, some courts interpreted the notice requirement more in accord with the spirit of the law than with the letter of the law. This often creates inconsistency in application of the notice requirement.[87] The rule provides that notice must be "sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet [the evidence]."[88] Fenner claims that "some courts stress the 'fair opportunity' part of the notice requirement over the 'in advance of the trial or hearing' part."[89] He notes that "[o]ne influential court has said that in cases where the need to use this exception does not become apparent until after the trial has begun, midtrial notice given enough in advance of the actual use of the evidence can satisfy the rule's pretrial notice requirement."[90]

The cases surveyed herein reveal that variations of the flexible approach to notice requirement predominate. Although this does not appear consistent with the plain meaning of the rule, we shall see that the interests of justice require such flexibility. Even less formal notice is better than no notice. With this analytical framework in mind with respect to appropriate

84. *Id.*
85. *Id.*
86. Fenner, *supra* note 12, at 280.
87. *See id. See also* Beaver, *supra* note 11, at 802.
88. FED. R. EVID. 807.
89. Fenner, *supra* note 12, at 281.
90. *See* Fenner, *supra* note 12, at 280 (citing United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y. 1976), *aff'd*, 540 F.2d 574 (2d Cir. 1976).

indicia of reliability and notice, let us survey the recent cases relying on the residual exception to determine whether the rule is being abused.

IV. RULE 807 CASES IN THE FEDERAL COURTS

A. *Civil Cases*

Since the 1997 amendment to the *Federal Rules of Evidence*, the residual exception was cited as an issue in seven civil cases in the federal courts. The cases come from the Second and Eleventh Circuit Courts of Appeal, federal district courts in the Eastern District of New York, and the district court for Puerto Rico. It will be clear from a review of these civil cases that judges are not abusing their authority with respect to admitting unreliable hearsay pursuant to the residual exception.

The Eleventh Circuit Court of Appeals gave short shrift to a plaintiff's argument that the residual exception of rule 807 should be admissible to allow hearsay of a dead witness to help substantiate her claim of copyright infringement.[91] In *Herzog v. Castle Rock Entertainment*[92] the plaintiff, Herzog, brought a copyright action against the writer, director, producer, and distributor of the motion picture "Lone Star."[93] Plaintiff alleged that defendants infringed her copyright for a screenplay she had written entitled "Concealed."[94] The district court granted defendant's motion for summary judgment and Herzog appealed.[95] The Eleventh Circuit, relying on the district court's opinion, upheld the grant of summary judgment on the grounds that Herzog had failed to establish that Sayles, the writer-director of "Lone Star," had a reasonable opportunity to view her screenplay, and that the motion picture and screenplay were not substantially similar.[96]

Herzog's burden was to show that her screenplay was a copyrighted work, and that Sayles had copied it.[97] Herzog submitted a certificate of copyright for her screenplay to the court.[98] The second requirement, proof of

91. Herzog v. Castle Rock Entm't, 193 F.3d 1241 (11th Cir. 1999).
92. 193 F.3d 1241 (11th Cir. 1999).
93. *Id.* at 1243.
94. *Id.*
95. *Id.* at 1244.
96. *Id.* at 1263.
97. *Herzog*, 193 F.3d at 1249.
98. *Id.*

copying, she attempted to prove circumstantially by demonstrating that the person who copied the work had access to her copyrighted screenplay.[99]

Herzog averred that she had written the screenplay as a requirement for her Master Degree in film studies at the University of Miami.[100] She had given her screenplay to Cosford, one of her professors for review.[101] He had never returned it to her.[102] After "Lone Star" was released, she learned that Sayles was an acquaintance of Cosford and that Sayles and Cosford had met for lunch in Miami during the time Cosford had her screenplay.[103] Herzog theorized that Cosford had shown Sayles her work.[104] By the time of the lawsuit, Cosford had died and was, thus, unavailable to testify as to whether he had shown Sayles the screenplay.[105]

Herzog sought to introduce, under rule 807, hearsay statements of Allegro, another Professor at the University of Miami.[106] Allegro testified at deposition that Cosford told him that he was reading Herzog's screenplay and he found it interesting.[107] Allegro, further, testified that during this same time period Sayles was in Miami and Cosford came out of his office at the university and announced to Allegro that he was on his way home to pick up Sayles to take him to lunch.[108] Allegro also testified that he only inferred from Cosford's statements that he was picking up Sayles at his home and that he had never actually saw Sayles and Cosford together.[109]

Courts cannot properly consider hearsay evidence in ruling on motions for summary judgment.[110] Defendants argued that the proffered testimony of Allegro would be inadmissible hearsay.[111] There were no equivalent guarantees of trustworthiness found in those conversations.[112] The Eleventh Circuit Court of Appeals agreed on the ground that rule 807 requires the equivalent circumstantial guarantees of trustworthiness covered by exceptions in rule

99. *Id.*
100. *Id.* at 1244.
101. *Id.*
102. *Herzog*, 193 F.3d at 1244–45.
103. *Id.* at 1245.
104. *Id.*
105. *Id.* at 1252.
106. *Id.* at 1252–53.
107. *Herzog*, 193 F.3d at 1252–53.
108. *Id.*
109. *Id.*
110. *Id.* at 1254 (citing Martin v. John W. Stone Oil Distrib., Inc., 819 F.2d 547, 549 (5th Cir.1987)).
111. *Id.* at 1254.
112. *Herzog*, 193 F.3d at 1255.

803 and rule 804.[113] The court undertook the requisite analysis for circumstantial guarantees of trustworthiness and found that the conversations had taken place five years earlier and Allegro was vague and not precise or knowledgeable in his memory of the conversations.[114]

This was hearsay of the worst kind. The court found that even if such hearsay was admissible to show that Cosford had a copy of Herzog's screenplay and that Sayles had stayed at Cosford's home in 1993, said evidence did not establish that Cosford had a copy of the screenplay with him when he met Sayles for lunch and that he allowed Sayles to see it, and that Sayles was not truthful when he averred he had never heard of Herzog's composition.[115] Also, there was no allegation that Cosford previously contributed creative ideas or material to Sayles.[116]

The hearsay was not admitted despite proper pretrial notice being given under the residual exception. No appropriate indicia of reliability could be found on the facts of the case. The Eleventh Circuit did not abuse its powers by allowing the admission of unreliable hearsay pursuant to the residual exception in Herzog.

In *Schering Corp. v. Pfizer, Inc.*,[117] the Second Circuit found that although certain surveys offered by plaintiffs in a false advertising case called for statements concerning memory, this did not automatically preclude their admission under the residual exception of rule 807.[118] The plaintiff, Schering, was a pharmaceutical company that produces Claritin, a prescription antihistamine.[119] UCB, a European pharmaceutical company, developed a competing product called Zyrtec.[120] UCB licensed Pfizer, a Delaware corporation to promote Zyrtec in the United States.[121] In 1996, Schering brought an action against UCB and Pfizer alleging false advertising with respect to Zyrtec in violation of the Lanham Act and a prior settlement agreement between the parties.[122]

At a 1998 hearing on a preliminary injunction, Schering sought to introduce five surveys concerning the marketing and sale of Zyrtec to

113. *Id.* at 1254.
114. *Id.*
115. *Id.* at 1255.
116. *Id.*
117. 189 F.3d 218 (2d Cir. 1999).
118. *Id.* at 240.
119. *Id.* at 221.
120. *Id.*
121. *Id.* at 222.
122. *Schering Corp.*, 189 F.3d at 222.

doctors.[123] Pfizer responded to the motion on grounds that the surveys were inadmissible as hearsay.[124] The district court agreed and issued a written opinion disallowing the surveys for any purpose.[125] The trial court denied the injunction and Schering appealed.[126] The Second Circuit found that the surveys should have been allowed, vacated the judgment, and remanded the case for further hearing regarding the surveys concerning memory statements.[127]

Five surveys Schering had sought to introduce called for more information than rule 803(3) would allow.[128] The court found that those surveys went beyond the state of mind of those surveyed and called for memory or belief to prove the facts remembered or believed.[129] However, Pfizer had also sought to introduce the surveys under the residual hearsay exception.[130] The court examined the surveys and rule 807 and found that the lower court had abused its discretion by not allowing admission of the surveys pursuant to the residual exception.[131] The Second Circuit held that the trial court had been in error to rule against the use of out-of-court memory statements to prove facts remembered.[132] The court reminded us that:

> Unlike Rule 803(3), which explicitly excludes from its purview memory statements offered to establish the facts remembered, the residual hearsay rule contains no such express limitation. There is a reason for this difference. Almost any statement used to describe events that a speaker has experienced in the past can be characterized as a 'memory,' which is a presently-existing state of

123. *Id.* at 223.
124. *Id.* at 224.
125. *Id.*
126. *Id.*
127. *Schering Corp.*, 189 F.3d at 239–40.
128. Rule 803 of the *Federal Rules of Evidence* provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (3) A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

FED. R. EVID. 803(3).
129. *Schering Corp.*, 189 F.3d at 231.
130. *Id.* at 224.
131. *Id.* at 231.
132. *Id.*

> mind when it is conveyed. If such statements were admissible under Rule 803(3) to prove the facts remembered, parties could thus offer hearsay to establish almost any past fact, a result that would indeed mark the 'the virtual destruction of the hearsay rule' .... The residual hearsay rule, by contrast, escapes this problem by setting forth its own set of requirements, which include necessity and trustworthiness, before it will allow for a statement's admission.[133]

The court held that memory surveys, in principle, may have greater circumstantial guarantees of trustworthiness than many other traditional exceptions to the hearsay rule, but that it was the methodological validity of the survey that had to be examined before a guaranty of trustworthiness could be assured.[134]

In *Schering Corp.*, the court found that there was long standing notice of the intent to introduce the surveys.[135] The court further found that the surveys were trustworthy and necessary, and concluded that in the context of survey evidence, the interests of justice and the general purposes of the rules of evidence are generally best served by the admission of the surveys that meet these two criteria.[136] A review of the case shows that the residual exception is not being abused in the Second Circuit, rather, the exception is being put to a strong analytical process as to its application.

In *Rotolo v. Digital Equipment Corp.*,[137] the Second Circuit overturned a trial court judgment on the ground that the notice requirement of 807[138] had not been met.[139] In this case, plaintiff brought a products liability case against Digital, alleging that she suffered repetitive stress injuries resulting from the use of their computer keyboard.[140] Plaintiff presented evidence of her injuries and evidence from medical witnesses to bolster her claim.[141]

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133. *Id.* at 232.
134. *Schering Corp.*, 189 F.3d at. 234.
135. *Id.* at 238.
136. *Id.*
137. 150 F.3d 223 (2d Cir. 1998).
138. The notice requirement of FED. R. EVID. 807 provides:

> However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, . . . including the name and address of the declarant.

FED. R. EVID. 807.
139. *Id.* at 226.
140. *Rotolo*, 150 F.3d at 224.
141. *Id.*

Plaintiff's attorneys also came into possession of a videotape made by Apple Computer Corporation.[142] The tape, which was received in evidence, contained the voice and images of three Apple consultants who asserted and emphasized the existence of a possible causal connection between computer keyboard use and repetitive stress injury.[143] Digital objected to the introduction of the videotape as hearsay.[144]

The Second Circuit agreed that the videotape contained inadmissible hearsay and vacated judgment and remanded the case.[145] The court found that the consultants that appeared in the videotape, two identified as physicians and one as an engineer, were unsworn witnesses, whose qualifications were not expounded upon or subjected to cross-examination.[146] Rotolo's counsel had informed the trial court that he was not offering the videotape because it was publicly available, but offered it "as appropriate and compelling state of the art proof as to what could be known."[147] The court held it was error to admit the report.[148] Before a defendant, who has never seen an unpublished report that is not part of the published literature, can be said to have non-hearsay notice, it must be shown that the defendant "was at least inferentially put on notice by the report."[149] Digital presented proof that it had no such notice of the report or that they should have seen it as a part of the published literature on the industry.[150]

The court held a rule 807 residual exception inapplicable to the videotape evidence because the advance notice of intent to use that section was not used.[151] The court further found that the district court "misadvised the jury that it might consider the videotape as evidence of 'what might have been made available [to] these defendants [sic] and what was in the field to show what their state of mind was or should have been . . . .' Simply put, the Apple videotape was inadmissible hearsay."[152] No notice, no residual exception. No abuse there.

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142. *Id.*
143. *Id.*
144. *Id.*
145. *Rotolo*, 150 F.3d at 223.
146. *Id.* at 223.
147. *Id.* at 225.
148. *Id.*
149. *Id.*
150. *Rotolo*, 150 F.3d at 225.
151. *Id.*
152. *Id.*

Rotolo v. Digital Equipment Corp. was decided on July 24, 1998.[153] A month earlier the same company, Digital, had not fared as well in a similar case heard in the District Court of the Eastern District of New York. On June 8, 1998, plaintiffs prevailed in the case of *Gonzalez v. Digital Equipment Corp.*[154] Much of that case concerned the rule 807 residual exception. Although notice was also at issue, the court in *Gonzalez* reached a result opposite that of the court in *Rotolo.*

In *Gonzalez,* a number of plaintiffs had sued Digital claiming that their upper body, arm, or hand problems had been caused by repeated use of Digital's computer keyboards and that they had not been properly warned by Digital of the possibility of such injury.[155] Plaintiffs sought to introduce documents and two videotapes, one produced by IBM and the other produced by Apple Computer which addressed the comfort disorders of keyboard users.[156] Digital moved to exclude such evidence, alleging among other reasons, that it was hearsay.[157] The district court found that the proffered evidence was relevant to the proceedings on the theory that evidence of the current state of mind of large producers in this industry was relevant.[158] It allowed the inference that given the state of the art at that time, members of the industry as a whole had, or should have had, the same "state of mind" with respect to possible users that needed to be considered by each of the manufactures even though they were operating separately.[159] Since Digital had "a duty to keep abreast of scientific knowledge, discoveries and advances it [was] presumed to know what [was] imparted thereby."[160] Thus, the documents and videos were deemed relevant.[161]

The court ruled that with respect to the hearsay objection such documents would be admitted pursuant to the residual exception.[162] The court specifically found that the notice requirement of 807 had been met, because Digital had notice for an extended time (a whole year and one half prior to trial) that the evidence had been proposed.[163] The court also found that the proffered evidence offered evidence of a material fact and the

153. *Id.* at 223.
154. 8 F. Supp. 2d 194 (E.D.N.Y. 1998).
155. *Id.* at 196.
156. *Id.*
157. *Id.*
158. *Id.* at 197.
159. *Gonzalez,* 8 F. Supp. 2d at 197.
160. *Id.* at 198.
161. *Id.*
162. *Id.* at 201.
163. *Id.*

internal materials were highly probative.[164] The court further found that the "general interests of justice and the standards of trustworthiness" had been met in the case.[165] The court maintained that the fear of fabrication or of inaccuracies inherent in much hearsay was unfounded because these videos had been created for legitimate business reasons and were less likely to have been fabricated than would testimony of a live witness.[166] The court also found that with respect to inaccuracies, the videos were more likely to be more accurate than a live witnesses because they were created internally and with great care.[167] The court did not find the inability to cross-examine with respect of the videotapes compelling, because Digital could call its own experts or those who created the videotapes to refute contentions of notice.[168]

The court allowed admission of the documents and videotapes under the residual rule to show the state of mind of other producers in the industry on the issue of notice.[169] Although notice was informal in this case, the court found that a proposal made by plaintiffs to use the evidence a year and a half prior to trial met the notice requirement.[170] This stands in stark contrast to *Rotolo*, where there was no advance notice of the intent to use the evidence.[171] Again, in *Gonzalez*, the district court followed a well-reasoned analytical framework to determine whether the evidence bore adequate circumstantial guarantees of trustworthiness and that there was proper notice. Such analytical approach to admitting evidence pursuant to the residual exception should put to rest fears by Beaver and others that the residual exception will swallow the hearsay rule.

In *Vasquez v. National Car Rental Systems, Inc.*,[172] the district court in Puerto Rico held that a statement by a driver in an auto accident was not admissible under the rule 807 residual exception.[173] Mr. and Mrs. Lopez had rented a car from defendant at Puerto Rico's international airport on December 26, 1997.[174] Shortly thereafter, they were in a auto accident with

164. *Gonzalez*, 8 F. Supp. at 201.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Gonzalez*, 8 F. Supp. at 202.
170. *Id.*
171. *Id.*
172. 24 F. Supp. 2d 197 (D.P.R. 1998).
173. *Id.*
174. *Id.* at 198.

another vehicle driven by Gonzalez.[175] Mr. Lopez, the driver of the rented vehicle, died several days later as a result of his injuries.[176] Mrs. Lopez, the passenger, was also injured and subsequently died.[177] Suit was brought pursuant to a diversity action by Mrs. Lopez's daughters, the Vazquezs.[178] Plaintiffs sued National, because under Puerto Rico Law, the owner of a leased vehicle is accountable for its lessee's negligence.[179]

National sought admission into evidence of certain portions of Ms. Vazquez's deposition testimony in which she described Mr. Lopez's utterances right after the accident.[180] According to plaintiff, Vasquez, her mother told her that immediately after the accident Mr. Lopez uttered to her the words "[w]hat hit us?"[181] National offered this evidence because it cast doubt as to who hit whom.[182] National argued that because Mr. Lopez did not explicitly say that he ran a red light or was negligent in his driving, there was uncertainty as to whether he was negligent.[183] Under Puerto Rico Law, defendant's liability hinged on the driver's liability (i.e. lessee's liability).[184] If National could prove that Mr. Lopez was not driving negligently, the defendant would not be liable. National acknowledged that such statement would be hearsay but sought to have it admitted under the residual hearsay rule.[185]

The court reviewed rule 807 and the facts and found that there was adequate notice of intent to use the statements.[186] Yet, the court did not allow the hearsay evidence on the grounds that the evidence fell below the threshold of trustworthiness required by the rule.[187] The court found that even though in the hospital, the circumstances surrounding Mr. Lopez's remarks did not assure the court that he was under a condition that would still his capacity of reflection or that he was under any pressure to tell the truth.[188] The court found further that the defendant had "failed to prove that

175. *Id.*
176. *Id.*
177. *Vasquez*, 24 F. Supp. 2d at 198.
178. *Id.*
179. *See* 9 P.R. LAWS ANN. § 1751 (1996).
180. *Vasquez*, 24 F. Supp. 2d at 199.
181. *Id.*
182. *Id.*
183. *Id.*
184. *See* 9 P.R. LAWS ANN. § 1751 (1996).
185. *Vasquez*, 24 F. Supp. 2d at 199.
186. *Id.*
187. *Id.* at 200.
188. *Id.*

Mr. Lopez had reliable knowledge of the events that transpired on the night of the accident."[189] Ms. Vazquez in her deposition testified that Mr. Lopez was not clear as to the events that transpired, and that he really did not recall what happened.[190] The court disallowed the evidence and said it could not rely on an individual's account of an event, if that individual acknowledged that he did not recall the specifics of the event,[191] as had Mr. Lopez.[192]

Mr. Lopez's lack of recall would not support a finding of trustworthiness to his statements. In accord with our analytical framework, the court found no support to substantiate appropriate indicia of reliability for his statements.[193] To keep such evidence out was the correct decision. Here, the hearsay rule prevailed. Critics have little to fear about the use of the residual exception when a court explains its analysis of the circumstantial guarantees of trustworthiness as in *Vasquez*.[194] The hearsay rule prevails despite the residual exception.

In the case of *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*,[195] the court allowed admission, pursuant to the residual exception, into evidence, of a news article that had appeared in a Chinese newspaper.[196] In 1998, Chase Bank, acting as a trustee, and Traffic Stream, had entered into an indenture agreement in which Traffic Stream issued secured notes to finance a business venture involving the construction of toll roads in China.[197] In 1999, plaintiff Chase commenced litigation contending that Traffic Stream had defaulted on payment.[198] Chase sought summary judgment.[199] Defendant Traffic admitted default but argued that its default should be excused pursuant to the contract doctrine of impossibility of performance.[200] Traffic Stream contended that a change in Chinese policy delayed recoupment of money from the toll road projects, making it impossible for them to fulfill their obligation under the indenture.[201]

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189. *Id.*
190. *Vasquez*, 24 F. Supp. 2d at 200.
191. *Id.*
192. *Id.*
193. *Id.* at 200.
194. *Id.*
195. 86 F. Supp. 2d 244 (S.D.N.Y. 2000).
196. *Id.*
197. *Id.* at 246.
198. *Id.*
199. *Id.*
200. *Chase Manhattan Bank*, F. Supp. 2d at 247.
201. *Id.* at 250.

The facts of the case reveal that in the wake of the 1997 Asian financial crisis, the Chinese government had taken steps to strengthen its supervision of disbursement of foreign exchange involving Chinese companies doing business with foreign partners.[202] On September 14, 1998, the Chinese State Administration of Foreign Exchange gave notice of its change in policy.[203] The notice was a confidential document of the Chinese government that had not been publicly released.[204] However, news of the notice appeared in the People's Daily, the official newspaper of the government on September 18, 1998.[205] Traffic Stream maintained that it was this change in foreign exchange supervision that made it impossible for them to perform.[206]

Chase objected to the introduction of the newspaper article on grounds that it was hearsay.[207] The court agreed that the article was hearsay but found the article admissible pursuant to the residual exception of rule 807.[208] The court found that Traffic Stream had given Chase adequate notice of its intention to introduce the article.[209] Perhaps, more importantly, the court found the newspaper article had been offered as evidence of a material fact, namely a change in Chinese policy, which could have rendered Traffic Stream's performance under the indenture impossible.[210] The court also found that the article was the most probative evidence of the notice of change of policy that Traffic Stream could reasonably procure, because the notice itself had not been publicly released by the Chinese government.[211] Similarly, the court found because the notice itself was unavailable, "the interests of justice would best be served by the admission of the article."[212] The court further found, with respect to rule 807, the People's Daily newspaper article had a sufficient guarantee of trustworthiness since it was published by the Chinese Communist Party Central Commission.[213] Therefore, it was deemed to be authoritative and representative of the official opinion of the Chinese government.[214]

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202. *Id.* at 251.
203. *Id.*
204. *Id.*
205. *Chase Manhattan Bank*, 86 F. Supp. 2d at 251.
206. *Id.*
207. *Id.* at 253.
208. *Id.* at 254.
209. *Id.*
210. *Chase Manhattan Bank*, 86 F. Supp. 2d at 254.
211. *Id.* at 251.
212. *Id.*
213. *Id.*
214. *Id.*

Although the article was admitted as evidence, Chase was ultimately granted summary judgment on the claim.[215] Nevertheless, the court gave a well reasoned analysis as to why the evidence should be found admissible pursuant to the residual exception.[216] There had been adequate notice of the intent to use the newspaper article, and there was a thorough analysis of the circumstantial guarantees of trustworthiness that surrounded the introduction of the article.[217] There was no abuse to the traditional hearsay rule in this case.

In *John Paul Mitchell Systems v. Quality King Distributors, Inc.*,[218] the residual exception was used to allow the introduction of certain business records at a hearing on an injunction.[219] In this case, John Paul Mitchell sought a preliminary injunction restraining the distributor Quality King from selling over a million dollars of Paul Mitchell hair care products.[220] Allegedly these products had traveled to China for distribution, but were diverted to Holland and then back to Quality King's Long Island, New York warehouse.[221] Paul Mitchell sought an injunction against Quality King in order to prevent irreparable damage to its exclusive salon only distribution policy.[222] In order to prove its case, Paul Mitchell sought introduction of business records of the company which it arranged to sell its products in China.[223] This firm, China Marketing & Distribution (CDM), was a company that Paul Mitchell found defrauded it by diverting products from the Chinese market where it would be sold only in salons to other wholesalers who intended sale to direct retailers.[224] Quality King objected to introduction of the CDM business records on the ground that they were not authenticated.[225]

The court found, pursuant to rule 901(b)(4),[226] that the document authentication requirement in this case was satisfied by the document's form

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215. *Chase Manhattan Bank*, 86 F. Supp. 2d at 262.
216. *Id.* at 253–61.
217. *Id.*
218. 106 F. Supp. 2d 462 (S.D.N.Y. 2000).
219. *Id.*
220. *Id.* at 466.
221. *Id.* at 466–67.
222. *Id.* at 467.
223. *John Paul Mitchell Sys.*, 106 F. 2d at 468.
224. *Id.* at 467–69.
225. *Id.* at 471–72.
226. Rule 901(b)(4) of the *Federal Rules of Evidence* provides, in relevant part: "the following are examples of authentication or identification conforming with this rule: (4)

and content, taken together with other circumstances that indicated reliability of the documents.[227] Thus authenticated, the court found the documents admissible pursuant to the residual exception because the records were particularly trustworthy.[228] In its analysis, the court found that the trustworthiness of the documents was established by the fact that they were produced by the president of CDM against his interests in the litigation.[229] The court also found the issue of whether the Paul Mitchell product was sold and shipped to Quality King material to the litigation, and the documents were probative of the fact that CDM believed the product was shipped from its warehouse in China to Rotterdam.[230] The court further found that the documents were the most probative evidence available of the route the goods followed.[231] The court found further still that Quality King had sufficient notice of the documents, as demonstrated by Quality King's motion in limine to exclude them.[232] In the final analysis, the court found that it was in the best interests of justice to admit the documents.[233]

Although the documents were admitted pursuant to the residual exception, Paul Mitchell's motion for preliminary injunction was denied.[234] The court found that it did not have the power to issue an injunction on a replevin claim.[235] Again, there appeared to be no abuse by the court of the residual exception in this case.

The foregoing has been a survey of the federal civil cases found since the 1997 amendment of rule 807. It does not appear from a review of these cases that there should be fear that the use of the residual exception is being abused. In *Herzog* and *Vasquez* the courts did not allow statements pursuant to the exception because they could find no circumstantial guarantees of trustworthiness to the statements in question. In *Rotolo* the statements were disallowed by the appeals court because adequate notice of the intended use of the evidence had not been given prior to trial by the plaintiffs. In *Schering, Gonzalez, Chase Manhattan Bank,* and *John Paul Mitchell*

Distinctive Characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."

227. *John Paul Mitchell Sys. Inc.*, 106 F. Supp. 2d at 472.
228. *Id.*
229. *Id.* at 473.
230. *Id.*
231. *Id.*
232. *John Paul Mitchell Sys. Inc.*, 106 F. Supp. 2d at 473.
233. *Id.*
234. *Id.*
235. *Id.* at 478.

Systems, both the notice requirements and the requirement of circumstantial guarantees of trustworthiness were found to be adequate. However, admission of such hearsay pursuant to the residual exception seldom determined the ultimate outcome of the case. Let us now turn to the federal criminal cases involving the residual exception since the 1997 amendment. We will see that the analytical framework is just as important as in the civil cases, if not more so.

B. *Criminal Cases*

Since the 1997 Amendment, the residual exception has been reported in few federal criminal cases. No more than eight such cases have been found. This is approximately equal to the number of civil cases in which the exception was either mentioned or reported in federal civil cases during the same time period. Although anecdotal, this provides further evidence that the residual exception is not being abused by the federal courts as a way of allowing inadmissible hearsay into evidence. The cases reported on herein come to us from the Second, Fourth, Fifth, Eighth, and Ninth Circuit Courts of Appeals.

The introduction of hearsay statements in the context of criminal cases, whether federal or state, must be assessed in the light of a defendant's right to confrontation under the Sixth Amendment.[236] The Confrontation Clause does not operate as an absolute ban on hearsay evidence.[237] If the declarant is unavailable and the statement bears adequate "indicia of reliability," hearsay declarations may be received into evidence without violating a defendant's right to confrontation.[238] The indicia of reliability requirement can be met in two ways: "where the hearsay statement 'falls within a firmly rooted hearsay exception,' or where it is supported by 'a showing of particularized guarantees of trustworthiness.'"[239]

In *United States v. Sanchez-Lima*,[240] the Ninth Circuit reversed the conviction of Sanchez-Lima for assault on a federal officer and determined that evidence he sought to admit at trial under the residual exception should

236. Amendment VI of the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

237. *See Wright*, 497 U.S. at 805, 825.

238. *Roberts*, 448 U.S. at 66.

239. *Wright*, 497 U.S. at 816.

240. 161 F.3d 545 (9th Cir. 1998).

have been admitted.[241] In 1996, Sanchez-Lima, an alien, and others illegally entering the United States from Mexico, were arrested two miles east of the Otay Mesa port of entry by border Patrol Agents.[242] At the time of his apprehension, Sanchez-Lima struck an agent with a rock.[243] Defendant was arrested for assault on a federal officer in violation of title 18, section 111 of the *United States Code*.[244] At trial, Sanchez-Lima asserted a self-defense claim alleging he had been pistol whipped by the federal officer before striking him.[245]

In all, the Border Patrol agents apprehended twenty-two aliens that night.[246] The Border Patrol and the FBI interviewed and videotaped all of these aliens the night of their apprehension.[247] At trial, Sanchez-Lima alleged that these interviews contained evidence in support of his self-defense theory.[248] The remaining aliens were deported on May 31, 1996.[249] The trial court did not allow admission of the videotaped statements.[250]

On appeal, Sanchez-Lima asserted that the failure to admit the videotaped interviews, pursuant to the residual exception, denied him of his Sixth Amendment right to present a defense.[251] The Ninth Circuit agreed.[252] That court reviewed rule 807 and determined that the videotaped statements contained circumstantial guarantees of trustworthiness and met the other criteria of the rule.[253] The government had adequate notice of the intended use of the evidence.[254] The court found the statements were trustworthy because the declarant's statements: 1) were under oath and subject to the penalty of perjury; 2) were voluntary; 3) were based on facts within their own personal knowledge; 4) did not contradict any previous statements to government agents or defense investigators; and 5) was preserved on

241. *Id.* at 546.
242. *Id.*
243. *Id.*
244. Title 18, section 111(a)(1) of the *United States Code* provides, in relevant part: "[w]hoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person shall be fined or imprisoned not more than one year."
245. *Sanchez-Lima*, 161 F.3d at 547.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Sanchez-Lima*, 161 F.3d at 547.
251. *Id.*
252. *Id.*
253. *Id.* at 547–48.
254. *Id.* at 548.

videotape for the jurors to view their demeanor.[255] The court also found that the government had the opportunity to develop the testimony of these witnesses and had notice of the videotapes.[256] The court further found that the videotaped statements constituted evidence of a material fact regarding Sanchez-Lima's self-defense theory.[257] Finally, the court found that "these statements [were] more probative than any other evidence which could be procured by reasonable efforts . . . ."[258]

In refusing to admit the sworn videotaped statements, the district court effectively prevented Sanchez-Lima from exercising his Sixth Amendment right to present a defense. The decision appears well reasoned and does not abuse the hearsay rule.

In *United States v. Bryce*,[259] the Second Circuit reviewed Bryce's convictions for conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine.[260] The convictions grew out of law enforcement surveillance of persons suspected of narcotics trafficking.[261] Agents intercepted and recorded seven telephone conversations between Bryce and his co-defendant Johnson, and one conversation between Johnson and another individual named Gomez.[262]

During the Bryce and Johnson conversations, Bryce arranged to sell cocaine to Johnson.[263] Johnson, in turn telephoned Gomez and informed him that Bryce was selling cocaine.[264] Johnson and Gomez expressed concern during the conversation that the price quoted would depress the price in other transactions.[265] Nevertheless, after discussing matters with Gomez, Johnson called Bryce back and said he would buy two kilograms of cocaine.[266] Johnson and Bryce agreed to meet in fifteen minutes.[267] The meeting never took place, because Bryce called Johnson several hours later to say he had only one left.[268] Johnson pleaded with Bryce to sell him the

255. *Sanchez-Lima*, 161 F.3d at 547.
256. *Id.* at 548.
257. *Id.*
258. *Id.*
259. 208 F.3d 346 (2d Cir. 1999).
260. *Id.* at 348.
261. *Id.* at 349.
262. *Id.*
263. *Id.*
264. *Bryce*, 208 F.3d at 349.
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*

one kilogram.[269] Bryce agreed and they arranged to meet later that day.[270] This meeting never happened, because Johnson called Bryce five days later and asked if he still had the cocaine.[271] Bryce indicated that he did and they agreed to meet.[272] Several days later Johnson was arrested.[273] Soon thereafter, Bryce was also arrested.[274] No evidence of the cocaine itself was presented at trial.[275]

On appeal, Bryce challenged his conviction on, among other grounds, that the taped telephone conversation between Johnson and Gomez, in which Johnson repeated Bryce's claim that he had cocaine for sale and had distributed it to others, was inadmissible hearsay.[276] The district court had admitted the telephone conversation pursuant to the residual exception of rule 807.[277]

The Second Circuit in analyzing the rule and the facts found that Bryce "[did] not dispute that the statements in the Johnson-Gomez tape were material, that the declarants were unable to testify, or that the government complied with the Rule's notice requirement."[278] The court found that Bryce's objection was that the admission of the tape violated his Sixth Amendment confrontation rights and therefore could not have been deemed to advance the interests of justice.[279] The court believed that the resolution of the argument was linked to trustworthiness.[280] The court found that the Johnson-Gomez tape had a high degree of trustworthiness.[281]

The Second Circuit had already held in *United States. v. Matthews*[282] that:

> [O]rdinarily a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of guilt of an accused, absent some circumstance indicating authorization or adoption. On the other hand, if the statement is made to a person

269. *Bryce*, 208 F.3d at 349.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Bryce*, 208 F.3d at 349.
275. *Id.* at 352.
276. *Id.* at 350.
277. *Id.*
278. *Id.* at 351.
279. *Bryce*, 208 F.3d at 351.
280. *Id.*
281. *Id.*
282. 20 F.3d 538 (2d Cir. 1994).

> whom the declarant believes is an ally rather than a law enforcement official, and if the circumstances surrounding the portion of the statement that inculpates the defendant provide no reason to suspect that inculpatory portion is any less trustworthy than the part of the statement that directly incriminates the declarant, the trustworthiness of the portion that inculpates the defendant may well be sufficiently established that its admission does not violate the Confrontation Clause.[283]

Under this theory, the court found that the Johnson-Gomez tape did not violate Bryce's Confrontation rights. The court specifically found:

> 1) the statements were obtained via a covert wiretap that neither Johnson nor Gomez was aware; 2) the statements were made during the same time period that Johnson was conversing with Bryce; 3) Johnson's statements implicated both himself and Bryce as participants in a narcotics conspiracy; and 4) Gomez was Johnson's colleague in the narcotics trade.[284]

Based on these factors, the court found there was little reason to believe that Johnson and Gomez had any motive to lie, or were lying.[285] With this analysis, the court found the admission of the tape was proper under both rule 807 and the Confrontation Clause.[286] Here, the court rightfully looked to the surrounding circumstances of Bryce's drug activities to find support for the appropriate indicia of reliability that made the statement trustworthy. With such analysis, it is unlikely that the residual exception will swallow the hearsay rule. Ultimately, the Second Circuit upheld Bryce's conspiracy conviction, but reversed the possession with intent to distribute cocaine conviction on the ground that there was no corroborating evidence that Bryce actually did possess cocaine on the dates specified in the indictment.[287]

In *United States v. Papajohn*,[288] the Eighth Circuit found that use of the grand jury testimony of an unavailable witness, admitted pursuant to the residual exception in an arson and conspiracy trial, was proper.[289] Ms.

283. *Id.* at 545–46.
284. 208 F.3d at 351.
285. *Id.*
286. *Id.* at 351.
287. *Id.* at 356.
288. 212 F.3d 1112 (8th Cir. 2000).
289. *Id.* at 1119.

Papajohn and her husband, Donald Lee Earles, were suspected of burning down their convenience store in order to gain insurance proceeds.[290] A grand jury was convened before which Mr. Earles' son, Donnie, testified three times.[291] During Donnie's first grand jury appearance, he testified that he did not know who burned down the store.[292] During his second grand jury appearance, he changed his story, stating that Ms. Papajohn and his father conspired to burn down the store for the insurance money.[293] "During Donnie's third grand jury appearance, he claimed his Fifth Amendment right to remain silent and refused to testify."[294]

At the subsequent trial of Papajohn and Earles, Donnie again refused to testify.[295] The trial court declared Donnie an unavailable witness and allowed the government, over objections of the defense, and pursuant to the residual exception to the hearsay rule, to read to the jury portions of the transcripts of all three of Donnie's appearances before the grand jury.[296] The jury convicted both defendants.[297]

On appeal, Papajohn argued that she should be granted a new trial on the basis of the Supreme Court's holding in the case of *Lilly v. Virginia*.[298] In *Lilly*, the Court held that the admission of a non-testifying accomplice's confession violated the defendant's right to confront his accuser.[299] However, the Eighth Circuit distinguished the facts of *Lilly*:

> Donnie was never arrested or charged with a crime. The obvious incentive that the captured accomplice in *Lilly* had to shift blame is not present in our case. We recognize that although Donnie was not charged with a crime at the time he made the statements, he might still have had some incentive to blame [defendants], so that he would not later be charged with the arson. It seems to us, however, that it can almost always be said that a statement made by a declarant that incriminates another person in a crime will make it less likely that the declarant will be charged for that crime .... We

290. *Id.* at 1116.
291. *Id.*
292. *Id.*
293. *Papajohn*, 212 F.3d at 1116.
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.* at 1116. The appeal in this case was only brought by Ms. Papajohn. She appealed her convictions for one count of conspiracy to commit arson and mail fraud, one count of aiding and abetting arson, and two counts of mail fraud. *Id.* at 1115.
298. 527 U.S. 116 (1999).
299. *Id.* at 119.

> also find that the conditions under which the disputed hearsay statement was made in our case differ significantly [than] in *Lilly*. In *Lilly* . . . the accomplice's statements were made in response to leading police questions, asked during a custodial interrogation that took place very late at night, shortly after his arrest.[300]

The court in *Papajohn* found that the grand jury testimony satisfied the requirement of having equivalent circumstantial guarantees of trustworthiness required of rule 807.[301] The court found that Donnie's testimony had been: 1) given in a formal proceeding; 2) under oath; 3) before a grand jury.[302] Also, Donnie was not in police custody, nor had he been charged with any crime at the time the testimony was given.[303] Further, he had been asked non leading questions by the government, and he answered them with lengthy narratives.[304] Papajohn's convictions were affirmed by the Eighth Circuit.[305] The Eight Circuit's analysis of the appropriate indicia of reliability factors supporting residual exception as it applied to this situation does not harm the hearsay rule. It is difficult to argue abuse of the hearsay rule here.

In *United States v. Brothers Construction*,[306] the Fourth Circuit reached an opposite result with respect to grand jury testimony that had been admitted pursuant to the residual exception. Brothers Construction Company of Ohio and Tri-State Asphalt Corporation were convicted of conspiracy to defraud the United States, mail fraud, and with making false statements to the government.[307] Their trial and convictions grew out of a scheme whereby the two companies falsified records in connection with obtaining highway construction subcontract work in West Virginia.[308] Specifically, the companies obtained federal highway money to comply with the development of "disadvantaged business enterprises" ("DBEs").[309] However, no disadvantaged business employees ever performed any of the subcontract work.[310]

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300. *Papajohn*, 212 F.3d at 1119.
301. *Id.* at 1119.
302. *Id.* at 1120.
303. *Id.*
304. *Id.*
305. *Papajohn*, 212 F.3d at 1122.
306. 219 F.3d 300 (4th Cir. 2000).
307. *Id.* at 308.
308. *Id.* at 304–06.
309. *Id.* at 304.
310. *Id.* at 306–08.

Robert Samol, an officer and in-house counsel for Tri-State, had testified in the grand jury investigating the case, that prior to sending the state a letter of certification of the company meeting its DBE goals under its subcontract, he learned that there had never been an independent DBE work force.[311] At trial, Samol invoked his rights under the Fifth Amendment and refused to testify.[312] The trial court determined that Samol was unavailable, and "concluded that [his] grand jury testimony was sufficiently reliable."[313] The court admitted the grand jury testimony pursuant to the residual exception.[314] On appeal, both Brothers and Tri-State asserted that it was improper to have allowed the grand jury testimony read to the jury.[315] Here, the Fourth Circuit agreed.[316]

The court observed that the nature of grand jury testimony provided some indicia of trustworthiness, because it was "given in the solemn setting of the grand jury, under oath and the danger of perjury, in the presence of jurors who are free to question and assess credibility, and a court reporter made an official transcript of the proceedings."[317] The court held that with respect to grand jury testimony they were still "required to consider 'the totality of the circumstances' [of the testimony] for 'particularized guarantees of trustworthiness.'"[318]

In considering the totality of the circumstances in this case, the court found that Samol's grand jury testimony was suspect.[319] During the oral argument of the case, the government acknowledged that after Samol's appearance before the grand jury, the government began an investigation to determine whether Samol committed perjury through the same testimony that the government sought to introduce.[320] The court held that it had "serious reservations about the reliability of testimony which, at least in part, the [g]overnment finds so untrustworthy that it would consider bringing a perjury charge."[321] As a result, the court concluded that Samol's grand jury

311. *Bros. Constr.*, 219 F.3d at 309.
312. *Id.*
313. *Id.*
314. *Id.* at 309–10.
315. *Id.*
316. *Bros. Constr.*, 219 F.3d at 310.
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*
321. *Bros. Const.*, 219 F.3d at 310.

testimony was not properly admitted pursuant to the requirements of the residual exception.[322]

Such reasoning is similar to that used by the district court in Puerto Rico in the *Vasquez* case, that found Mr. Lopez's memory problems to be a weak foundation for the admission of statements pursuant to the residual exception.[323] The determination to not admit the grand jury testimony in *Brothers* was the correct one and not in conflict with *Papajohn* when all of the circumstances are analyzed. Although the court found that the admission of the grand jury testimony against Brothers was an error, they found it to be harmless error.[324] The Fourth Circuit found that there was other sufficient evidence to affirm the convictions of both Brothers and Tri-State.[325]

In *United States v. Phillips*,[326] the Fifth Circuit found that the trial court did not abuse its discretion in refusing to apply the residual exception to admit alleged exculpatory statements of a witness proffered by defendants.[327] The case involved convictions on several schemes of local corruption involving ghost employees, payment of salary kickbacks, and misuse of state government funds by Phillips, the tax assessor for St. Helena Parish, Louisiana, and Newman, a friend and political supporter who owned the largest hardware store in the Parish.[328]

Phillips and Newman were involved in many schemes.[329] The Fifth Circuit found that the salient scheme for purposes of the review of the use of the residual exception involved Phillips, Newman, and Newman's wife, Jean, who was deceased by the time of trial.[330] Starting in 1990, Phillips put Newman and his wife on the tax assessor payroll, at a salary of $800 per month, and health benefits.[331] The health benefits were important because Jean had been diagnosed with cancer. Jean subsequently died of cancer in 1992.[332] She remained on the tax assessor payroll until one month prior to

322. *Id.*
323. *See Vasquez*, 24 F. Supp. 2d at 197.
324. *Id.* at 320.
325. *Id.* at 320–21.
326. 219 F.3d 404 (5th Cir. 2000).
327. *Id.* at 419.
328. *Id.* The defendants were each convicted on all counts of a twenty-nine count indictment charging conspiracy, mail fraud, engaging in an illegal monetary transaction, theft from a federally funded program, money laundering, and perjury. *Id.* at 407.
329. *Id.*
330. *Id.* at 408, 419.
331. *Id.* at 407–08.
332. *Phillips*, 219 F.3d at 407.

her death.[333] Facts at trial showed that over the time period of this scheme Newman kicked back most of their $800 a month salary to Phillips, less what was needed to pay federal taxes at the end of the year.[334] Evidence at trial showed that Newman and his wife did little or no work for the tax assessor.[335]

At trial, defendants sought to admit exculpatory statements made by Jean Newman to her friend Margaret Carter to show that she was working for the assessors office.[336] The trial court would not admit the statements under the residual exception.[337] If she had been allowed to testify, defendants maintained

> that Carter would have testified that one day, while in the hardware store, she noticed Jean working with several pieces of paper. When Carter inquired about the nature of the paperwork, Jean allegedly responded that she was working on a project for Phillips that had something to do with land.[338]

The Fifth Circuit, in a footnote, enumerated the requirements of rule 807, and then held:

> The passing comment made by Jean concerning her employment is arguably vague. It may be correct that Jean would have no reason to lie in making a passing comment to a casual acquaintance concerning the nature of any paperwork she was doing. It may also be correct, however, that Jean's motivation to lie—her desire to maintain the favorable status of her pseudo-employment for the purpose of receiving health coverage—was so strong that any statements made concerning her supposed employment with the assessor's office cannot be trusted.[339]

The court found that "[r]egardless of which option seemed more persuasive, neither presents a 'definite and firm conviction the [district] court made a clear error of judgment'" by excluding the statements.[340] As such, the court did not disturb the ruling of the trial court with respect to the

333. *Id.* at 408.
334. *Id.*
335. *Id.*
336. *Id.* at 419.
337. *Phillips*, 219 F.3d at 419.
338. *Id.*
339. *Id.*
340. *Id.*

hearsay exclusion.[341] Again, good analysis by the court of the circumstances and motivations for the proffered statement found that there was inadequate indicia of reliability to support the trustworthiness of the statement.

Can one find abuse of the residual exception with respect to any of these federal criminal cases? Of course not. The federal courts have used good analysis and common sense in assessing the equivalent guarantees of trustworthiness required of evidence admitted under rule 807. In *Sanchez-Lima, Bryce*, and *Papajohn*, the court found equivalent guarantees of trustworthiness for the statements after thoroughgoing analysis. In *Brothers* and *Phillips*, analysis by the courts showed that the admission of the statements sought to be admitted were unreliable and not supported by equivalent guarantees of trustworthiness. Although the standard used to reach the decision to admit the evidence pursuant to the residual exception was different, it appears that such decisions were solid and reasonable in each case,

Let us now turn our attention to the various states who, since 1997, have reported cases that involved the residual exception. Could it be that state courts are abusing the hearsay rule by its overindulgent use of the residual exception? The evidence from the cases says no.

V. THE RESIDUAL EXCEPTION IN STATE COURT CASES

A. *Civil Cases*

Our search of the reported use of the residual exception in state cases since 1997, yielded only a small number of such reports in civil cases. Such cases were reported from Colorado,[342] Delaware,[343] and Arkansas.[344] A

341. *Id.*

342. Rule 804(b)(5) of the *Colorado Rules of Evidence* provides:

> A statement not specifically covered by [Rule 803 or 804] but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, 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 proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

COLO. R. EVID. 804(b)(5). On January 1, 1999, Colorado transferred its two part residual exceptions into one new rule 807 Residual Exception.

343. Rule 803(24) of the *Deleware Rules of Evidence* provides: the following is not excluded by DEL. R. EVID. 803(24) 802, the hearsay rule:

review of these cases shows that fears of the residual exception in state court cases swallowing the hearsay rule as we know it is highly unlikely. The judges in the state courts appear to be very careful with respect to the admission of hearsay pursuant to the residual exception. These judges use the same analytical framework of seeking to determine whether there are appropriate indicia of reliability to give the statements trustworthiness. These same judges seek to determine whether there has been proper notice of intent to use the exception.

In the Colorado case, *Board of County Commissioners v. City and County of Denver*,[345] the court of appeals upheld the introduction by plaintiffs, pursuant to the residual exception to the hearsay rule, of a study prepared for defendant.[346] The case involved a breach of contract action brought by the county concerning excessive noise levels by the defendant, City of Denver's airport.[347] The study, prepared for Denver, showed that a sixth runway would increase noise levels.[348] The court found the report was probative of the validity of Denver's defenses and that it was not inherently

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A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that:
(A) the statement is offered as a evidence of a material fact;
(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
(C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence.

DEL. R. EVID. 803(24).

344. Rule 803(24) of the *Arkansas Rules of Evidence* provides:

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

ARK. R. EVID. 803(24).

345. Board of County Comm'rs v. City & County of Denver, No. 00CA0217, 2001 Colo. App. LEXIS 564, *1 (Colo. Ct. App. Mar. 29, 2001).

346. *Id.* at *1.

347. *Id.*

348. *Id.* at *25.

unreliable.[349] Plaintiff county ultimately prevailed and received damages for the excessive noise.[350]

The admission of hearsay statements were also admitted pursuant to the residual exception in a Delaware case. In *Juran v. Bron*,[351] the Delaware Court of Chancery reviewed the trial of parties involved in a partnership venture.[352] Plaintiffs alleged fraud and breach of fiduciary duty against defendants.[353] The trial court had admitted into evidence a conversation of the son of one of the defendants that went to the heart of the plaintiff's fraud, bad faith, and fiduciary duty claims.[354] The Appeals Court upheld this ruling, finding that the statements had circumstantial guarantees of trustworthiness. The court found that, "in an action for fraud and breach of fiduciary duty where few nonparties have knowledge of the facts, statements by a witness in a position to know the truth should . . . be admitted."[355]

Lincoln v. AAA Bail Bond Co.[356] was an Arkansas case where the introduction of evidence pursuant to the residual exception was found to be reversible error.[357] In *Lincoln*, appellant Lincoln brought suit "to collect unpaid commissions he claimed to have earned prior to his termination."[358] A judgment, however, was entered in favor of the appellee bail bond company.[359] The court of appeals reviewed the admission of an exhibit relied upon by appellee to show that Lincoln owed the company money. The exhibit was a list concerning accounts receivable, which allegedly reflected monies collected by Lincoln, but not turned in to the company.[360]

The court of appeals found the introduction of this evidence was inadmissible under the residual exception.[361] They held that the list had not been prepared in the regular course of business, but was prepared for a special purpose to show the court that Lincoln owed the company money.[362] The court also found that the source of the information contained in the

349. *Id.* at *26.
350. *Id.* at *29.
351. No. 16464, 1999 Del. Ch. LEXIS 232, at *1.
352. *Id.* at *1.
353. *Id.*
354. *Id.* at *10–11.
355. *Id.* at *12.
356. No. CA 98-365, 1998 Ark. App. LEXIS 863, at *1 (Ark. Ct. App. Dec. 9, 1998).
357. *Id.* at *1.
358. *Id.*
359. *Id.*
360. *Id.* at *3.
361. *Lincoln*, 1998 Ark. App. LEXIS 863, at *6.
362. *Id.*

exhibit lacked trustworthiness, since the information was provided by criminal defendants who had the incentive to inflate the amount of monies paid, so as to reduce their own debts.[363]

Each of these state courts was cognizant and discerning of the requirement that there be circumstantial guarantees of trustworthiness before evidence could be admitted under the residual exception. Although these state cases are far less analytical than those reported from the federal courts, they all articulate, in a well reasoned way, the reason the hearsay statements were admissible or inadmissible. Again, in these states there should be no worry that the residual exception will swallow the hearsay rule. It is clear the state court judges in the civil cases reported on here have not abused their power with respect to the residual exception.

B. *Criminal Cases*

Let us now briefly examine the state criminal law cases reported since 1997 involving the residual exception. The state courts must often balance the residual exception against a defendant's confrontation rights. A review of the state criminal cases shows that such state courts are very careful concerning admission of hearsay pursuant to the residual exception. In Arkansas, the Court of Appeals of the state has upheld trial judges' refusal that a defendant be allowed to admit hearsay pursuant to that state's residual exception on several occasions. In *Clark v. State*,[364] the defendant, on trial for murder, sought to introduce statements through a police detective who had allegedly heard that other persons had bragged to confidential police informants that they, and not the defendant, had committed the murder.[365] The trial court and the court of appeals found no guarantees of trustworthiness to such alleged statements and excluded the evidence.[366]

In *Bilyeu v. State*,[367] the Arkansas court of appeals again upheld the trial court's refusal to admit statements pursuant to residual exception.[368] Bilyeu, on trial for the death of his girlfriend's nineteen-month-old son, sought to introduce a diary, purportedly written by the girlfriend, to show that he could

363. *Id.*

364. No. CACR 98-86, 1998 Ark. App. LEXIS 747, at *1 (Ark. App. Ct. Oct. 14, 1998).

365. *Id.* at *1.

366. *Id.* at *12.

367. No. CACR 97-505, 1998 Ark. App. LEXIS 66, at *1 (Ark. Ct. App. Feb. 4, 1998).

368. *Id.* at *5.

not have killed the child on the day in question.[369] The court found that since the diary was unsigned and undated, that it did not contain equivalent guarantees of trustworthiness required by the state's residual exception.[370]

In *Williams v. State*,[371] defendant's attempt to introduce hearsay through the residual exception also failed.[372] In this murder and kidnapping case, Williams gave a statement concerning his involvement in the crimes at the time of his arrest.[373] He later made a different and less inculpatory statement to county detectives prior to trial.[374] At trial the State introduced, in its case in chief, only Williams' first statement.[375] Williams sought to introduce his second statement. The court ruled that it was inadmissible under the residual exception because there was no guarantee of trustworthiness to this second statement, which Williams made after a co-defendant had implicated him.[376] The court contended that Williams had every reason to give detectives a self-serving statement to minimize his participation in the crimes.[377]

The Arkansas cases show that there is little likelihood that the residual exception will swallow the hearsay rule, or that judges are abusing the use of the exception. In *Clark*, *Bilyeu*, and *Williams*, none of the defendants could show the requisite indicia of reliability surrounding the statements they proffered to make one believe that they were trustworthy.

In *People v. Meyer*,[378] the court of appeals of Colorado upheld the prosecution's right to introduce, pursuant to the residual exception, a verified complaint to obtain a restraining order sworn out by the murder victim against defendant.[379] The court found that the complaint possessed sufficient indicia of reliability as a court document, and that the victim had little reason to fabricate.[380] Because the statement possessed the necessary guarantees of trustworthiness, admission of the statement did not violate defendant's right of confrontation.[381]

369. *Id.* at *4.
370. *Id.* at *5.
371. 946 S.W.2d 678 (Ark. 1997).
372. *Id.* at 680.
373. *Id.* at 684.
374. *Id.*
375. *Id.* at 683.
376. *Williams*, 946 S.W.2d at 684.
377. *Id.*
378. 952 P. 2d 774 (Colo. Ct. App. 1997).
379. *Id.* at 777.
380. *Id.*
381. *Id.*

In *State v. Anderson*,[382] the court did not allow the prosecution to introduce, pursuant to Delaware's residual exception, statements made by the victim in a felony murder case while he was in the hospital. The victim gave three statements concerning the identity of the defendants before he died.[383] The court found that over the course of the victim's hospitalization he suffered from nightmares and hallucinations.[384] The court also found that over the course of the hospitalization the victim discussed the case with numerous people.[385] The court maintained that such facts raised doubts as to whether the proffered statements against defendants came from the victim's unaided memory.[386] Lacking particularized guarantees of trustworthiness, the court excluded the statements because to admit them would have deprived defendants of their right to confrontation.[387]

In an earlier case, *State v. Bowe*,[388] the court reached a similar finding with respect to the in hospital photo identifications of defendants by the victim nine days after an assault. The court found that the photo identifications, sought to be introduced by the prosecution came after the victim had spoken with the detective investigating the case nine times.[389] The court was not convinced that the identification was not influenced by the detective or by something other than a desire to tell the truth.[390] There was no appropriate indicia of reliability to the identifications to be found in this situation. The identifications were disallowed pursuant to the residual exception.

In *State v. Castaneda*,[391] the Supreme Court of Iowa overturned the defendant's conviction for child abuse and remanded the case. The court provided an explanation supporting the use of the residual exception on remand. Yet, the court gave no thoroughgoing analysis for the trial court to follow in order to determine whether there existed particularized "guarantees of trustworthiness" with respect to the reintroduction at the retrial of a videotaped statement of the child victim.[392] Castaneda is disappointing in this respect.

382. 2000 Del. Super. LEXIS 60 (Mar. 20, 2000).
383. *Id.* at 1.
384. *Id.* at 12.
385. *Id.*
386. *Id.*
387. 2000 Del. Super. LEXIS 60 at 12.
388. 1997 Del. Super. LEXIS 603 (1997).
389. *Id.* at 4.
390. *Id.* at 9.
391. 621 N.W.2d 435 (Iowa 2001).
392. *Id.* at 443–48.

The same court gave an excellent analysis of its findings of particularized guarantees of trustworthiness in the case of *State v. Hallum*.[393] In *Hallum*, the court allowed the prosecution during a murder trial, pursuant to the residual exception, to introduce defendant's accomplice's videotaped narrative of the crime.[394]

The accomplice in *Hallum* was Carlos Medina. The Supreme Court of Iowa allowed Medina's statement into evidence pursuant to the residual exception after finding: 1) Medina was not offered leniency in exchange for his statement; 2) he did not attempt to shift blame to the defendant; 3) he unequivocally acknowledged that he committed serious offenses and did not attempt to avoid responsibility for his own acts; 4) he did not attempt to curry favor with the police; 5) he voluntarily gave his statement after being given his Miranda rights; 6) he had not been caught "red-handed" and so was not in a situation where his only recourse was to share blame by implicating the defendant; 7) his statement was given shortly after the commission of the crime while his memory was fresh; and 8) his statement was extremely detailed.[395] This thoroughgoing analysis by the court demonstrated that there were appropriate indicia of reliability to show that the statement was trustworthy.

In *State v. Martin*,[396] the Supreme Court of Minnesota upheld the trial court's refusal to allow the defendant, who was on trial for murder, to introduce a double hearsay statement as part of his defense.[397] The court found that the defendant had failed to establish sufficient guarantees of trustworthiness because he made no offer of proof about the circumstances of the conversations about the declarant's memory.[398] Additionally, the court found that before defendant had offered this double hearsay testimony, he had already introduced extrinsic evidence to contradict the proffered testimony.[399]

A year earlier in *State v. Martin*,[400] involving the same defendant, the Supreme Court of Minnesota reversed the state appellate court's ruling that prior testimony of Martin's co-defendants who were tried separately could

393. 585 N.W.2d 249 (Iowa 1999).
394. *Id.* at 257–59.
395. *Id.* at 257.
396. 614 N.W.2d 214 (Minn. 2000).
397. *Id.* at 225.
398. *Id.*
399. *Id.*
400. 591 N.W.2d 481 (Minn. 1999).

be introduced at his trial by the prosecution.[401] The supreme court found that the appeals court erred when it concluded that the entire portions of the co-defendants' trial testimony bore sufficient indicia of reliability to merit admission under the residual exception and the Confrontation Clause.[402] The supreme court found that some of the proffered testimony was so unreliable it would have to be subjected to cross examination.

In re L.E.P.,[403] a case involving a juvenile, the Supreme Court of Minnesota examined the criteria state courts should articulate in evaluating statements by young children admitted pursuant to the residual exception.[404] The criteria included evaluating the "lack of motive to fabricate, spontaneity and demeanor of the child, expressions unexpected from a child of that age, and the absence of leading questions."[405]

In *State v. Wikan*,[406] the Court of Appeal of Minnesota upheld the prosecution's introduction of prior inconsistent statements of a victim of spousal abuse pursuant to the state's residual exception.[407] The court found that the prior statements implicating her spouse, which differed from her testimony at trial, possessed the requisite guarantees of trustworthiness.[408] The court found that the statements were reliable, because: 1) they were against interest due to the relationship; 2) she did not appear confused when she made the statements; 3) the statements were corroborative of what other witnesses testified, and 4) they were made just after the event.[409]

In *People v. Lee*,[410] the court of appeal of that state upheld the admission, pursuant to the state's residual exception, statements of a victim of an armed robbery who died before the trial. The declarant identified defendant as the perpetrator. The court found the statements had particularized guarantees of trustworthiness.[411] Among other factors, the court found were that 1) the victim suffered no memory loss from the incident; 2)

401. *Id.* at 484.
402. *Id.*
403. 594 N.W.2d 163 (Minn. 1999).
404. *Id.* at 170–71.
405. *Id.* at 173.
406. No. C1-96-880, 1997 Minn. App. LEXIS 271, at *1 (Minn. Ct. App. Mar. 11, 1997) (unpublished opinion).
407. *Id.* at *11.
408. *Id.* at *6.
409. *Id.* at *6–7.
410. 622 N.W.2d 71 (2000).
411. *Id.* at 79.

that he was coherent when he made the statements; 3) he was not confused; and 4) the statements were voluntary.[412]

In *People v. Welch*,[413] the Michigan Court of Appeals upheld the trial court's decision not to allow a hearsay statement offered by the defendant pursuant to the residual exception.[414] Defendant, on trial for the murder of a girlfriend he allegedly pushed off a bridge to her death, sought the introduction of statements by witnesses who allegedly heard the victim say she was going to kill herself moments before her plunge.[415] Here, the court held that the statements were not reliable. The court found that statement had not been related directly to the police officer who would testify. The defense sought to have the police officer testify to what a witness had overheard from others.[416] However, there was 1) no evidence that this witness actually heard the statement by the victim; 2) no other witnesses testified as to such statement; 3) sixteen minutes had elapsed between the victim's plunge and the witness relating the information to the officer.[417] The court also found unreliable the fact that the officer who approached the group of witnesses 4) found them laughing and giggling about the situation.[418] Finally, the court found the officer 5) had not written down the statement.[419] A sad set of facts here would not support a finding of equivalent guarantees of trustworthiness.

In *State v. Garner*,[420] the Supreme Court of Nebraska upheld the trial court's refusal to introduce tapes of a false confession at a murder trial.[421] Defendant, on trial for murder sought introduction of the taped confession of an eleven-year-old boy who confessed to the crime.[422] The eleven-year-old had been seen at the victim's house prior to the murder.[423] He was questioned by police for seven hours before defendant became the true suspect of the crime. The eleven year old later said he made up the confession so that he could go home and go to sleep.[424] The eleven year old

412. *Id.* at 80–81.
413. 574 N.W.2d 682 (Minn. Ct. App. 1977).
414. *Id.* at 685.
415. *Id.* at 684.
416. *Id.*
417. *Id.*
418. *Welch*, 574 N.W. at 684.
419. *Id.*
420. 614 N.W. 2d 319 (Neb. 2000).
421. *Id.* at 329–30.
422. *Id.* at 323.
423. *Id.* at 323.
424. *Id.* at 323.

was available and testified at trial.[425] The court found the tapes were inadmissable hearsay and that it was not an abuse of discretion for the trial court to not allow the tapes pursuant to the residual exception.[426] There was no guarantee of trustworthiness to the tapes made under the conditions of this case. The court rightly decided in this situation that it was best that the eleven-year-old, who was available for the trial, testify and be subjected to cross examination.

In *State v. Jacob*,[427] the Supreme Court of Nebraska again upheld a trial court's refusal to allow a defendant, on trial for murder, to introduce evidence pursuant to the residual exception.[428] In this case, Jacob sought introduction of a videotape deposition of a used car salesman in Maine.[429] Jacob, who had planned to fly to England, sought to sell his vehicle in Maine, where he had driven after killing his girlfriend and her new lover in Nebraska.[430] He sought introduction of the videotape to show his innocent behavior prior to his arrest.[431] The Nebraska trial court did no analysis, but held that the videotape would not be admitted pursuant to the residual exception.[432] The Supreme Court found the trial court had not abused its discretion for the "residual hearsay exception is to be used rarely and only in exceptional circumstances."[433] The opinion infers that the defense did little to show that the proffered videotape possessed any particularized guarantees of trustworthiness. The court was correct not to admit the evidence.

As this review illustrates, the state courts are very cautious concerning introduction of hearsay pursuant to the residual exception in criminal cases. The Supreme Court of Arkansas, in three separate cases, would not allow introduction of defense evidence pursuant to the residual exception. In Delaware, the court, in separate cases, twice denied prosecutors the use of residual hearsay of unreliable identifications by crime victims who were hospitalized. The Supreme Court of Iowa gave a very thoroughgoing analysis of appropriate indicia of reliability for introduction of the statements in *Hallum*. In the four cases considered by the Supreme Court of Minnesota, the court found particularized guarantees of trustworthiness in

425. *Garner*, 614 N.W.2d at 330.
426. *Id.*
427. 574 N.W.2d 117 (Neb. 1998).
428. *Id.* at 139.
429. *Id.*
430. *Id.* at 126–28.
431. *Id.* at 139.
432. *Id.* at 139–40.
433. *Id.* at 139.

only two of the cases. The Michigan courts allowed testimony pursuant to the residual exception in one case, but not the second. The Nebraska court gave short shrift to defendants' requests to introduce hearsay pursuant to the residual exception in the two cases it considered. As a result of this review, we need not fear that the use of the residual exception is being abused by judges in state criminal court cases.

C. *The Florida Cases*

As noted earlier in this article, Florida does not have a residual exception akin to rule 807. However, Florida does have two sections of its evidence code directed to the types of circumstances where residual exceptions often are applied. Section 90.803(23) allows the use of out-of-court statements of children eleven years old or younger in child abuse cases. Section 90.803(24) allows introduction of such statements by elderly or disabled adults. These may be viewed as "quasi-residual" exceptions.

This survey would not be complete without commenting on the cases in Florida where hearsay statements have been offered pursuant to these "quasi-residual" exceptions. The initial question is whether such cases require the same type of rule 807 analysis to determine whether there are appropriate indicia of reliability and notice to establish trustworthiness. The answer is, of course, no. There is no need for an independent analytical framework in Florida because the statutes in question set out the requirements to be followed. If the requirements of the statute are not met, the evidence is not allowed. A review of the cases reveals that the courts of Florida are very careful with the hearsay evidence sought to be introduced pursuant to their "quasi-residual" statutes.

The essence of both statutes is that they seek to test the reliability of out of court statements. In criminal cases, notice must be given. In all cases the judge must hold a hearing outside of the hearing of the jury to determine the reliability of such statements.[434] If reliable, such statements may be introduced whether the declarant is available or unavailable.[435] If the declarant is unavailable:

> the trial judge must determine whether the hearsay statement is reliable and from a trustworthy source without regard to corroborating evidence. If the answer is yes, then the judge must determine whether other corroborating evidence is present. If the

434. *See* FLA. R. EVID. 90.903(23)(a)(1), 90.803(24)(a)(1).
435. *See* FLA. R. EVID. 90.903(23)(a)(2), 90.803(24)(a)(2).

answer to either question is no, then the hearsay statements are inadmissable.[436]

In *Doe v. Broward County School Board*,[437] a trainable mentally retarded girl with Down's Syndrome had been digitally penetrated by a mentally disabled male in an after school care program at an elementary school in Broward County.[438] Her mother brought a personal injury lawsuit claiming negligent supervision.[439] The victim was unavailable to testify at the trial. The School Board made a motion in limine to exclude from trial the victim's hearsay statements to her mother and a psychologist on the ground that the hearsay statements were not admissible pursuant to section 90.803(23), because the victim was unavailable and there was no corroborating evidence of the incident.[440] The trial court granted the motion in limine.[441] The court then granted the School Board's motion for summary judgment "based upon the court's conclusion that section 90.803(23) preempted all other hearsay exceptions, and as a result, [the victim] had no evidence with which to prove her case."[442]

The Florida District Court of Appeal found that the trial judge had not abused its discretion in finding that there was no corroborating evidence of the incident which would allow the introduction of the hearsay statements pursuant to section 90.803(23).[443] The appeals court reversed the summary judgment and remanded the case for the trial judge to determine whether the victim's out of court statements may have been admitted pursuant to other hearsay exceptions.[444]

In *Florida v. Townsend*,[445] the Supreme Court of Florida reversed defendant's conviction for abuse of a child of a two year old because of

436. *Id.*

437. 744 So. 2d 1068 (Fla. 4th Dist. Ct. App. 1999).

438. *Id.* at 1070.

439. *Id.*

440. *Id.*

441. *Id.*

442. *Doe*, 744 So. 2d at 1070.

443. *Id.* at 1071.

444. *Id.* at 1073. Specifically, the court remanded the case in order that the trial court might determine whether the victim's out-of-court statements to the psychologist, not relating to the identity of the perpetrator, were admissible under the medical diagnosis and treatment exception and whether the victim's out of court statements to her mother were admissible as excited utterances. *Id.*

445. 635 So. 2d 949 (Fla. 1994).

errors in the trial court's failure to make adequate findings for the admission of the child victim's hearsay statement.[446] The court found that:

> Section 90.803 (23) (a) (1) mandates that the trial judge, in a hearing conducted outside the presence of the jury, determine whether a hearsay statement is trustworthy and reliable by examining the 'time, content, and circumstances' of the statement, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim and any other factor deemed appropriate .... Other factors may include ... a consideration of the statements's spontaneity; whether the statement was made at the first available opportunity following the alleged incident ... whether the child used terminology unexpected of a child of similar age; the motive or lack thereof to fabricate the statement ... [I]n sum, as noted by the United States Supreme Court in *Wright,* a court is to use a totality of the circumstances evaluation in determining reliability.[447]

The court in *Townsend* found, however, that "the trial judge merely listed each of the statements to be considered and summarily concluded, without explanation or factual findings, that the time, content, and circumstances of the statements to be admitted at trial were sufficient to reflect that the statements were reliable."[448] The court found such findings insufficient under both the Florida statute and the constitutional requirements of *Idaho v. Wright.*[449]

Similarly, in *Hill v. State,*[450] the district court of appeal reversed and remanded defendant's conviction for sexual battery and a lewd and lascivious act committed in the presence of a four year old.[451] The court found that, although some of the child's out-of-court hearsay statements had been found reliable pursuant to section 90.803(23), the trial court had erred when it allowed the examining physician to testify as to the child victim's

446. *Id.* at 958.
447. *Id.* at 957–58.
448. *Id.* at. 958.
449. *Id.*
450. 643 So. 2d 653 (Fla. 2d Dist. Ct. App. 1994).
451. *Id.* at 654.

statements about the defendant's culpability, without observing the safeguards of section 90.803(23) with respect to such testimony. [452]

In *State v. Jones*,[453] the Supreme Court of Florida determined that by providing safeguards outlined in section 90.803(23), the legislature of Florida had sought to strike a balance between the need to consider child hearsay statements in judicial proceedings and the rights of the accused.[454] The court held that section 90.803(23) comported "with the confrontation clauses of both the federal Constitution and the Florida Constitution."[455]

In stark contrast to these child abuse cases, the Supreme Court of Florida in *Conner v. State*,[456] held that the use of hearsay exception for elderly adults, pursuant to section 90.803(24), was, in criminal cases unconstitutional.[457] In that case, the defendant was convicted, on a plea of nolo contendre, of armed burglary, armed robbery and armed kidnapping.[458] The victim was an eighty year old man who died prior to trial.[459] The trial court ruled that hearsay statements he gave to police about the crime were corroborated by other evidence, and that the state would be allowed in a hearing "to establish that the circumstances surrounding the statements guaranteed their reliability."[460]

The Supreme Court of Florida found deficiencies in the statute as it applied to elderly persons. The court found that section 90.803(24), in defining elderly as an adult sixty years of age or older, applies to a much broader class of adult declarants than did the child abuse statute of section 90.803(23).[461] As written, the statute applied to all persons over sixty years old. The court also found, unlike the child abuse statute which was limited to acts describing child abuse, neglect, or sexual abuse, that under the 90.804(24) exception for the elderly, declarants could describe "any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act."[462] Thus, the elderly hearsay exception would not be limited to crimes concerning elder abuse. Finally, the court could not determine a list of

452. *Id.*
453. 625 So. 2d 821 (Fla. 1993).
454. *Id.* at 826.
455. *Id.*
456. 748 So. 2d 950 (Fla. 2000).
457. *Id.* at 954.
458. *Id.* at 953.
459. *Id.* at 952.
460. *Id.* at 953.
461. *Conner*, 748 So. 2d at 958.
462. *Id.* (quoting FLA. STAT. § 90.803(24)(a)).

factors for the elderly, unlike the factors for children set out in section 90.803(23), that would guarantee the reliability of the hearsay statements of the elderly adult.[463]

The case was well reasoned. From such reasoning, it is easy to presume that though Florida has no residual rule akin to 807, the "quasi-residual" exceptions it has adopted for the elderly and children will not swallow the hearsay rule as we know it.

VI. CONCLUSION

This review of the twelve federal cases and twenty-two state cases, which relied on the residual exception in some part, show that there has been no abuse of the rule by the courts at the federal or the state level since the 1997 amendment to the residual exception. Courts appear vigilant with respect to analyzing the need for particularized guarantees of trustworthiness for statements proffered pursuant to the exception. Very often, such analysis shows that the statements lack the particularized guarantees of trustworthiness needed to pass muster. We need the residual exception to the hearsay rule. It is the exception that gives flexibility to the rule. If the states are reluctant to adopt such residual exceptions, they may well be advised to look at the Florida model, especially for child abuse and neglect cases.

463. *Id.* at 958–59.