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Erosion of the Confrontation Clause in the Ocean State: Admitting Declarations of a Decedent Made in Good Faith

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Notes and Comments

Erosion of the Confrontation Clause in the Ocean State: Admitting Declarations of a Decedent Made in Good Faith

I. Introduction

Rhode Island's courts have opened the door to a hearsay exception which erodes defendants' rights under the Confrontation Clause of the United States Constitution.[1] In two recent criminal cases the Rhode Island Supreme Court admitted hearsay statements by deceased declarants into evidence under Rhode Island Rule of Evidence 804(c),[2] an exception which is unique to Rhode Island's criminal justice system.[3] Used for decades in testamentary and other civil proceedings,[4] this rule requires the court to

1. U.S. Const. amend. VI.

2. "A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant." R.I. R. Evid. 804(c). Unlike the exception for dying declarations, statements made under this provision do not have to be made under belief of impending death, nor must they concern the cause or circumstances of the impending death. *See* R.I. R. Evid. 804(b)(2). Under certain circumstances, however, these statements may also be admissible under R.I. R. Evid. 804(b)(2). *See, e.g.*, State v. Burke, 574 A.2d 1217 (R.I. 1990).

3. While other states have similar exceptions, they are limited to use in civil proceedings. The federal rules exception for statements of recent perception was similar, but was applied more broadly. Wisconsin and New Mexico are the only states to adopt it for use in criminal prosecutions. *See infra* part III.2.

4. *See, e.g.*, Morinville v. Old Colony Coop. Newport Nat'l Bank, 522 A.2d 1218, 1221 (R.I. 1987) (affirming trial court's admission of decedent's declaration under § 9-19-11); Hamrick v. Yellow Cab Co., 304 A.2d 666 (R.I. 1973) (declining to admit statements of decedent in a negligence action where they were not made in good faith); Desmarais v. Taft-Pierce Mfg. Co., 252 A.2d 445 (R.I. 1969) (admitting declarations of decedent in a negligence action where compliance with specific

find that a deceased declarant made a statement from personal knowledge in "good faith" before an "action" was commenced.[5] This Note argues that admission of hearsay evidence under Rule 804(c) diminishes the Constitutional confrontation requirement by improperly treating the rule's elements as guaranteeing the trustworthiness of the decedent's statements.

The Confrontation Clause does not completely ban admission of hearsay statements against a criminal defendant.[6] In some instances, it may provide a thin additional layer of protection for a criminal defendant presented with unavailable witness hearsay statements,[7] by barring admission of such evidence where it might otherwise be admissible under a hearsay exception.[8] In other situations, hearsay exceptions permit admission of unavailable witness testimony despite the Clause.[9] As an exception for hearsay

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provisions of the statute was not explicit, but could be circumstantially inferred); R.I. Hosp. Trust Co. v. Letendre, 77 A.2d 203 (R.I. 1950) (declarations of deceased admitted with note to weigh such declarations with caution); Segee v. Cowan, 20 A.2d 270 (R.I. 1941) (admitting statements made by decedent regarding accident in a personal injury action); Caswell v. Bathrick, 164 A. 505 (R.I. 1933) (admitting declarations of deceased testatrix in estate dispute); Paulson v. Paulson, 145 A. 312 (R.I. 1929) (admitting declarations of decedent but indicating such should be done by carefully weighing the circumstances surrounding the statement).

5. R.I. R. Evid. 804(c). Prior to Rule 804(c), the provision for declarations of decedents made in good faith was included in the Rhode Island General Laws. R.I. Gen. Laws § 9-19-11 (Reenactment 1985) (as enacted by P.L. 1927, ch. 1048, § 1 and repealed by P.L. 1987, ch. 381, § 5).

6. *See* Idaho v. Wright, 497 U.S. 805, 813 (1990) (confirming that although the admission of hearsay statements might actually violate the Confrontation Clause, precedent requires that not all hearsay statements be forbidden). *See, e.g.*, Mattox v. United States, 156 U.S. 237, 243 (1895); Pointer v. Texas, 380 U.S. 400, 407-8 (1965). This is also true in cases where a witness is unavailable, since on its face the Confrontation Clause could bar admission of any statements made by unavailable witnesses. A long line of cases indicates the literal interpretation of the Clause is not the accepted one. *See, e.g.*, *Wright*, 497 U.S. at 813; Bourjaily v. United States, 483 U.S. 171 (1987), Ohio v. Roberts, 448 U.S. 56 (1980). The United States Supreme Court has indicated that while the Confrontation Clause and the hearsay doctrine protect "similar values" they are not "congruent." 4 David W. Louisell & Christopher B. Mueller, Federal Evidence § 418, at 131 (1st ed. 1980).

7. *See, e.g.*, *Roberts*, 448 U.S. at 63 (reasoning that the "Confrontation Clause reflects a preference for face-to-face confrontation at trial," and that cross-examination is a major interest secured by the Clause).

8. *Wright*, 497 U.S. at 814.

9. *See, e.g.*, Dutton v. Evans, 400 U.S. 74, 87 (1970) (admitting hearsay in a prosecution where evidence was neither "crucial" nor "devastating"); United States v. Rogers, 549 F.2d 490, 494-502 (1976) (upholding use of unsigned, unsworn statement of co-offender implicating the accused where statements were not

statements of unavailable declarants, Rule 804(c) does not provide defendants with the minimal protection required by the Confrontation Clause.[10] This Note supports the view that hearsay evidence should not be admitted under Rule 804(c) in criminal proceedings because it violates a defendant's right to confront the witnesses against him under the Confrontation Clause.

The presence of Rule 804(c) distinguishes Rhode Island's rules from the Federal Rules of Evidence and most other state evidentiary codes.[11] In other states, similar provisions have been confined to civil cases.[12] At the federal level the rule was rejected completely.[13] Rhode Island, however, elected to change the entire characterization of this provision. History suggests that the Rhode Island legislature's original purpose was to provide a method for admitting certain testimony in civil actions, primarily testamentary proceedings.[14] True to this objective, Rule 804(c) was not used outside reported civil cases until the adoption of the Rhode Island

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crucial to government's case). Louisell Evidence, *supra* note 6, § 418, at 151-52, n.21.

10. Reading the Confrontation Clause narrowly leads to the theory that the accused is entitled to be physically present when testimony against him is given. Louisell Evidence, *supra* note 6, § 418, at 124. In a broader sense, the Clause could be read as giving the accused the opportunity to cross-examine and face witnesses. *Id.* at 125. Even more broadly, the accused might be entitled to exclude out of court statements. *Id.* The main concern with hearsay is the reconciliation of the public's need for useful evidence in prosecuting defendants with the defendant's right to confront the witnesses against him. Theoretically, hearsay which "falls within an exception is attended by surrounding circumstances that make it more reliable than ordinary extra-judicial statements." Graham C. Lilly, An Introduction to the Law of Evidence, § 7.29, at 311 (2d ed. 1987).

11. *See, e.g.*, 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence 804-189 to 804-206 (1994) (presenting a summary of state adaptation of hearsay exceptions not found within the federal rules).

12. Mass. Gen. Laws Ann. ch. 223, § 65 (West 1985). *See infra* part III.1 for a historical overview of the origination of the rule in Massachusetts.

13. *See infra* part III.2 for a discussion of the proposed federal rule for statements of recent perception.

14. The statute was likely enacted to combat the evidentiary problems brought on by dead man's statutes which made surviving parties in a transaction with a deceased person incompetent to testify to the extent that his testimony might be questioned by the deceased party. 81 Am. Jur. 2d *Witnesses* § 557 (1992). In statutes such as that enacted in Massachusetts, the provision was considered to be a "compensating provision" which relaxed the rule against hearsay so that decedent's statements could be admitted where survivor's testimony was freely admissible. *Id.* § 564. *See infra* part III for a full discussion of Rule 804(c)'s history and evolution.

Rules of Evidence in 1987[15] which broadened its applicability. Rhode Island's advisory committee on evidence seemingly ignored 60 years of precedent in opening the rule for use in both civil and criminal forums, resulting in potentially inescapable prejudice to criminal defendants faced with this type of hearsay evidence at trial.

The issue of using Rule 804(c) in a criminal setting first reached the state's high court in *State v. Burke*,[16] and was not revisited again until 1995 when *State v. Scholl*[17] was decided. Both cases involved assault crimes against elderly individuals in which the victims died before trial.[18] In *Burke* and *Scholl*, the court adopted the state evidence advisory committee's recommendations regarding the scope of the rule, refused to consider the rule's long history and original purpose, and contorted their reasoning regarding its application. As a result, the court failed to reconcile differing interpretations of this rule in each case, causing uncertainty regarding the actual meaning behind the rule's elements. The court treated the elements of the rule as themselves providing the trustworthiness necessary to carry a hearsay statement past the Confrontation Clause barrier. This reasoning lead the court to broaden usage of a rule which provides little if any protection to defendants under the Sixth Amendment. Such a dangerous precedent should be carefully reconsidered before defendants' confrontation rights are further dissipated.

Part II of this Note reviews both the Sixth Amendment issues and the relationship between the Confrontation Clause and the hearsay doctrine to establish the setting in which Rule 804(c) must be interpreted. Part III addresses the history behind the rule, comparing its evolution with the similar Massachusetts provision and the Federal Rules of Evidence. The development of the rule in Rhode Island and elsewhere establishes the original drafters' in-

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15. R.I. R. Evid. 804(c) advisory committee's note. The committee noted that this exception, unlike the traditional dying declarations exception, applied in all civil and criminal cases, and was "not limited to the cause or circumstances of the declarant's impending death." They also stated that there appeared "no persuasive reason to limit the exception to civil cases," since the constitutionality of admitting such statements must be made on a case by case basis. *Id.*

16. 574 A.2d 1217 (R.I. 1990) (affirming conviction of defendants for robbery, attempted robbery, and assault and battery on a person over 60 years of age).

17. 661 A.2d 55 (R.I. 1995) (affirming conviction of defendant for robbery and felony murder).

18. *See infra* parts IV.1-.2 for a discussion of the facts of each case.

tent for the applicability of the rule, and presents the sharp departure from that intent in the adoption of the Rhode Island Rules of Evidence. Part IV presents an evaluation of the rule's components under the constitutional framework to establish that 804(c) does not provide the same circumstantial guarantees of trustworthiness as the recognized exceptions to the hearsay rule. Part V is an analysis of the Rhode Island Supreme Court's interpretation of the rule in criminal proceedings to date, demonstrating that the only precedents for use of this rule in a prosecution have set a path which cannot be followed without adversely impacting a defendant's right to confrontation.

II. HEARSAY AND THE RIGHT TO CONFRONTATION

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[19] Until federal codification of hearsay rules in 1975, the admission of hearsay evidence was largely dealt with by common law rules and exceptions.[20] For the purposes of this Note, hearsay is confined to statements made by deceased individuals which are then repeated in court by testifying witnesses. The primary concern regarding admission of hearsay evidence is that the individual making the statement cannot be cross-examined at trial. Cross-examination tests the sincerity, veracity, memory and perception of a witness and serves to filter ambiguities in testimony.[21]

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19. Fed. R. Evid. 801(c). Sometime during the late 1600s hearsay became an accepted form of evidence. 5 John H. Wigmore, Evidence § 1364, at 18 (Chadbourn rev. 1974).

20. *See* Joanne A. Epps, *Passing the Confrontation Clause Stop Sign: Is All Hearsay Constitutionally Admissible?*, 77 Ky. L.J. 7, 14 (1989).

21. Laurence H. Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957, 958-61 (1974) (describing the testimonial triangle which sets out the possible inaccuracies in the inferential chain when the statement being examined has not been made in court, under oath, by a person whose demeanor at the time is witnessed by the factfinder, or under circumstances permitting immediate cross-examination by counsel). Defects in perception reflect the concern that a statement may be unreliable because the declarant did not observe or hear accurately. Lilly, *supra* note 10, § 6.1, at 182. Problems with memory reflect the danger that the declarant's recollection may have been inaccurate or incomplete. *Id.* The concern with a declarant's sincerity simply questions whether the statement was truthful, and ambiguity may result where a declarant has used a word or phrase that has a special meaning or when a statement is incomplete. *Id.*

Where cross-examination is impossible, an adversary loses the ability to bring such tainted testimony to the attention of the trier of fact. Therefore, as the common law has evolved, hearsay statements have been admissible as evidence only through numerous exceptions.[22] Hearsay exceptions developed because of the need for hearsay evidence to secure justice in certain cases, and because the inherent reliability of some hearsay justified its admissibility.[23] An example of such excepted hearsay evidence deemed inherently reliable is former testimony, where the proponent in the present trial offers testimony given in an earlier hearing or proceeding.[24] Under this exception, hearsay risks "are minimized by the prior opportunity to test or develop the [witness's] testimony".[25] Numerous specific exceptions as well as residual or "catch-all" exceptions are codified at the federal level and in the Rhode Island Rules of Evidence.[26]

The Confrontation Clause[27] collides with those hearsay exceptions which serve to admit out-of-court statements by unavailable

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22. The Federal Rules of Evidence contain 27 specific exceptions, and two residual or catchall exceptions to the rule against hearsay. Fed. R. Evid. 803, 804. The Rhode Island rules largely parallel the federal rules, but add one additional exception, "Declaration of Decedent Made in Good Faith." R.I. R. Evid. 804(c). The United States Supreme Court has noted that the hearsay rule was "riddled with exceptions developed over three centuries" and that such exceptions "vary among jurisdictions as to number, nature and detail." *Roberts*, 448 U.S. at 62.

23. Randolph N. Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 Case W. Res. L. Rev. 431, 435 n.18 (1986). According to Wigmore, "the great principle underlying the [hearsay] exceptions were [n]ecessity and [c]ircumstantial [g]uarantees of [t]rustworthiness." *Id.* The term "reliability" is interchangeable with the concept of trustworthiness. *Id.* Some commentators have suggested the hearsay rules are too harsh and prevent much valuable evidence from being used in court. *See, e.g.*, Jack B. Weinstein, *Probative Force of Hearsay*, 46 Iowa L. Rev. 331 (1961) (arguing that present evidence rules do not provide a satisfactory solution to the hearsay problem); James J. Chadbourn, *Bentham and the Hearsay Rule - A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 Harv. L. Rev. 932 (1962); Wigmore, *supra* note 19, § 1577, at 540.

24. *See, e.g.*, R.I. R. Evid. 804(b)1.

25. Lilly, *supra* note 10, § 7.22, at 285.

26. R.I. R. Evid. 803, 804. Exceptions under Rule 803 apply to situations where the availability of the declarant is immaterial, while those under Rule 804 apply when the declarant is unavailable.

27. "In all criminal prosecutions, the accused shall enjoy the right to . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. The Confrontation Clause is applicable to the states through the Fourteenth Amendment. *See* Pointer v. Texas, 380 U.S. 400, 403 (1965).

declarants.[28] If applied literally, the Clause would abrogate nearly every hearsay exception.[29] The accused is entitled to be present at trial to see and hear the witnesses against him,[30] and beyond that, he has the right to cross-examine witnesses.[31] The Rhode Island Constitution contains a similar provision,[32] and its supreme court has often held "that the right to cross-examination is guaranteed by the [C]onfrontation [C]lause of the Sixth Amendment."[33]

The strict requirement of confrontation in the Sixth Amendment, however, does not necessarily prohibit the use of hearsay in a criminal trial,[34] as demonstrated by the numerous exceptions to the rule against hearsay.[35] The United States Supreme Court has found that "[w]hile a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as 'unintended and too extreme.' "[36] At the same time, however, the

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28. California v. Green, 399 U.S. 149, 156 (1970) ("Given the similarity of the values protected [by the hearsay rules and Confrontation Clause], however, the modification of a State's hearsay rules to create new exceptions for the admission of evidence against a defendant, will often raise questions of compatibility with the defendant's constitutional right to confrontation.").

29. Ohio v. Roberts, 448 U.S. 56, 63 (1980) (stating that the clause was not meant to be read as such, and the result of such reading had long been rejected as unintended and too extreme).

30. Christopher B. Mueller & Laird C. Kirkpatrick, Modern Evidence § 8.74, at 1449 n.4 (1995).

31. *Id.* at 1450. The United States Supreme Court said the clause envisions "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237, 242-43 (1895).

32. R.I. Const., art. 1 § 10.

33. State v. Correia, 600 A.2d 279, 285 (R.I. 1991) (quoting State v. Dame, 488 A.2d 418, 423 (R.I. 1985); State v. DeBarros, 441 A.2d 549, 552 (R.I. 1982)).

34. *See Roberts*, 448 U.S. at 64 (citing Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (stating that the United States Supreme Court has recognized that "competing interests," i.e., public policy and the necessities of the case versus confrontation, may warrant dispensing confrontation at trial)).

35. *See, e.g.*, R.I. R. Evid. 803(1)-(24); R.I. R. Evid. 804(b)(1)-(5); R.I. R. Evid. 804(c).

36. Idaho v. Wright, 497 U.S. 805, 814 (1990) (quoting Bourjaily v. United States, 483 U.S. 171, 182 (1987) (quoting *Roberts*, 448 U.S. at 63 (1980))). *Wright* was a child molestation case where the court considered the admissibility of out-of-court statements made by a 2-1/2-year-old child to her pediatrician regarding alleged abuse. *Wright*, 497 U.S. 805.

Confrontation Clause affords a criminal defendant protection against inaccurate, untrustworthy testimony, particularly when the witness testifying against the accused is unavailable.[37] Therein lies the tension between the rule against hearsay and the defendant's right to confrontation.

There are few situations involving an unavailable declarant which rise to the level of trustworthiness that would be sufficient for such testimony to be admitted at trial.[38] Generally, the hearsay rules for testimony of an unavailable witness incorporate two substitutes for actual cross-examination and oath. First, a rule of necessity demands that the prosecutor demonstrates the unavailability of the declarant whose statement is to be admitted at trial.[39] This is satisfied by one of five situations: the declarant's death, physical or mental illness, exemption by ruling of the court on the ground of privilege, refusal to testify despite an order of the court to do so, lack of memory on the subject matter, or flight from the court's jurisdiction.[40]

The prosecution must also establish indicia of reliability in the unavailable declarant's testimony which affords "the trier of fact a satisfactory basis for evaluating the truth of the prior statement."[41] The United States Supreme Court applied the "indicia of

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37. *Roberts*, 448 U.S. at 65 (setting forth the general approach to hearsay analysis under the Confrontation Clause).

38. This is demonstrated in the federal rules, which are generally followed in Rhode Island. Where it is immaterial whether a witness is available, 23 specific exceptions and one residual exception have evolved and are included in the federal rules. *See* Fed. R. Evid. 803(1)-(24) (availability of declarant immaterial). Where the witness is unavailable there are only four specific exceptions and one residual exception to the hearsay rule. Fed. R. Evid. 804(b)(1)-(5) (unavailable declarant). *See, e.g.*, *Wright*, 497 U.S. at 813-827 (1990) (holding that admission of a victim's hearsay statements under the residual exception of the federal rules of evidence violated defendant's Confrontation Clause rights).

39. *Roberts*, 448 U.S. at 65. While *Ohio v. Roberts* seemed to suggest that to satisfy the Confrontation Clause the unavailable declarant would have to either be produced at trial or be found unavailable before his out of court statement could be admitted, later cases declined to follow that lead. *See also* United States v. Inadi, 475 U.S. 387 (1986). This requirement was narrowed at the federal level, where the Supreme Court stated "unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." White v. Illinois, 112 S. Ct. 736, 741 (1992). This point, however, is not relevant in the analysis of 804(c), since the rule requires that the declarant be deceased. R.I. R. Evid. 804(c).

40. Fed. R. Evid. 804(a)(1)-(5); R.I. R. Evid. 804(a)(1)-(5).

41. California v. Green, 399 U.S. 149, 161 (1970). *See also Roberts*, 448 U.S. at 63 (citing Douglas v. Alabama, 380 U.S. 415, 418 (1965)). "[I]t is difficult to

reliability" requirement in *Ohio v. Roberts*[42] when it found that certain hearsay exceptions rest upon "such solid foundations" that admitting "virtually any evidence within them" does not offend the constitutional protection of confrontation.[43] Reliability may be inferred without more where evidence falls within a "firmly rooted" hearsay exception.[44] Otherwise, evidence must be excluded unless there is a showing of "particularized guarantees of trustworthiness."[45] An exception is firmly rooted where it is implicitly grounded in "longstanding judicial and legislative experience in assessing [its] trustworthiness."[46] For example, the exceptions for dying declarations, prior testimony, and business and public records are considered firmly rooted.[47] On the other hand, the United States Supreme Court has declared some exceptions are not firmly rooted.[48] An example is the residual exception, Federal Rule of Evidence 804(b)(5), which the Court found accommodated "ad hoc" situations where statements not otherwise falling into a recognized exception might still be reliable for use at trial.[49] It is unclear, however, whether firmly rooted is a function of longevity, the number of jurisdictions recognizing it,[50] or something else.

When a firmly rooted exception is not present, the Court requires that additional steps be taken to determine whether testimony possesses particularized guarantees of trustworthiness which would make it admissible.[51] Particularized guarantees of trustworthiness must be shown from the totality of the circum-

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conceive of a case in which the admitted hearsay had the accouterments of reliability and yet was without a sufficient basis for evaluation by the trier." Lilly, *supra* note 10, § 7.31, at 326 n.8.

42. 448 U.S. 56 (1980) (holding that introduction of preliminary hearing testimony was constitutionally permissible under the Confrontation Clause where it bore sufficient "indicia of reliability."). In *Roberts*, the defendant was charged with forgery of a check and possession of stolen credit cards. A witness made a statement regarding the charges during a preliminary hearing, but was unavailable for trial despite numerous attempts to procure her presence. The trial court admitted the transcript of the preliminary hearing, and the defendant was convicted.

43. *See id.* at 66.

44. *Id.*

45. *Id.*

46. *See* Idaho v. Wright, 497 U.S. 805, 817 (1990).

47. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1990).

48. *Wright*, 497 U.S. at 817 (finding that the residual exception is not firmly rooted).

49. *Id.*

50. Lilly, *supra* note 10, § 7.31, at 331.

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

stances surrounding the making of the statement and the credibility of the declarant.[52] In addition, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other corroborating evidence at trial.[53]

In *Idaho v. Wright*, the United States Supreme Court reasoned that evidence used to corroborate a hearsay statement's particularized guarantees of trustworthiness essentially bootstraps on the trustworthiness of the corroborating evidence, circumventing the Confrontation Clause's mandate that hearsay evidence be "so trustworthy that cross-examination of the declarant would be of marginal utility."[54] The Court, however, refused to support a mechanical test for determining particularized guarantees of trustworthiness, preferring to consider factors relating to whether the declarant was "particularly likely to be telling the truth when the statement was made."[55] Such factors included an adequate chance to observe, spontaneity of speaking, likelihood of sufficient recollection, and absence of motive to falsify.[56] These factors parallel the classic hearsay concerns of misperception, inaccurate narration, faulty memory, and insincerity, respectively.

Any substantive modification of a state's hearsay rules for unavailable declarants must necessarily undergo a rigorous examination in the courts to maintain the balance between the public need for evidence and the defendant's right to confrontation. The rule and its practical application should provide the trier of fact with sufficient information to determine the reliability and accuracy of the statements presented, and to accurately consider the conditions surrounding the making of the statements. It should serve as a reliable substitute for a defendant's right to confrontation. In the

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52. *Wright*, 497 U.S. at 820.

53. *Id.* at 822.

54. *Id. See* Lee v. Illinois, 476 U.S. 530, 544 (1986) (declining to rely on corroborative physical evidence); State v. Ryan, 691 P.2d 197, 204 (Wash. 1984) (requiring reference to "circumstances surrounding the making of the out-of-court statement, and not from subsequent corroboration of the criminal act.").

55. *Wright*, 497 U.S. at 822 (refusing to consider medical evidence of sexual abuse as corroborating the reliability of the child's identification of the abuser).

56. *Id.* at 821-22 (citing State v. Robinson, 735 P.2d 801, 811 (Ariz. 1987) (spontaneity and consistent repetition); Morgan v. Foretich, 846 F.2d 941, 948 (4th Cir. 1988) (mental state of the declarant); State v. Sorenson, 421 N.W.2d 77, 85 (Wisc. 1988) (use of unexpected terminology by a child); State v. Kuone, 757 P.2d 289, 292-93 (Kan. 1988) (lack of motive to fabricate)).

case of Rule 804(c), history suggests that such an evaluation might never have been required but for the abrupt alteration of the basic objectives of this rule by the drafters of the Rhode Island Rules of Evidence.

III. FOUNDATION OF RULE 804(c)

Rule of Evidence 804(c), and its predecessor Rhode Island General Law section 9-19-11, is a longstanding evidentiary provision in Rhode Island law.[57] When the State enacted the original statute in 1927, it based the provision on a Massachusetts statute for declarations of deceased persons.[58] While Massachusetts courts limited application of the statute for decedent declarations to civil cases,[59] Rhode Island courts have not.[60] At the federal level, Congress refused to include a provision similar in scope to the Rhode Island rule.[61] Rhode Island went further than either Massachusetts or the federal rules when it permitted Rule 804(c)'s use in criminal prosecutions, eventually opening the exception to challenge under the Confrontation Clause.[62] The Rhode Island advisory committee on the rules of evidence discarded the rule's roots provision with potentially adverse impact on criminal defendants.

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57. R.I. R. Evid. 804(c); R.I. Gen. Laws § 9-19-11 (Reenactment 1985) (as enacted by P.L. 1927, ch. 1048, § 1 and repealed by P.L. 1987, ch. 381, § 5).

58. 1898 Mass. Acts ch. 535.

59. *See, e.g.*, Commonwealth v. Mandeville, 436 N.E.2d 912 (Mass. 1982) (holding that the statutory exception for statements of deceased persons does not apply in criminal cases); Desrosiers v. Germain, 429 N.E.2d 385 (Mass. 1981) (admitting statements of deceased mother made years after she created a joint bank account with daughter); Saldi v. Brighton Stock Yard Co., 181 N.E.2d 687 (Mass. 1962) (considering past statements in tort action for negligence brought by executrix for injuries suffered by her decedent); Re Keenan, 192 N.E. 65 (Mass. 1934) (declaration of deceased juryman in regard to misconduct of an attorney); Commonwealth v. Gallo, 175 N.E. 718 (Mass. 1931) (holding the rule for decedent declarations not applicable in criminal prosecutions); Phillips v. Chase, 87 N.E. 755 (Mass. 1909) (reviewing declarations of deceased wife reacting to adoption of a child).

60. *See* State v. Scholl, 661 A.2d 55 (R.I. 1995); State v. Burke, 574 A.2d 1217 (R.I. 1990).

61. This was the proposed federal exception for statements of recent perception, discussed *supra* part III.2. The main difference between the two exceptions is that this exception is not limited to statements of deceased declarants. Weinstein & Berger, *supra* note 11, at 804-13.

62. R.I. R. Evid. 804(c), advisory committee's note. *See supra* part III.3 for the advisory committee's approach to the applicability of the rule.

III.1 *The Origin of the Rule*

The early 1800s sparked interest in broadening the scope of admissible hearsay evidence[63] and reducing the confusion surrounding the existing system,[64] a trend which continues to this day.[65] In 1898, Massachusetts enacted a statute, applicable to civil cases, which contained a general hearsay exception for all statements of deceased persons who had competent knowledge and no apparent interest to deceive.[66] This exception, the first of its kind, provided the following: "No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant."[67] The statute "contained carefully prescribed limitations," including requirements that the declarant be deceased at the time of trial, and that the exception be applied only to civil cases.[68]

The Massachusetts legislature and courts collaborated to clarify the limitations of the exception. The original form of the statute was amended to change the phrase "before the beginning of the suit" to "commencement of the action."[69] The Massachusetts high court found that this phrase meant that the rule was to be applied exclusively in civil actions.[70] In 1943 the Massachusetts legisla-

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63. Wigmore, *supra* note 19, § 1576, at 529. ("There was a time in the early 1800s when it became near to being settled that a general exception should exist for all statements of deceased persons who had competent knowledge and no apparent interest to deceive; but this tendency was of short duration . . . .").

64. The chief criticisms of the hearsay rules through the years are generally cited as their complexity and their failure to achieve the "purpose of screening good evidence from bad." 2 John W. Strong, McCormick on Evidence § 325, at 373 (1992).

65. *See generally id.* § 327, at 378-380 (postulating that prediction of the future course of hearsay rules is hazardous at best, but that changes will generally move in the direction of liberalizing admission of hearsay); Lilly, *supra* note 10, § 7.28, at 304-311 (noting that hearsay exceptions are the product of an evolutionary process which began two centuries ago, and continue through the present day in such rules as the residual exception).

66. 1898 Mass. Act ch. 535; Wigmore, *supra* note 19, § 1576, at 533.

67. *Id.*

68. Charles W. Quick, *Hearsay, Excitement, Necesssity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 Wayne L.Rev. 204, 217 (1960).

69. *See* Wigmore, *supra* note 19, § 1576, n.11.

70. *See, e.g.*, Commonwealth v. Gallo, 175 N.E. 718, 725 (Mass. 1931) (finding that twenty years of judicial interpretation indicates that the rule is not intended for application in criminal prosecutions).

ture deleted "the requirement that the declaration be made before the commencement of the action,"[71] further liberalizing the statute.[72] The legislature, agreeing with the court's limitation on applicability, subsequently made its intent explicit by adopting the current version: "*[I]n any action or other civil judicial proceeding*, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant."[73] The Massachusetts law has remained in this form since 1943.

In recommending adoption of a similar provision nationally in 1938, the American Bar Association's Committee on the Improvement of the Law of Evidence recognized both the value of the hearsay rule and the need for certain exceptions.[74] At that time, there were about a dozen exceptions, most based on situations where cross-examination was no longer practicable, where "it is better to accept what can be got than to reject it entirely."[75] In supporting adoption of a provision similar to Massachusetts', the committee noted that "the Massachusetts statute has given rise to virtually no technical trouble in interpretation . . . ."[76]

III.2 *The Federal Response to Massachusetts' Ingenuity*

The Federal Rules of Evidence do not contain a provision similar to either Rhode Island's or Massachusetts' rules on declarations of decedents. However, such provisions have been considered at the federal level since the latter part of the 19th century.[77] Legal scholars of the time were attempting to resolve the issue of establishing a claim or defense when "the only witness with knowledge of what occurred is unavailable[.]"[78] To address this, the 1938 American Bar Association committee recommended that all juris-

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71. Wigmore, *supra* note 19, § 1576, at 533 n.11.

72. *Id.*

73. Mass. Gen. L. Ann. ch. 233, § 65 (West 1995) (emphasis added).

74. Quick, *supra* note 68, at 217.

75. American Bar Association's Committee on the Improvement of the Law of Evidence note (1938) *reprinted in* Wigmore, *supra* note 19, § 1577, at 536.

76. *Id.* Despite this early support, such a provision was never adopted by Congress for the federal rules of evidence. *See infra* part III.2.

77. Quick, *supra* note 68, at 216-17.

78. Weinstein & Berger, *supra* note 11, at 804-202. In attempting to resolve this problem, the evidence reformers eventually promulgated Uniform Rule 63(4)(c), which was termed "the most far reaching exception" contained in the 1953

dictions adopt the Massachusetts provision, limited to civil proceedings.[79] Despite the committee's support for a permissive view of hearsay exceptions in its 1942 Model Code of Evidence,[80] this

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Uniform Rules of Evidence. *Id.* (quoting Quick, *supra* note 68, at 215). This rule read as follows:

> [I]f the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been visibly perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action.

Id. at 804-202 n.2. The most controversial aspect of this rule was its proposed application to criminal cases. *Id.* at 804-202. "The wisdom of this extension was questioned by a number of legal authorities who feared that overreaching and unscrupulous prosecutors could take advantage of such an exception to obtain unjustified convictions." *Id.* at 804-203.

79. Wigmore, *supra* note 19, § 1576 at 536. The relevant part of the American Bar Association Committee report is as follows:

> The Hearsay Rule, requiring that all testimonial assertions be subjected to the scrutiny and test of cross-examination, and therefore excluding all statements made out of court and not so tested, is a most valuable rule, being one of the great contributions of Anglo-American law for the methodical investigation of facts.
>
> But of course it has always had to recognize exceptions; there are a dozen or more of them, having large scope. Many or most of them are based on situations where the test of cross-examination is no longer practicable — the person being deceased or otherwise unavailable — and that therefore it is better to accept what can be got than to reject it entirely.
>
> The scope of these Exceptions has been gradually enlarged, over the past century. And just 40 years ago the State of Massachusetts (at the instance of Professor James Bradley Thayer, known as the greatest authority on the law of Evidence) undertook to make another enlargement, viz. to admit in general the declaration of a deceased person who had had personal knowledge and spoke or wrote in good faith before controversy had arisen.
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> . . . .
>
> The Massachusetts statute has given rise to virtually no technical trouble in interpretation, and it stands today as indorsed [sic] by 40 years of trial experience.

Id.

80. *Id.* § 1577, at 536 n.2. The Model Code took an extremely liberal view of admissibility of statements by an unavailable declarant, and in fact, its proposed Rule 503(a) provided that "[e]vidence of a hearsay declaration is admissible if the judge finds that the declarant . . . is unavailable as a witness . . . ." *Id.* at 537 (quoting Chadbourn, *supra* note 23). Between this rule which threatened to swallow the rule against hearsay and the huge latitude given to trial judges, this provision and the Model Code in general met with vehement opposition and was not adopted anywhere. *Id.* at 538.

provision was modified and included as Rule 63(4)(c) in the 1953 Uniform Rules of Evidence.[81] The exception read as follows:

> Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: . . . (4) . . . (c) if the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action. . . .[82]

While clause (c) was drafted "so as to indicate an attitude of reluctance and require most careful scrutiny in admitting hearsay statements under its provisions,"[83] no language limiting the application of the exception to civil actions was included in either the proposal or the National Conference of Commissioner's comment.[84] The provision's applicability in criminal prosecutions was implicit in the absence of limitations to civil actions. However, the Commissioners gave no reasons for extending the rule to criminal situations.[85] In a 1956 writing, a URE Commissioner added that extending the subsection "to criminal as well as civil cases will open the door to statements by victims of crime which can meet the condition of trustworthiness, even though consciousness of impending death would not appear and would not be eligible as dying declarations."[86]

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81. *Id.* at 538. The Uniform Rules of Evidence [hereinafter URE] were drafted by the National Conference of Commissioners on Uniform State Laws, and were not adopted for use at the federal level.

82. *Id.* The URE defined unavailability much as the Model Code had, as follows:

> Unavailability as a witness includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant, or (b) disqualified from testifying to the matter, (c) unable to be present or to testify at the hearing because of death or then existing physical or mental illness, or (d) absent beyond the jurisdiction of the court to compel appearance by its process, or (e) absent from the place of hearing because the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

Quick, *supra* note 68, at 218, n.53 (quoting Unif. R. Evid. 62(7)).

83. Quick, *supra* note 68, at 219, n.59.

84. *Id.* at 219.

85. *Id.*

86. *Id.* (quoting McCormick, *Hearsay*, 10 Rutgers L. Rev. 620, 624 (1956)).

Later commentary on the Uniform Rules spawned criticism of the expansion of the rule to criminal cases.[87] Professor Quick, in 1960, stated:

> If adopted, this exception *would apply in all criminal cases without a showing of necessity, if by necessity we mean evidence of what occurred. Nor, indeed, would the exception be restricted to declarations of victims.* . . . The statement of a witness . . . not subject to effective impeachment, or the cathartic effects of cross-examination may be used by an overzealous prosecutor to deprive one of his liberty or, in some cases, of his life.[88]

Professor Chadbourn added that there was an area of "permissible change" for enlarging traditional hearsay exceptions between constitutional guarantees against hearsay use[89] and the use of traditional exceptions:

> Whether the large exception . . . advocated by the Model Code could be fitted within this area is, to say the least, doubtful. . . .
>
> . . . .
>
> . . . Would not a nearer approach to middle be a subdivision of rule 63, providing this: In civil cases a statement by a declarant [is admissible] if the judge finds that such declarant is unavailable and the statement would have been admissible if made by the declarant as a witness.[90]

While doubts existed as to the efficacy of this form of exception, in 1969 the federal advisory committee on the rules of evidence proposed Rule 804(b)(2), "Statement of Recent Perception," which was essentially a restatement of Uniform Rule 63(4)(c).[91] In its comments, the advisory committee cited the "well known" Massachu-

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87. *See* Quick, *supra* note 68; Chadbourn, *supra* note 23.

88. Quick, *supra* note 68, at 219-20.

89. Chadbourn, *supra* note 23, at 951. Professor Chadbourn was reassessing the views of Jeremy Bentham, an originator of the evidence reform movement which resulted in the Model Code of Evidence. Chadbourn, *supra*, at 933.

90. *Id.*

91. Weinstein & Berger, *supra* note 11, at 804-201 to 202. Proposed Rule 804(b)(2) read as follows:

> A statement, not in response to the instigation of a person engaged in investigating, litigating or settling a claim, which narrates, describes or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.

Rule 804. Hearsay Exceptions: Declarant Unavailable, 56 F.R.D. 183, 321 (1972).

setts Act of 1898 and Rhode Island General Law section 9-19-11 in support of Rule 804(b)(2).[92] "With respect to the question whether the introduction of a statement under this exception against the accused in a criminal case would violate his right of confrontation,"[93] the committee referred to the former testimony exception, stating that former testimony:

> [I]s not admissible if the right of confrontation is denied or . . . if the accused was not a party to the prior hearing. . . . Mattox v. United States (citation omitted) held that the right was not violated by the Government's use, on a retrial of the same case, of testimony given at the first trial by two witnesses since deceased.[94]

The committee seemed to imply that the constitutional admissibility of dying declarations and former testimony in criminal cases extended to statements of recent perception as well.

The possible application of the rule in a criminal case, however, proved the very aspect of the rule which was most troublesome to its critics.[95] The House of Representatives hearings on the provision led to its deletion, largely because the rule was characterized as "an invitation to perjury."[96] It created "a new and unwarranted hearsay exception of great potential breadth. The committee did not believe that statements of the type referred to bore sufficient guarantees of trustworthiness to justify admissibility."[97] In a communication to the Senate, the committee recommended reinstatement of the rule because elimination "disregards the safeguards which were incorporated in the Rule. Since the Rule required unavailability of the declarant, the effect of the deletion was simply to eliminate all evidence from that source."[98] Despite the committee's efforts, the rule was eliminated from the final bill.[99]

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92. Rule 804. Hearsay Exceptions: Declarant Unavailable, 56 F.R.D. 183, 325 (1973) (reporting the U.S. Supreme Court Advisory Committee notes on proposed Fed. R. Evid. 804(b)(5)).

93. *Id.* at 326.

94. *Id.* at 325.

95. *See* Louisell & Mueller, *supra* note 6, at 1006-7 nn.85 & 86.

96. *Id.* at 1006.

97. Weinstein & Berger, *supra* note 11, at 804-13 (quoting H.R. Rep. No. 650, 93rd Cong., 1st Sess. at 6 (1973) *reprinted in* 1974 U.S.C.C.A.N. 7075, 7089).

98. *Id.*

99. *Id.* at 804-205.

Despite the rejection of the rule at the federal level, New Mexico and Wisconsin enacted the final draft version of Rule 804,[100] containing the statements of recent perception exception, applicable in civil and criminal proceedings.[101] Hawaii, North Dakota, and Wyoming followed the URE, limiting the recent perceptions exception to civil actions.[102] Rhode Island has generally followed the federal rules of evidence as enacted by Congress, and did not include the exception for statements of recent perception,[103] but rather, liberalized the application of Rule 804(c).

III.3 *History of the Rhode Island Rule*

Rule 804(c)'s precursor was Rhode Island General Law section 9-19-11, first adopted in 1927.[104] This statute, enacted as Chapter 1048 "An Act in Amendment of Chapter 342 of the General Laws entitled 'of Views, Witnesses, Depositions and Evidence,' "[105] was nearly identical to the 1898 Massachusetts statute.[106] The language of the rule has not changed since it was originally enacted,[107] and Rule 804(c) incorporated section 9-19-11 verbatim.[108]

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100. The final "draft" was that version which was submitted to the House of Representatives, but eventually eliminated from the final bill. *See* N.M. R. Evid. 11-804(B)(2); Wis. R. Evid. 908.045(2).

101. Weinstein & Berger, *supra* note 11, at 804-206.

102. *Id.* The optional provision for statements of recent perception in the Uniform Rules contains the phrase "[I]n a civil action or proceeding . . . ." Unif. R. Evid. 804(b)(5), 13B U.L.A. 564 (1986).

103. Eric D. Green, Rhode Island Rules of Evidence with Advisory Committee Notes and Case Law Developments xxxii (1995).

104. R.I. Gen. Laws § 9-19-11 (Reenactment 1985) (as enacted by P.L. 1927, ch. 1048, § 1 and repealed by P.L. 1987, ch. 381, § 5). It is likely, as was the case in Massachusetts's adoption of its similar statute, that this provision was provided to even out the playing field for survivors and the decedent's estate in actions against the estate. Rhode Island does not disqualify survivors from testifying in such an action by reason of their having an interest therein, and thus allow the decedent to "speak" as well, under § 9-19-11, and its descendant, R.I. R. Evid. 804(c).

105. 1927 R.I. Acts and Resolves ch. 1048, § 1.

106. 1898 Mass. Acts ch. 535.

107. There is little information regarding the intent of the original drafters of this rule. However, placement of the provision within the General Laws provides some insight into legislator's views on its purposes. On its adoption in 1927, the statute amended Title XXXIII of 1923 R.I. Gen. Laws entitled "Of Actions, of Pleading and Practice, and of Procedure in Courts," found within ch. 342 entitled "Views, Witnesses, Depositions and Evidence." R.I. Gen. Laws ch. 342 (1923). This title addressed largely civil matters, while separate titles addressed criminal proceedings. In the 1938 R.I. Gen. Laws, the provision was placed in ch. 538, entitled "Admissibility and Competency of Evidence" within a subsection entitled "Ad-

Rhode Island remains the sole state with a provision similar in scope to the original Massachusetts provision which is applicable in criminal cases.[109] As originally enacted, the statute read as follows: "A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant."[110] Rhode Island, however, did not follow Massachusetts, refusing to amend its rule to respond to changing evidentiary needs.[111] While the legislative history of the provision for good faith decedent declarations is sparse, it can be inferred from the timing of original enactment, the similarity in language between the Rhode Island and Massachusetts statutes,

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missibility of Declarations, Entries and Memoranda of Deceased Persons." R.I. Gen. Laws, ch. 538, § 6 (1938). All three sections within that subsection related to civil proceedings. One subsection, separate from that noted above, addressed evidentiary considerations in criminal cases. In the 1956 R.I. Gen. Laws § 9-19-11 was included in the "Evidence" subsection of ch. 9, entitled "Courts and *Civil Procedure Generally*" R.I. Gen. Laws § 9-19-11 (1956) (emphasis added); Chapters 11 and 12 addressed criminal offenses and procedures. *Id.* at §§ 11-13. Because this provision was positioned in the laws regarding civil proceedings, it is logical to conclude that it was meant to apply to civil situations. Since it was never included in a section specifically addressing criminal proceedings one may also inferentially derive that it was not intended for use in such situations. *See also* Brief for Appellant at 24, State v. Scholl, 661 A.2d 55 (R.I. 1995).

108. R.I. R. Evid. 804(c) advisory committee's note, *reprinted in* Green, *supra* note 103, at 804-14.

109. *See* Wigmore, *supra* note 19, § 1576, n.12. Other states with provisions which are similar, but applicable only in limited civil situations include: N.J. R. Evid. § 804(b)(6) (excepting from hearsay rule trustworthy statements of a decedent when made in good faith); N.H. Rev. Stat. Ann. § 516:25 (1974) (not excluding as hearsay statements made by a decedent in good faith and upon personal knowledge in "actions, suits or proceedings by or against the representatives of deceased persons"); Conn. Gen. Stat. Ann. § 52-172 (1991) (admitting all written statements of a deceased person in actions by or against the representatives of him, and by or against the beneficiaries of any life or accident insurance policy insuring a person who is deceased at time of trial); S.D. Codified Laws Ann. § 19-16-34 (1995) (admitting deceased's statements in actions involving the decedent's estate by or against representatives of deceased persons, provided trial judge finds statement was made by decedent, in good faith, on decedent's personal knowledge). *See also* Wis. Stat. Ann. § 908.045(2) (admitting statements not made in response to the instigation of a person engaged in investigating, litigating or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending litigation and while declarant's recollection was clear; applicable in civil and criminal cases).

110. R.I. Gen. Laws ch. 538, § 6 (1938).

111. R.I. R. Evid. 804(c), *reprinted in* Green, *supra* note 103, at 804-14.

and the placement of the provision within the general laws that the legislature intended that it be used only in civil proceedings.[112]

III.4 *Application of the Rhode Island Statute*

The provision for good faith decedent statements was first reported in an estate dispute in 1929,[113] where the Rhode Island Supreme Court upheld the use of the exception when used to introduce testimony of a decedent's statements to her son concerning facts about a real estate conveyance. In 1933, the court stated in dicta that "[t]his statute is identical with the Massachusetts statute - Mass. Gen. Laws, Chap. 233, § 65."[114] In following the Massachusetts court's liberal interpretation of the provision, the court emphasized that since the facts to which the witness was testifying were within the personal knowledge of the decedent, and if living the decedent could have testified to the same facts, the testimony was admissible.[115] Similar patterns of interpretation of the rule continued throughout the years between 1927 and 1987,[116] after which the Rhode Island Supreme Court adopted the current Rhode Island Rules of Evidence.[117]

The Rhode Island rules do not completely parallel the federal rules.[118] Furthermore, by expanding the applicability of Rule 804(c), the advisory committee adopted a rule which Congress ex-

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112. *See* Bradley v. Quinn, 164 A. 330 (R.I. 1933) (finding that the Rhode Island statute regarding decedent's statements was identical with the Massachusetts statute).

113. Paulson v. Paulson, 145 A. 312 (R.I. 1929).

114. *Bradley*, 164 A. at 332. Later cases continued the theme that the provision for decedent declarations was "to promote the ends of justice" presented in the early Massachusetts cases. *See* Waldman v. Shipyard Marina, Inc., 230 A.2d 841, 843 (R.I. 1967) (stating that the statute was intended to be liberally interpreted by the trial justice toward achieving the ends of justice). Massachusetts cases have held that its statute for decedent statements was remedial, and entitled to liberal construction. *See, e.g.*, Hall v. Reinherz, 77 N.E. 880 (Mass. 1906); American Ry. Express v. Rowe, 14 F.2d 269 (1st Cir. 1926).

115. *Bradley*, 164 A. at 332.

116. *See, e.g.*, cases cited *supra* note 4.

117. Daniel J. Donovan, Highlights of the New R.I. Rules of Evidence, 1988 R.I. Bar J. 19. The advisory committee which developed the Rhode Island Rules of Evidence submitted its final draft to the Supreme Court in 1986. *Id.* The Supreme Court adopted the rules unchanged in an order dated July 23, 1987, and the R.I. General Assembly enacted coordinating legislation repealing several sections of the General Laws, including § 9-19-11. *Id.*

118. *Id.*

plicitly rejected.[119] In recommending continuation of section 9-19-11 as Rule 804(c), the advisory committee noted the following:

> Section (c) incorporates R.I.G.L. § 9-19-11. It is similar to an exception proposed by the Federal Advisory Committee and the Supreme Court as FRE 804(b)(2), but deleted by Congress.
>
> R.I.G.L. § 9-19-11, adopted in 1927, was based on an identical Massachusetts statute, M.G.L.A. ch. 233, § 65. Under the Rhode Island statute and under the rule, declarations by deceased persons which could have been testified to had the declarant remained alive are admissible if the court finds that the declaration was made in good faith, prior to commencement of the action, and upon the personal knowledge of the declarant. If one of these elements is missing, the statement will be excluded. However, no special formula for satisfying the foundational requirements exists, even in the jury cases. Further, the court may find that the foundational requirements are satisfied based on reasonable inferences, and formal findings are not required.
>
> Unlike the exception for dying declarations contained in Rule 804(b)(2), this exception applies in all criminal and civil cases, and is not limited to the cause or circumstances of the declarant's impending death.
>
> Application of this exception to criminal cases goes beyond the scope of the Massachusetts statute from which this rule derives, but there appears no persuasive reason to limit the exception to civil cases. Constitutional considerations concerning the admission of statements under this section against an accused are subject to the same analysis as statements admitted under the exceptions for dying declarations, former testimony, etc. Analysis of the constitutionality of admitting such statements must be made on a case by case basis.[120]

Despite the advisory committee's broadening of its application, in practice 804(c) remained steadfastly in the civil realm[121] until 1990, when it was first used in a prosecution to introduce hearsay evidence in *State v. Burke*.[122] The committee, however, chose not

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119. R.I. R. Evid. 804(c) advisory committee's note, *reprinted in* Green, *supra* note 103, at 804-13.

120. *Id.* (citations ommitted).

121. *See* cases cited *supra* note 4.

122. 574 A.2d 1217 (R.I. 1990).

to amend the rule's language to make the applicability of the rule in a criminal case explicit, leaving it for the courts to work out. Manifesting their willingness to broaden the rule's application, the committee wrote that "there appears no persuasive reason to limit the exception to civil cases."[123]

III.5 Conclusion

While Rhode Island Rule 804(c) is bereft of the debate and adjustment which led to the workable, present-day Massachusetts rule, the Massachusetts rule has benefited from years of legislative and judicial correction. Congress, concerned with the scope of the federal rules, abandoned the exception for statements of recent perception, a provision which was similar to Rule 804(c). Rule 804(c) has not been the focus of any attention with the exception of the advisory committee's review which led to the 1987 rules of evidence. This is particularly true regarding its application in a criminal setting, which was an issue of first impression for the Rhode Island Supreme Court in 1990, when it decided *State v. Burke*.[124] The long precedential history of the rule in practice, the reluctance of Congress to enact a bill containing the exception for statements of recent perception, the restriction to civil cases of the Massachusetts rule on which the Rhode Island rule is founded, and the long history of debate leading to the present day absence of any similar rule on a large scale across the country leads to the conclusion that this rule does not belong in the criminal courtroom.

IV. Application of Rule 804(c) in Criminal Prosecutions

As Rule 804(c)'s origin and legal history demonstrate its unsuitability for application in criminal cases, practical application of the rule further underscores the need for its reevaluation. *State v. Burke*[125] and *State v. Scholl*[126] illustrate the potential problems associated with applying this rule in a criminal prosecution. Parts IV.1 and IV.2 summarize the facts of *Burke* and *Scholl*, followed by an evaluation in Section V of the Rhode Island Supreme Court's treatment and interpretation of Rule 804(c) in the two cases.

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123. R.I. R. Evid. 804(c) advisory committee's note, *reprinted in* Green, *supra* note 103, at 804-13.

124. 574 A.2d 1217.

125. *Id.*

126. State v. Scholl, 661 A.2d 55 (R.I. 1995).

Since the promulgation of the exception for declarations of decedent made in good faith, *Burke* and *Scholl* are the only two reported cases in which it has been applied in criminal cases. In both instances, hearsay statements were found admissible at trial under Rules 804(c), defendants were convicted and convictions were affirmed on appeal. The *Burke* court opened the door for use of the exception in criminal cases when it found it need not "struggle with the language of . . . Rule 804(c) in an effort to discern the legislative intent behind its enactment. . . . The Advisory Committee's notes clearly articulate the intended reach of the exception. . . ."[127] The court adopted the advisory committee's interpretation that "the statute was intended to apply to criminal proceedings, provided, of course, that constitutional safeguards are met."[128]

IV.1 State v. Burke

In *State v. Burke*, two co-defendants were convicted in a jury trial of conspiracy to rob and two counts of robbery, and in addition, individually, one defendant was convicted of one count of assault and battery on a person over 60 years of age, and the other of attempted robbery.[129] During the course of this robbery of a small variety store, witnesses testified that the co-defendants beat the store owner, Lucien Laurence, with a baseball bat.[130] Laurence was taken to the hospital for treatment, and checked himself out that same evening.[131] After he checked out of the hospital, Laurence spoke to his daughter, Gloria Flaherty, about the robbery.[132] He died two months after the incident of natural causes, at age 71, and his daughter testified as to his statements made that night under Rule 804(c).[133]

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127. *Burke*, 574 A.2d at 1221-22.

128. *Id.* at 1222. These constitutional safeguards relate to the discussion in Part II regarding the Confrontation Clause of the Sixth Amendment to the United States Constitution, applicable to the states by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 405 (1965).

129. 574 A.2d at 1219.

130. *Id.*

131. *Id.* at 1220.

132. *Id.* at 1220. Flaherty testified to her father's statements about the amount of money which was taken in the robbery. *Id.* at 1220-21. The victim's statements were not made in anticipation of impending death, and therefore were not eligible for admission under the dying declarations exception. *Id.* at 1223.

133. *Id.* at 1220.

At trial, defense counsel objected to Flaherty's testimony, arguing that Rule 804(c) did not operate to render such hearsay statements admissible in criminal proceedings.[134] After a voir dire hearing, the trial justice found the hearsay admissible under Rule 804(c).[135]

On appeal, the Rhode Island Supreme Court upheld its admissibility.[136] The portion of the opinion addressing Rule 804(c) first rejected the argument that the language of the rule on its face demonstrates that it was intended for use only in civil actions.[137] The court relied solely on the advisory committee's notes[138] regarding the intended reach of the exception, and concluded that "the statute was intended to apply to criminal proceedings."[139] The court recognized the importance of the defendant's constitutional right to confront and cross-examine witnesses, but added that this right was tempered by notions of practicality and judicial economy.[140] The hearsay exceptions, the court continued, permitted the factfinder access to a "great deal of testimony" that it might otherwise never see or hear because of the Confrontation Clause restrictions.[141] The court cited the general test for the admissibility of hearsay evidence under *Ohio v. Roberts*, with approval[142] and evaluated Flaherty's statements using that approach.

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134. *Id.* at 1221. Defendants relied upon two theories to support the assertion that Rule 804(c) did not render this testimony admissible in a criminal proceeding. *Id.* First, that the language of the rule on its face demonstrates that it was intended to apply only to civil actions. *Id.* Second, that the applicability of Rule 804(c) in a criminal case infringed upon the defendant's constitutional right to confrontation. *Id.*

135. *Id.* at 1221, n.1.

136. *Id.* at 1223.

137. *Id.* at 1221-22. The opinion noted that the rule's language is identical to that first enacted in Massachusetts in 1898. *Id. See supra* part III.1. It then rejected the premise that the rule was not intended for use in criminal cases as in Massachusetts. *Id.* at 1221-22 (discussing Commonwealth v. Gallo, 175 N.E. 718, 725 (1931)). In *Gallo*, the supreme judicial court concluded that based upon the language of the original statute, the word "[a]ction, although a word of broad import, can hardly be interpreted in this connection as intended to include prosecutions for crime." *Id.*

138. *Burke*, 574 A.2d at 1222. *See supra* part III.4 for a review of the advisory committee's notes.

139. *Burke*, 574 A.2d at 1222.

140. *Id.*

141. *Id.* (citing Fed. R. Evid. 803, 804; R.I. R. Evid. 803, 804).

142. *Id. See supra* part II for a discussion of this two-pronged approach.

The court stated that the unavailability of the witness in this case was undisputed, since the declarant victim had died prior to trial.[143] Second, the court noted that 804(c) was not a firmly rooted exception, and therefore the court stated that it "must determine whether these controversial declarations bear any 'indicia of reliability' as required by *Roberts*."[144] In finding that the requisite indicia of reliability existed to "pass constitutional muster," the court relied on the trial justice's findings regarding the requirements of 804(c).[145] The opinion noted that the trial justice "specifically found" that the good faith requirement was satisfied because the statement involved:

> [T]he words of an individual who purportedly had just been robbed and beaten with a baseball bat; an individual who was taken to the hospital and returned and is speaking to a blood relative, his daughter; and he's saying to his daughter precisely what she says she is going to testify to.[146]

Adopting the trial court's position, the supreme court stated, "these findings also amply fulfill the indicia-of-reliability [sic] requirement set forth in *Roberts*."[147] The court went on to review the trial justice's comments on the timing of the statement: "[I]t has to do with something that occurred and was stated prior to the commencement of this action. This statement was made even before the defendants were arrested. It is made on the premises shortly after this robbery occurred."[148] The robbery occurred between 10:30 and 10:45 p.m., and the police investigation commenced at 10:50 p.m., at which time Laurence was taken to the hospital by a rescue unit for treatment of his injuries.[149] In a slightly different read from the trial court, the supreme court found that Laurence's

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143. *Burke*, 574 A.2d at 1222, n.4.

144. *Id.* at 1222. Where the exception is not firmly rooted, the evidence considered under the exception must be excluded, unless there is a showing of particularized guarantees of trustworthiness. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

145. *Burke*, 574 A.2d at 1223.

146. *Id.* at 1223 (quoting State v. Burke, No. 89-55 (1988)).

147. *Id.*

148. *Id.* at 1223. It was unclear from the supreme court opinion exactly when the defendants were arrested. However, the fact summary presented by the Supreme Court seems to indicate the discussion between Laurence and his daughter actually occurred after he checked himself out of the hospital. *Id.* at 1220.

149. *Id.*

statements were made after he was discharged from the hospital and once the investigation had begun.[150]

The supreme court agreed with the trial court's finding that the statements made "by an individual who purportedly had just been robbed" satisfied the rule's requirement of personal knowledge.[151] Thus the circumstantial guarantees of trustworthiness required under the *Roberts* test were held to be satisfied by the fulfillment of Rule 804(c)'s four elements.[152] Five years later, a similar result was obtained upon application of the rule in *State v. Scholl*.[153]

IV.2 State v. Scholl

Clive Browne, a 73 year-old, wheelchair-bound resident of a public apartment for the elderly, was attacked and robbed on March 12, 1991, in an elevator in that building.[154] Browne did not report the incident that night, and it went unreported until the following day, when his home health care provider arrived.[155] Rescue technicians transported Browne to the hospital.[156] The rescue technicians testified that Browne's blood pressure was nearly nonexistent and that he was in extreme pain.[157] One rescue technician also testified that Browne told him he had been attacked the night before, and failed to report it because he had not wanted to bother anyone.[158] A security guard at Parenti Villa testified that she had seen Tyrone Scholl in the building the night Browne was attacked, and had watched him sign the register.[159] She also noted that when she left her post to make rounds, visitors could move into and out of the building at will, and in fact, that there was a lot of traffic in the building at that time of night.[160]

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150. *Id.* at 1220. Laurence spoke with his daughter after he left the hospital on the evening of the robbery. *Id.*

151. *Id.*

152. *Id.*

153. State v. Scholl, 661 A.2d 55 (R.I. 1995).

154. *Id.* at 57.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 58. Detectives later confirmed that Scholl signed the log. *Id.* at 57.

160. Brief for Appellant at 11, State v. Scholl, 661 A.2d 55 (1995).

Shortly after Browne was brought to Roger Williams Hospital, a detective of the Providence Police Department spoke with him.[161] The detective testified that Browne described the attack, saying that he had been riding the elevator when another man got on.[162] When the elevator doors closed, the man proceeded to punch Browne in the stomach several times, and took twelve dollars from him.[163] Browne then described the assailant to the detective, stating that he was a white male, five feet eight inches tall or taller, having a husky build and reddish-blond hair, and not cleanly shaven.[164]

After this meeting, the detective and two other officers checked the sign-in log at Parenti Villa, and recognized two names, Luigi Ricci and the defendant's.[165] From past experience with the defendant, they knew he fit the description given by Browne.[166] A second detective then returned to the station and assembled two photo arrays, one with pictures of Ricci and five others, and one with the defendant and five others.[167] The detective later met with Browne in his hospital room.[168] The detective testified that he showed each picture in the photo packs separately.[169] Browne did not identify anyone from the first set of photos, which contained Ricci's photo.[170] When Browne saw defendant's photo, the detective testified that he "reached up and grabbed the photo, said 'Yes, yes, that's the face, those are the eyes.' "[171] The detective then asked Browne "is this the man that assaulted you?"[172] Browne answered, "I want to say yes. The hair is different so I can't swear to

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161. *Scholl*, 661 A.2d at 57.

162. *Id.*

163. *Id.*

164. *Id.* In a photo taken for police purposes two months prior to this incident, notations on the photo indicated that Scholl was 5'11" tall and 150 pounds. Brief for Appellant at 9, n.5, State v. Scholl, 661 A.2d 55 (R.I. 1995). In addition, Scholl had received severe head injuries when he was beaten with a tire-iron a couple of years before this incident. Thereafter, and at the time of this incident, he walked unsteadily and relied on a cane to maintain his balance. *Id.* at 12, n.8.

165. *Scholl*, 661 A.2d at 57. Defendant conceded that he was present at Parenti Villa March 12, 1991 between 7:00 and 7:10 p.m. *Id.* at 58.

166. *Id.* at 57.

167. *Id.* at 57-8.

168. *Id.* at 58.

169. *Id.*

170. *Id.*

171. *Id.*

172. Brief for Appellant at 9, State v. Scholl, 661 A.2d 55 (R.I. 1995).

it."[173] Browne then told the detective "he would be able to make a positive identification if he saw a more recent photograph or the actual person."[174] The detective returned the following day with a more recent photo of Scholl, however, he was not permitted to see Browne.[175] Browne underwent surgery the day after the attack, and never regained consciousness.[176] He never made a positive identification of Scholl.

At Scholl's trial the photo identification made by Browne to the detective was admitted under Rule 804(b)(2), the dying declarations exception, and Rule 804(c).[177] With regard to the admissibility of this testimony under 804(c), the trial court said:

> We had a statute, a Dying Declaration statute, that has been repealed by the adoption of the rule. And under that whole statute, that was always considered to apply only to civil cases. That's why it said prior to the cause of action something arising. Massachusetts has a very similar statute, and Massachusetts has construed that to mean civil proceedings.[178]

The trial justice denied the defendant's motion to suppress the testimony,[179] reasoning that since the Rhode Island Supreme Court in *Burke* decided that the exception possessed the requisite degree of reliability and trustworthiness, it lent credibility to Browne's out-of-court identification statements.[180] Scholl was subsequently found guilty of felony murder and the underlying robbery.[181] In affirming the application of Rule 804(c) to criminal cases, the

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173. *Scholl*, 661 A.2d at 58.

174. *Id.*

175. *Id.* He was not allowed to see Browne, presumably due to the victim's deteriorating physical condition.

176. *Id.* The state also offered testimony of the chief medical examiner for Rhode Island, who had performed the autopsy on the victim Browne. *Id.* He testified that Browne's injuries were consistent with having recently been struck in the abdomen, and that those blows would have been enough to cause the injuries. *Id.*

177. *Id.* The portion of the opinion addressing the dying declarations exception is excluded from this analysis. The court found that the victim's statements to rescue personnel, plus the surrounding circumstances, permitted an inference that the victim was aware of his impending death. *Id.* at 60.

178. Transcript of Trial at 119, State v. Scholl, No. 93-200 (1992).

179. *Id.* at 139.

180. *Id.* at 124.

181. *Scholl*, 661 A.2d at 57. Following the verdict, the defendant lost his motion to dismiss the underlying robbery conviction, and was sentenced to a mandatory life imprisonment. No separate sentence was imposed for the robbery.

Rhode Island Supreme Court[182] found no abuse of discretion in admitting Browne's statements, and upheld the trial court's ruling that the statements "possessed the 'particularized guarantees of trustworthiness' necessary to satisfy constitutional requirements."[183]

After finding that the declarant was unavailable, the court reviewed the circumstances surrounding the making of the statement to establish the indicia of reliability necessary for admissibility.[184] The court validated the trial justice's finding of good faith in the decedent's statements, reasoning that good faith was demonstrated by several surrounding circumstances, as well as corroborating evidence.[185] The court adopted the trial court's findings on the timing and personal knowledge elements of the rule without elaboration.[186]

V. EVALUATION OF THE COURT'S INTERPRETATION OF RULE 804(c)

The Confrontation Clause affords a criminal defendant some, albeit indefinite, protection against inaccurate, unreliable testimony from unavailable witnesses.[187] Thus, where a necessity for evidence exists due to witness unavailability, several hearsay exceptions may be employed from which reliability may be inferred.[188] Out-of-court statements which satisfy these exceptions' requirements rise to a level of trustworthiness such that the de-

182. *Id.* at 60 (citing *Burke*, 574 A.2d at 1222) The court noted that since it found the statements were admissible under Rule 804(b)(2), the dying declarations exception, that it would "only briefly address this issue [804(c)]. *Id.*

183. *Id.* at 61.

184. *Id.*

185. *Id.* at 61. This evidence included: Browne's giving the same description of his assailant to two detectives; his statement that he would be able to identify the attacker because he had seen him at Parenti Villa before; that he grabbed the photo and said that it was the face and eyes of the attacker; and that he was reluctant to "swear" that the defendant was his attacker because the hair in the photo was different from what he remembered. The court did not consider that the identification was not confirmed by a second review of a more current photo of the defendant, nor that the victim specifically asked to see the photos again because he was unsure of his identification. *Id.* at 58, 61.

186. "In addition, as required by Rule 804(c), Browne's statements were made before the commencement of the action and based upon his personal knowledge." *Id.* at 61.

187. *See* Ohio v. Roberts, 448 U.S. 56 (1980).

188. *See, e.g., id.* at 66 (indicating that certain hearsay exceptions, including former testimony and dying declarations, rest on such solid foundations that testimony admitted within their bounds meets constitutional muster without more).

fendant's confrontation rights are adequately addressed.[189] Where, however, out-of-court statements are introduced under an exception which does not lend such inherent trustworthiness, further inquiry into the credibility of the declarant and the circumstances surrounding the making of the statement is demanded.[190]

Since Rule 804(c) is not considered an exception which lends inherent trustworthiness to a hearsay statement,[191] the Rhode Island Supreme Court has used the four elements of the rule to establish the requisite indicia of reliability.[192] First, only statements made by deceased declarants may be introduced. Once that threshold is met, then reliability is established by finding that the decedent made a statement in good faith, based on his personal knowledge and before the action is commenced. If the court finds the statement was reliable, it will be admitted.[193]

In *Burke* and *Scholl* the Rhode Island Supreme Court held that since the decedent's statements met the rule's requirements, they possessed the particularized guarantees of trustworthiness

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189. *See Roberts*, 448 U.S. at 66.

190. *See* Idaho v. Wright, 497 U.S. 805, 820 (1990).

191. *See Burke*, 574 A.2d at 1223.

192. *See id.* at 1222-23 (citing with approval the advisory committee's note stating that the "Constitutional considerations concerning the admission of statements under this section against an accused are subject to the same analysis as statements admitted under [the other Rule 804 exceptions]"). *See also Scholl*, 661 A.2d at 61.

193. The Rhode Island advisory committee on the rules of evidence stated that if any of the four elements of 804(c) are missing, a declaration will not be admissible. R.I. R. Evid. 804(c), *reprinted in* Green, *supra* note 103, at 804-14. Previously, in interpreting the precursor to 804(c), the Rhode Island Supreme Court found that:

> a trial justice need not observe ritualistic procedures in determining compliance with § 9-19-11. If it can be reasonably inferred from the circumstances surrounding the making of the statement by the deceased declarant that the statement was based on personal knowledge and was made in good faith prior to the institution of the action at hand, the trial justice may rely [on] such inferences and may, on that basis, admit such evidence without expressly finding compliance with each specific provision of the statute.

Morinville v. Old Colony Coop. Newport Nat'l Bank, 522 A.2d 1218, 1220 (1987) (quoting Desmarais v. Taft-Pierce Mfg. Co., 252 A.2d 445, 449 (1969)). If this holds true for criminal cases, a trial justice is not required to make formal findings on whether the rule's criteria have been satisfied, even though the criteria are the basis for the guarantees of trustworthiness necessary to meet constitutional requirements.

necessary to satisfy constitutional requirements.[194] However, the opinions differ as to the meaning behind Rule 804(c)'s elements, leading to irreconcilable differences in application and interpretation. Sections V.1 through V.3, which follow, present an analysis of Rule 804(c)'s elements and their application in *Burke* and *Scholl*, demonstrating that the rule as written does not ensure that statements admitted under it are constitutionally reliable.

V.1 *Unavailability*

Unavailability is the threshold requirement for consideration of an out-of-court statement under Rule 804.[195] While Rule 804(c) is listed separately from the standard 804(b) exceptions for unavailable witnesses,[196] it incorporates the unavailability requirement by permitting only consideration of statements made by decedents. While the unavailability of the declarant has proven to be a concern in recent United States Supreme Court decisions,[197] here it is not, by virtue of death being the most unavailable one can be.

The unavailability requirement in Rule 804(c) creates a necessity to procure the deceased declarant's statements through hear-

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194. State v. Scholl, 661 A.2d 55, 61 (R.I. 1995). *See* State v. Burke, 574 A.2d 1217, 1222-23 (R.I. 1990).

195. R.I. R. Evid. 804(a). Unavailability includes the declarant's death, physical or mental illness, exemption by ruling of the court on the ground of privilege, refusal to testify despite an order of the court, lack of memory on the subject matter, or flight from the court's jurisdiction. R.I. R. Evid. 804(a)(1)-(5).

196. The trial court in *Scholl* described it as "this thing sticking out in the end" [of the Rule 804 provisions]. Transcript of Trial at 120, State v. Scholl, No. 93-200 (1992). The question arises as to the reason that Rule 804(c) was not included in the list of Rule 804 exceptions, to which any form of "unavailability" applies. Under 804(c), only death of the declarant satisfies the unavailability requirement. It would not be possible to consider a statement made by a declarant who was unavailable by reason of physical or mental illness. The exclusion of the other modes of unavailability points toward the particular importance of the declarant's death to the operation of this exception. This is likely a result of the original use of the provision to combat then existing dead man's statutes. 81 Am. Jur. 2d *Witnesses* § 551 (1992). Where a survivor's testimony would be freely admissible, thus countering the original dead man's statutes, so too should the deceased's statements.

197. *See, e.g.*, Ohio v. Roberts, 448 U.S. 56 (1980); White v. Illinois 502 U.S. 346, 352-358 (1992) (holding that the Confrontation Clause does not require that, before a trial court admits testimony under the spontaneous declaration and medical examination exceptions to the hearsay rule, either the prosecution must produce the declarant at trial or the trial court must find that the declarant is unavailable).

say testimony. In a broader sense, however, Rule 804(c)'s requirement that unavailability is only established by the declarant's death, evidences its character as a guarantor of the declarant's trustworthiness.[198] All other Rule 804 exceptions only consider the reliability of an out-of-court statement when the declarant cannot be procured due to various reasons, for example, flight from the jurisdiction or mental incapacitation.[199] On the other hand, Rule 804(c) only can be employed where the declarant is dead. The reason for this seems to be derived from the historical use of the rule primarily in testamentary situations.[200] This reasoning, however, seems to have been discarded, and as now interpreted in criminal prosecutions, the declarant's death reinforces the reliability of his statements.[201] Otherwise, unavailability under Rule 804(c) would be equivalent to unavailability in Rule 804(b), the standard unavailable witness hearsay exceptions.

V.2 *Indicia of Reliability*

The touchstone for unavailable witness hearsay statements is that they must be reliable.[202] The United States Supreme Court has held that reliability may be inferred without more where evidence falls within a firmly rooted hearsay exception.[203] An exception is firmly rooted where it is grounded in "longstanding judicial and legislative experience in assessing its trustworthiness."[204]

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199. R.I. R. Evid. 804(a)(1)-(5).

200. *See* cases cited *supra* note 4.

201. This interpretation is similar to that for dying declarations, where the circumstances surrounding the declarant's death lend reliability to his statements. Under that exception, however, only statements which relate to the cause or circumstances of the declarant's death can be introduced. *See supra* note 2.

202. *See* Ohio v. Roberts, 448 U.S. 56, 65-66.

203. *Id.* at 66.

204. *See* Idaho v. Wright, 497 U.S. 805, 817 (1990). If qualifying as a firmly rooted exception is a question of longevity, Rule 804(c) may qualify since it has

Where an exception is not firmly rooted in jurisprudence, other guarantees of trustworthiness must be evaluated.[205] For example, the Rhode Island Supreme Court has found that Rule 804(c), despite its vintage, is not a firmly rooted exception.[206] Consequently, the court has looked to the elements of Rule 804(c) to provide the necessary constitutional guarantees of trustworthiness.

Even though Rule 804(c) is not firmly rooted, it threatens to swallow the longstanding, firmly rooted hearsay exception of dying declarations.[207] Nearly any statement admitted under the dying declarations exception can also be admitted under Rule 804(c), as long as the declarant dies before trial.[208] Rule 804(c), however, is bereft of the psychological underpinnings and other traits that lend dying declarations their reliability.[209] The dying declaration exception is based on the theory that the powerful psychological forces which a person experiences in the moments before death compel him to speak truthfully.[210] These psychological aspects guard against sincerity problems with statements admitted under the exception.[211] Because their use is restricted in terms of timing and content, dying declarations are also "unlikely to be affected by problems in memory, although psychological stress and physical

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been part of Rhode Island law since 1927. However, it was exclusively a creature of the civil courts for 68 of those years. Alternatively, if "firm roots" is a question of the volume of jurisdictions utilizing the exception, Rule 804(c) fails the test since Rhode Island is the only state to employ this exception in a criminal setting. Even those states which employ the rule for statements of recent perception are limited, and of those states, only Wisconsin and New Mexico permit its use in criminal proceedings.

205. *See Roberts*, 448 U.S. at 66.

206. *See* State v. Burke, 574 A.2d 1217, 1223 (R.I. 1990); State v. Scholl, 661 A.2d 55, 61 (R.I. 1995).

207. Brief for Appellant at 24, State v. Scholl, 661 A.2d 55 (R.I. 1995).

208. Rule 804(c) requires that statements have been made by a deceased declarant, while dying declarations require that the declarant have made statements in anticipation of impending death, and the declarant need not be deceased. R.I. R. Evid. 804(b)(2). Dying declarations must involve the cause or circumstances of what the declarant believed to be his impending death. *Id.* So long as a dying declaration is made in good faith, prior to the commencement of an action and in the declarant's personal knowledge, it can also be admitted under Rule 804(c). R.I. R. Evid. 804(c).

209. *See* Wigmore, *supra* note 19, § 1438.

210. Glen Weissenberger, *Federal Rule of Evidence 804: Admissible Hearsay from an Unavailable Declarant*, 55 U. Cin. L. Rev. 1079, 1107 (1987).

211. Mueller & Kirkpatrick, *supra* note 30, § 8.61, at 1376 (noting that the "dying statement presupposes spontaneity on the part of the declarant, but the fact that a statement is solicited should not foreclose use" of the exception).

pain may cause flaws in perception and narration."[212] All of these attributes go toward establishing the reliability of an out-of-court statement under the dying declarations exception, even though it is not considered one of the most reliable exceptions.[213] Similar traits are not present in Rule 804(c), although the Rhode Island Supreme Court has interpreted the rule's elements as conferring reliability on decedent's statements, similar to their interpretation of dying declarations.[214]

The standard for admitting statements falling outside a firmly rooted hearsay exception such as dying declarations is a strict one.[215] With respect to the requirements of Rule 804(c), the Rhode Island Supreme Court has relied on the trial justice's findings to identify particularized guarantees of trustworthiness surrounding statements admitted under the rule.[216] The elements which must be satisfied for the trial court to find such trustworthiness include whether a decedent's statements were made in good faith, prior to the commencement of the action and upon the decedent's personal knowledge.[217]

V.2.a *Good Faith*

The good faith[218] element of Rule 804(c) is intended to show that the deceased declarant was sincere when he made his out-of-

212. Weissenberger, *supra* note 210, at 1107. "Indeed, in many instances the declarant is either suffering from an appreciable amount of pain or anxiety which may itself cloud his perception and ability to communicate, or his perception and consciousness have been dulled by pain-depressant drugs." *Id.* at 1106 (quoting Charles W. Quick, *Some Reflections on Dying Declarations*, 6 How. L.J. 109, 112 (1960)).

213. H.R. Rep. No. 650, 93rd Cong., 1st Sess., at 6 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7089.

214. *See* State v. Burke, 574 A.2d 1217, 1223 (R.I. 1990); State v. Scholl, 661 A.2d 55, 61 (R.I. 1995).

215. State v. Kiewert, 605 A.2d 1031, 1043 (N.H. 1992) (finding that statements which fall outside a firmly rooted exception will be admitted only where circumstances establish that "the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.") (quoting Wigmore, *supra* note 19, § 1420 at 251).

216. 574 A.2d at 1223.

217. *See Burke*, 574 A.2d at 1223; *Scholl*, 661 A.2d at 61.

218. Good faith is generally defined as "an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage . . . ." Black's Law Dictionary, 693 (6th. ed. 1990) (quoting Doyle v. Gordon, 158 N.Y.S.2d 248, 259, 260 (1954)).

court statement.[219] A declarant's sincerity is an important consideration in deciding whether to admit a particular hearsay statement. But the fact that a person said something sincerely does not also mean that the statement was reliable. The United States Supreme Court, moreover, has declined to accept corroboration of an out-of-court statement with evidence other than the circumstances surrounding the making of the statement.[220] These circumstances alone must lend reliability and trustworthiness to the declarant's statement, acting as a constitutional safeguard of the defendant's confrontation rights.

In the sixty-plus years that the hearsay provision for decedent's good faith statements was in use in civil proceedings, Rhode Island courts have inferred good faith from many and varied situations.[221] While the *Burke* and *Scholl* courts varied in their definition of "good faith," both courts considered the circumstances surrounding the making of the statement to be significant.[222] While this is consistent with the United States Supreme Court's approach to unavailable witness hearsay,[223] the circumstances which are reviewable under Rule 804(c) do not always point to reliability, and may, in fact, detract from it. In *Burke*, the court presumed good faith in the victim's statements because the declarant had made the statement to his daughter shortly after being robbed and beaten, but "prior to the commencement" of the "action."[224] The trial court, quoted with approval by the supreme court, gave

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219. *See Scholl*, 661 A.2d at 61 (finding deceased's identification of assailant was in good faith because he was reluctant to "swear" that his identification was correct); *Burke*, 574 A.2d at 1223 (finding decedent's statements were in good faith because he was speaking to a blood relative, not to police); Hamrick v. Yellow Cab Co., 304 A.2d 666, 670 (R.I. 1975) (holding deceased cab driver's statements were not in good faith because they were made to a police officer at the police station during an investigation); Segee v. Cowan, 20 A.2d 220, 273 (R.I. 1941) (implying decedent's statement to daughter was made in good faith).

220. *See* Idaho v. Wright, 497 U.S. 805, 817 (1990) (refusing to consider corroborating evidence for a statement introduced under a hearsay exception).

221. *See, e.g.*, *Hamrick*, 304 A.2d at 670 (excluding statements on lack of good faith where decedent made statements to police while in fear of prosecution); Desmarais v. Taft-Pierce Mfg. Co., 252 A.2d 445, 449 (R.I. 1969) (presuming evidence of good faith in statements made by a decedent to his son while he was in the hospital for treatment from injuries received in an automobile accident which was the subject of the case).

222. *See Burke*, 574 A.2d at 1223; *Scholl*, 661 A.2d at 61.

223. *See Wright*, 497 U.S. 805 (1990).

224. *Burke*, 574 A.2d at 1223.

special emphasis to the fact that the statement was made to a "blood relative," not to a police officer.[225] Throughout the line of civil cases preceding *Burke*, the Rhode Island Supreme Court has consistently found that statements made to family members met the good faith test.[226] In terms of the timing of the statement, the Rhode Island Supreme Court in *Burke* adopted the trial court's view that since the decedent's statement was made shortly after the robbery, but before the defendants were arrested, it was made in good faith.[227] The implication is that the victim had nothing to gain from statements made regarding the robbery, since they were made prior to the arrest of particular suspects.

The *Burke* trial court also inferred the victim's good faith by alluding to his poor physical and emotional condition at the time he made the statements.[228] This analysis is similar to that which is required for a statement made under the dying declarations exception, where psychological forces compel the declarant to speak truthfully. While this may point toward the declarant's sincerity, it does not address the problem of possible misperception due to his highly stressed state.[229] The declarant, through his physical pain and in his highly emotional state, may not perceive ongoing events accurately. The circumstances in *Burke* which the court found conferred good faith on the declarant's statements could just as easily provide legitimate inferences that the declarant's physical state

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225. *Id.*

226. The Rhode Island Supreme Court has often noted that statements made by one family member to another bear the mark of good faith, without more. *See, e.g.*, *Desmarais*, 252 A.2d at 449 (finding statements of father to son made in good faith); Segee v. Cowan, 20 A.2d 270, 273 (R.I. 1941) (admitting statements made in good faith from father to daughter on how an accident occurred); Bradley v. Quinn, 164 A.2d 330, 332 (R.I. 1933) (admitting statements by decedent husband to wife). *Compare Hamrick*, 304 A.2d at 667 (excluding statements made by declarant to police during investigation of accident because not in good faith).

227. *Burke*, 574 A.2d at 1223.

228. *Id.* The court adopted the trial court's view, finding that since the statements were those of a man who had just been beaten and robbed, the circumstances "amply" fulfilled the good faith requirement, but did not provide reasons for its acquiescence.

229. A standard objective of cross examination of a hearsay witness is to test the out-of-court declarant's perception of the events/subject matter to which he is testifying. *See* Lilly, *supra* note 10. *See, e.g.*, Kopinos v. Sommer's Transfer Co., 170 A. 490, 491 (R.I. 1934) (admitting statements of victim under declaration of decedent made in good faith exception after receipt of evidence as to victim's mental condition at the time the statements were made to establish his perception of the accident).

would not allow him to perceive the events in question accurately. If the element of good faith is to be a reliable indicator that the out-of-court statements are trustworthy, the interpretation must be sufficiently precise to exclude equally plausible interpretations.

While the *Scholl* court also found the declarant's statements to have been made in good faith, its approach in reaching that conclusion was different than that used in *Burke*. Citing as determinative the facts that the victim's statements were made to a police detective from the victim's hospital bed, at the instigation of a detective, and during the course of the investigation, the court concluded the statements were made in good faith.[230] Unlike *Burke*, the *Scholl* court did not address the declarant's physical and emotional state either at the time he made his statements or at the time of the incident.[231] In addition, the *Scholl* victim's uncertainty in identifying his assailant was also characterized by the court as evidence of his good faith.[232] Moreover, in *Scholl*, the court considered the existence of corroborating evidence, other than the circumstances surrounding the making of the statement, as supporting the finding of good faith.[233] The United States Supreme Court has refused to consider corroboration of unavailable witness testimony with circumstances other than those surrounding the making of the statement.[234] The Rhode Island Supreme Court, however, did not address the high court's reservations regarding corroboration in either *Burke* or *Scholl*. Finally, even if the surrounding circumstances and the corroborating evidence go toward proving the victim's good faith, they are not conclusive as to the reliability of the statements.[235]

The *Scholl* court inferred good faith from the victim's statements because he had made them to police from his hospital

230. State v. Scholl, 661 A.2d 55, 61 (R.I. 1995).

231. *See id.*

232. *Id.*

233. *Id.* The corroborating and circumstantial evidence was that the decedent had given the same description of his assailant to two detectives, had said he could identify the assailant because he had seen him in the building before, and made a identification, albeit not definite, of the assailant from a photo array.

234. Idaho v. Wright, 497 U.S. 805, 819 (1990).

235. The United States Supreme Court's two pronged analysis to determine whether hearsay statements of unavailable witnesses are sufficiently trustworthy requires a determination that such statements carry adequate indicia of reliability. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

bed.[236] Other jurisdictions have held that a victim's identification statement was not made in good faith where it was made to a police officer who had gone to the victim's hospital room for the purpose of obtaining identification of the assailant.[237] Courts in these jurisdictions reasoned that since the identification was made "at the instigation of the officer, it was inadmissible.[238] Spontaneity is one factor which the United States Supreme Court has examined when ruling on whether a declarant was likely to be truthful.[239] The *Burke* court also implied that a statement made to an investigating officer is less indicative of a statement made in good faith than that made to a family member.[240] Whether made to a family member or to a police officer, the good faith requirement adds little to the search for reliability in the decedent's statements that is sufficient to overcome the lack of confrontation.

In contrast to *Burke*, the *Scholl* court gave no consideration to the declarant's physical or emotional condition at the time of the declarant's statements.[241] In *Scholl*, however, even though the declarant was an elderly man, hospitalized with severe internal injuries who died some days after making his statements to detectives, the court declined to consider his deteriorating health or emotional state.[242] Absent this consideration, the court was unable to address the corresponding issues of the declarant's memory or perception, which may have lent doubt to the accuracy of his statements.

The *Scholl* court also found good faith in the victim's uncertainty regarding the identification of his assailant and in his reluctance to "swear" that the defendant was his attacker.[243] Again, though this may point to the good faith of the declarant, it seri-

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236. *See* 661 A.2d at 61.

237. *See, e.g.*, State v. Barela, 643 P.2d 287 (N.M. 1982) (statements of recent perception); State v. Kiewert, 605 A.2d 1031 (N.H. 1992) (hearsay exception for statement against penal interest).

238. *Id.* New Mexico employs the exception for statements of recent perception in criminal proceedings. This was the exception on which the prosecution relied in *Barela*, in a situation similar to State v. Scholl. *See supra* part III.2.

239. Idaho v. Wright, 497 U.S. 805, 821-22 (1990).

240. *Burke*, 574 A.2d at 1223 (stating "In the Court's judgment that's a statement made in good faith. It's not made to a police officer. It is made to a family member . . . .").

241. *Scholl*, 661 A.2d at 61.

242. *Id.*

243. *Id.*

ously undermines the accuracy and reliability of the declaration. Analogously, under the firmly rooted exception for dying declarations, an identification is inadmissible "if it constitutes mere opinion or conclusion of the declarant, or is too vague or uncertain. A declaration will be inadmissible if it merely expresses a belief as to the identity of the assailant, rather than a positive statement of identification."[244] Despite the inherent trustworthiness of a statement admitted under the dying declarations exception, if such a statement merely expresses a belief as to the identification of the assailant, rather than a positive statement of identification, it will be inadmissible.[245] So too, should an equivocal identification made under the far less reliable Rule 804(c) be excluded.

In addition to their analysis of the factual circumstances, the Rhode Island Supreme Court in *Scholl* reviewed several pieces of corroborating evidence toward its finding of good faith in the victim's statements.[246] Under the United States Supreme Court's analysis in *Idaho v. Wright*,[247] evidence coming in under a hearsay exception must be intrinsically trustworthy, not acquiring its trustworthiness "by reference to other evidence at trial."[248] For example, the *Scholl* court found it indicative of the declarant's good faith that he said he could identify Scholl as his attacker since he had seen him in the building before.[249] The fact that the victim had seen his assailant in the building before does not relate to the circumstances surrounding his statement of identification. Corroborating the victim's identification of Scholl with this evidence does not comport with the United States Supreme Court's approach in *Idaho v. Wright*,[250] in that it did not render this declar-

244. 2 Charles E. Torcia, Wharton's Criminal Evidence § 314 at 351-52 (14th ed. 1986). *See also* State v. Pailin, 576 A.2d 1384 (R.I. 1990) (holding that a declarant's expression of an opinion or a conclusion is not admissible in evidence as a dying declaration).

245. *Id.*

246. *See Scholl*, 661 A.2d at 61.

247. Idaho v. Wright, 497 U.S. 805 (1990).

248. State v. Kiewert, 605 A.2d 1031, 1043 (N.H. 1992) (quoting *Wright*, 497 U.S. at 822). It is questionable whether the *Wright* Court's analysis will endure, since two of the five justices in the majority have since retired. Edward J. Imwinkelreid, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 Minn. L. Rev. 521, 528 (1992).

249. 661 A.2d at 61.

250. 497 U.S. 805 (refusing to consider medical evidence of sexual abuse as corroborating the reliability of the child's identification of her abuser).

ant's identification of the assailant "particularly worthy of belief" under the circumstances.[251] The court's analysis is at odds with the standards set forth in *Idaho v. Wright* and hence violates the Confrontation Clause.

Therefore, while a statement which is made by a decedent in good faith is helpful in overcoming the inherent hearsay danger of insincerity, it does not address the equally critical concerns of ambiguity, perception or memory. In fact, the very circumstances which may lead to an inference of good faith are the same circumstances which point to the possible unreliability of the statements. If Rule 804(c) is to provide a reliable basis on which to admit statements against defendants without benefit of confrontation, the timing and personal knowledge elements must overcome the weaknesses presented in the good faith element.

V.2.b *Prior to Commencement of the Action?*

The timing language of Rule 804(c), "prior to commencement of the action," seems to imply usage in a civil setting. Lack of a clear definition for this language as applied in a criminal setting has led the courts to formulate their own varying interpretations.[252] The inconsistencies which have developed as a result of the court's uncertainty regarding this language illustrate the negligible importance of this element of Rule 804(c) in establishing an out-of-court statement's reliability.

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251. *Wright*, 497 U.S. at 819. If the Rhode Island court's analysis of the good faith of the victim's statements in *Scholl* were to stand up under the *Idaho v. Wright* analysis, it would be limited to reviewing factors which relate to whether the hearsay statements made by the declarant was reliable. *Id.* at 821. Factors include the declarant's adequate chance to observe, spontaneity of speaking, likelihood of sufficient recollection, and absence of motive to falsify. *Id.* In *Scholl*, for example, it is not known whether the victim was wearing his eyeglasses at the time of the assault nor at the time he reviewed the photo arrays and identified the defendant. Brief for Appellant at 36, State v. Scholl, 661 A.2d 55 (R.I. 1995). The identification was made at the instigation of a detective who had a specific suspect in mind, and therefore cannot be considered spontaneous. *Scholl*, 661 A.2d at 58-59. With testimony that the victim "had his wits about him only 'at times,' " it is unclear whether he was able to accurately perceive and recall what happened at the time of the assault. Brief for Appellant at 36, State v. Scholl, 661 A.2d 55 (R.I. 1995).

252. *See Scholl*, 661 A.2d at 61 (suggesting that the action was commenced the day after the start of the investigation, but after police had a specific suspect); *Burke*, 574 A.2d at 1223 (inferring that commencement of the action was at some point "shortly after" the initiation of the investigation but prior to identification of a specific suspect).

The common definition of the term "commencement of the action" in the Rhode Island legal system is, in part, as follows:

> A civil action is commenced (1) by filing a complaint with the court together with payment of the entry fee prescribed by law, or (2) by depositing the complaint with said fee in the mail addressed to an officer for service, or (3) by delivery of a summons and complaint to an officer for service . . . .[253]

It is unclear in Rhode Island whether the term "commencement of the action" is applicable to criminal prosecutions, and if it is, how it is to be applied.[254] At least prior to the adoption of 1987 Rules of Evidence the term "commencement of the action" was construed only in the context of civil actions. The term does not appear in the Rhode Island Rules of Criminal Procedure, leading to the conclusion that it is considered a civil term of art in this jurisdiction.

There are several points in a criminal prosecution at which the action could be considered to have "commenced," for example, upon arrest, upon initiation of a formal investigation of the incident or of a specific suspect, upon indictment, or others. Since there is no benchmark for this moment, it is difficult for courts to define whether statements made by decedents under Rule 804(c) are actually made prior to commencement of the action.[255] *Burke* shed little light on this elusive concept. In *Burke*, the court reviewed the trial justice's summary of the timing of the statement, which was as follows: "it has to do with something that occurred and was stated prior to the commencement of this action. This statement was made even before the defendants were arrested. It is made on the premises shortly after this robbery occurred."[256] The dece-

253. Superior Ct. R. Civ. Proc. 3. Note that the rules of criminal procedure in Rhode Island do not refer to "commencement" of an "action," as is typical in civil proceedings, but rather use the criminal law terminology of "complaint" which sets forth the offense charged. Sup. Ct. R. Crim. Pro. 3. Historically, the term "commencement of the action" belonged in the civil realm. *See, e.g.*, State v. Barela, 643 P.2d 287, 289 (N.M. 1982) (finding that where an identification of defendant was made at the instigation of police during their investigation of an aggravated battery it was not prior to commencement of the action); Commonwealth v. Gallo, 175 N.E. 718, 725 (Mass. 1931) (stating that although "action" is a word of broad import, it cannot be interpreted as intended to include prosecutions for crime).

254. *See* Brief for Appellant at 30, n.13, State v. Scholl, 661 A.2d 55 (R.I. 1995).

255. In jurisdictions using statements of recent perception exception in criminal cases, courts have refused to admit statements made by an unavailable declarant which were "in response to the instigation of a person engaged in investigating, litigating or settling a claim." *Barela*, 643 P.2d at 289.

256. *Burke*, 574 A.2d at 1223.

dent's statements in *Burke* were made after the investigation had begun but prior to the arrest of the defendants.[257] This would suggest that arrest, rather than initiation of an investigation of a specific perpetrator, is equivalent to "commencing the action" in a criminal proceeding. However, in *Scholl*, the decedent's statements were made the day after the investigation had begun, and after police had a definite suspect.[258] This is even further into the criminal process, albeit still prior to arrest, than in *Burke*, yet was considered to be prior to "commencement of the action".

In comparison, the rule for statements of recent perception, rejected by the federal system but employed in Wisconsin and New Mexico criminal courts,[259] was specific in defining the timing issue as "not in contemplation of pending or anticipated litigation in which he [declarant] was interested . . . ."[260] and further, that the statement could not be "in response to the instigation of a person engaged in investigating . . . a claim . . . ."[261] At a minimum, Rule 804(c) should be similarly amended to clearly define what constitutes the commencement of the action in a criminal context. Then such amendment would lend additional trustworthiness by lessening the possibility that a statement elicited by police for investigation purposes can be admitted under this exception, without at least first meeting the requirements of another hearsay exception such as former testimony and dying declarations.

In conclusion, as Rule 804(c) currently exists, this requirement is too vague to add to the reliability of an unavailable witness's statements in the absence of confrontation. It is difficult to find a particularized guarantee of trustworthiness in a statement supposedly made "prior to commencement of the action," when this element is not clearly defined, or even inapplicable, in a criminal setting. Amending the rule to clarify the timing requirement, or requiring equivalent circumstantial guarantees of trustworthiness,[262] would substantially increase the court's ability to assess

257. *Id.* at 1220.

258. State v. Scholl, 661 A.2d 55, 58 (R.I. 1995).

259. *See supra* note 100.

260. Rule 804. Hearsay Exceptions: Declarant Unavailable, 56 F.R.D. 183, 321 (1973).

261. *Id.*

262. A statement having equivalent circumstantial guarantees of trustworthiness has other indicia of reliability equal to those provided under one of the standard unavailable witness hearsay exceptions. R.I. R. Evid. 804(b)(5).

the admissibility of an out-of-court statement in a criminal prosecution under Rule 804(c).

V.2.c *Decedent's Personal Knowledge*

Rule 804(c) requires the declarant's statement to have been made from personal knowledge of the statement's subject matter.[263] For a declarant to have personal knowledge he must speak from his own sensory perception.[264] The personal knowledge of an unavailable declarant may be easily established. However, it is more difficult to determine the quality of his knowledge, the very aspect of this Rule 804(c) element which is directly related to the reliability of his statements.[265]

The *Burke* court answered the personal knowledge question by finding that the statements were made "by an individual who purportedly had just been robbed."[266] Since the statements were based on the victim's account of the robbery from his sensory perception, it was within his personal knowledge. However, the court did not address the circumstances under which this personal knowledge had been gained so as to shed light on the quality of the declarant's perception of the events.[267] While the court was willing to infer that the emotional state of the declarant after the incident lent good faith to his statements, they declined to consider whether his emotional or physical condition may have adversely impacted his perception of the events.[268]

Similarly, in *Scholl*, the court found the declarant had personal knowledge of the assault, but failed to address the quality of that knowledge. In *Scholl*, the elderly, wheelchair-bound victim was punched in the abdomen and robbed while riding in an elevator in his building.[269] The trial justice rightly found that he had personal knowledge because he "had the opportunity to view his

263. R.I. R. Evid. 804(c).

264. Booth v. State, 508 A.2d 976, 981 (Md. 1986).

265. *Id.*

266. State v. Burke, 574 A.2d 1217, 1223 (R.I. 1990).

267. The victim had been beaten with a baseball bat, and later hospitalized for his injuries. *See id.* His statements were made the night of the beating, after he had checked himself out of the hospital. *Id.* at 1220.

268. *See id.*

269. State v. Scholl, 661 A.2d 55, 57 (R.I. 1995).

attacker."[270] However, the Rhode Island Supreme Court refrained from any review of the trial justice's findings as to the nature or quality of the declarant's perception during the assault.[271] Again, analogous to *Burke*, the facts which established the personal knowledge element of Rule 804(c) are the same facts which go toward the possible unreliability of the witness's perception and statements.

Without a complete understanding of the quality of perception, the sole fact that a declarant had personal knowledge contributes little to the reliability inquiry in Confrontation Clause analysis. The Rhode Island Supreme Court in both *Burke* and *Scholl* was quick to agree with the trial courts' findings that the declarants had personal knowledge, but declined to review the character of the knowledge as it related to the reliability of the declarants' statements. Thus, although a declarant's positive, personal knowledge may satisfy the rule, such knowledge cannot overcome a statement's lack of reliability, even where accompanied by the declarant's good faith.

V.3 Conclusion

In summary, Rule 804(c) fails to provide a criminal defendant with adequate constitutional safeguards against unreliable testimony. First, while the rule's unavailability requirement creates the necessity to produce the deceased declarant's statements, under Rule 804(c), unavailability is only satisfied by the declarant's death. This is indicative of the unavailability element's character as a guarantor of the declarant's trustworthiness.[272]

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270. Transcript of Trial at 138, State v. Scholl, No. 93-200 (1992). In addition, there was a substantial variance between the declarant's description of Scholl and his actual appearance at the time of the incident. The victim's description was of a "white male, five feet eight inches tall or taller, having a husky build and reddish-blond hair, and not cleanly shaven." *Scholl*, 661 A.2d at 57. Notes on a Providence Police Department photograph taken two months before the incident, described Scholl as "5'11" tall and 150 pounds." *See* Brief for Appellant at 9 n.5, State v. Scholl, 661 A.2d 55 (R.I. 1995).

271. At trial, witnesses testified that the victim regularly wore glasses, Transcript of Trial at 173, 200, State v. Scholl, No. 93-200, but no witnesses could testify as to whether the victim was wearing his glasses on the night of the assault. Witnesses also testified that the victim had his wits about him only "at times." *Id.* at 194.

272. The question arises as to the reason that Rule 804(c) was not included in the list of Rule 804 exceptions, to which any form of "unavailability" applies. Under 804(c), only death of the declarant satisfies the unavailability requirement.

Unavailability in the other Rule 804 exceptions can be satisfied in a variety of ways such as flight from the jurisdiction or mental incapacitation.[273] If the declarant's death was not considered as adding to the reliability inquiry, unavailability under Rule 804(c) would be equivalent to the situations considered in the standard unavailable witness hearsay exceptions.

Second, while the good faith element of Rule 804(c) provides a method to determine whether a declarant is sincere, it neither assists in determining whether the declarant's statement is reliable, nor does it address the equally critical concerns of ambiguity, perception or memory. Circumstances which point to an inference of good faith are often identical to those which indicate the possible unreliability of the statements. Declarant statements may be completely sincere, but completely unreliable, particularly where a police identification procedure is involved. Third, Rule 804(c)'s timing element, which requires that a statement be made prior to commencement of the action, is too vague a term on which to base a determination of reliability. It also does not provide protection from a witness's faulty memory, since a decedent's statement may have been made several years in advance of a legal proceeding.[274] Fourth, without consideration of the quality of the declarant's perception, the personal knowledge element of Rule 804(c) provides only a minimal contribution to the reliability inquiry. The rule as a whole does not provide equivalent guarantees of trustworthiness to the traditional hearsay exceptions, and fails to provide adequate indicia of reliability. The Rhode Island courts' use of Rule 804(c) to decide the admissibility of an out-of-court statement in a criminal courtroom thus depletes a defendant's constitutional rights under the Confrontation Clause.

The Rhode Island experience with Rule 804(c) in criminal prosecutions has been limited, but revealing. If faced with this is-

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It would not be possible to consider a statement made by a declarant who was unavailable by reason of physical or mental illness. The exclusion of the other modes of unavailability points toward the particular importance of the declarant's death to the operation of this exception. This is likely a result of the original use of the provision to combat then existing dead man's statutes. 81 Am. Jur. 2d *Witnesses* § 551 (1992). Where a survivor's testimony would be freely admissible, thus countering the original dead man's statutes, so too should the deceased's statements.

273. R.I. R. Evid. 804(a)(1)-(5).

274. *See, e.g.*, McLain v. Tripp, 53 A.2d 919 (R.I. 1947) (statements introduced at trial were made in 1927, and the action commenced in 1944).

sue again, the Rhode Island Supreme Court should request clarification and amendment of the rule's language. The court should limit the rule's applicability to civil actions. If the court declines to limit the rule's scope, it should require that any testimony admitted under this rule in a criminal setting must also meet the requirements of one of the other hearsay exceptions under Rule 804. Alternatively, the court should require equivalent circumstantial guarantees of trustworthiness similar to those required under the residual hearsay exception.[275]

The language of the rule should be clarified to more clearly define the meaning of "commencement of the action" for use in a criminal setting. For example, adding language limiting the statement to one which was "not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant . . . not in contemplation of pending or anticipated litigation in which he was interested . . . ."[276] In addition, to improve the probability that statements admitted under the rule were made with personal knowledge of an appropriate quality, language such as "while his recollection was clear"[277] should be added. Such changes would be positive steps toward shoring up the ebbing protection extended to defendants under the Confrontation Clause in Rhode Island.

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275. R.I. R. Evid. 804(b)(5).
276. *See* N.M. R. Evid. 804(b)(2) (statements of recent perception).
277. *Id.*