THE RESIDUAL EXCEPTION TO THE HEARSAY RULE: THE COMPLETE TREATMENT

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I. INTRODUCTION

The hearsay rule excludes from evidence a kind of information that we all use all of the time in our everyday lives: second-hand information. The rule expresses a judicial preference for first-hand knowledge. We want on the witness stand a person who has first-hand knowledge of the item in question.

There are many ways around the hearsay rule. There are, for example, ways in which it can be argued that all out-of-court statements are nonhearsay. In Rule 803 of the Federal Rules of Evidence, there are twenty-three categorical exceptions to the hearsay rule. There are five categorical exceptions in Rule 804. Expert witnesses can be used to get around the hearsay rule. Rule 32 of the Federal Rules of Civil Procedure is a huge door through which hearsay can be loaded into the courtroom.

Even with all of the categorical exceptions, rules of procedure, uses of expert witnesses, and the like that get hearsay into evidence, still there are cases where the rule excludes evidence that is relevant, reliable, and—if truth is to be determined and justice to be done—required. In cases where the hearsay rule excludes second-hand evi-

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1. FED. R. EVID. 801, 802.
2. In a wonderful short piece that thoroughly explains the common-law hearsay rule in less than two pages—this is not rocket science; compared to this, rocket science is easy—Professor James McElhaney calls this person "the real witness." James McElhaney, The Real Witness, 28 A.B.A. J. 82 (1988).
3. G. Michael Fenner, Law Professor Reveals Shocking Truth About Hearsay, 62 UMKC L. REV. 1, 10-21 (1993). For example, every statement has an effect on the mind of the person who heard it. If a statement is offered only to show its effect on one who heard it, then it is nonhearsay and the question is whether, as such, it is relevant. Id.
4. FED. R. EVID. 803(1)-(23).
5. FED. R. EVID. 804(b)(1)-(4), (5).
7. FED. R. CIV. P. 32. See also FED. R. CRIM. P. 15.
8. FED. R. EVID. 102. ("These rules shall be construed . . . to the end that the truth may be ascertained and proceedings justly determined.").
dence that is relevant, reliable, and required, pressure inevitably builds against the edges of the rule. Pressure builds to find a way to get the statement out from under the rule and into evidence. The residual exception is hearsay rule's safety valve: It allows the pressure to be released and keeps the hearsay rule from exploding.

The residual exception is an expression of the need for flexibility in the rules. The pre-rules common law allowed for flexibility: Judges created the rules; when they needed another one, they created another one. This kind of flexibility is a hallmark of the common law. Those who drafted the Federal Rules of Evidence believed that the statute needed its own flexibility. The drafters of the rules recognized that not even a group as distinguished as itself could anticipate every situation. "It would . . . be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system."9

Presumptuous, and potentially disastrous. When evidence is reliable, relevant, and needed for the effective presentation of a party's case, pressure builds to admit it into evidence. Without a safety valve, then sooner or later, more or less frequently, but unavoidably, the pressure would build until it impaired the rule. The pressure would build until it escaped at the rules' weakest points. The pressure of justice against the rigidity of the specific rules would result in the rules giving way. The lack of a residual exception would lead to tortured constructions of both the hearsay definition and the specific exceptions.10

10. The first Justice Harlan recognized this general problem as long ago as 1877: "[I]t is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law." United States v. Clark, 96 U.S. 37, 49 (1877) (Harlan, J., dissenting) (citation omitted). It is also the duty of the legislature, and as regards the hearsay rule, the Congress of the United States fulfilled this duty when it included the residual exception. Justice Holmes saw the problem too:

Great cases like hard cases make bad law. For great cases are called great cases, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests excercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

The legislative history of the residual exception includes the Senate's conclusion "that, absent a residual exception, the categorical exceptions might become 'tortured beyond any reasonable circumstances which they were intended to include.'" State v. Walker, 691 A.2d 1341, 1351 (Md. 1997) (quoting S. Rep. No. 93-1277, at 19, reprinted in 1974 U.S.C.C.A.N. 7051, 7065. Similarly:

The facts of this case demonstrate the wisdom of including in our rules a residual hearsay exception such as that in [the federal rules]. Otherwise, we face distorting or expanding our exceptions to the hearsay rule in a manner inconsistent with the text of the rules and the rationales justifying them, or
The evidence is coming in anyway and admitting it through a residual exception is a more honest way of doing it—more honest than doing it through a tortured construction of the underlying rule itself or one of the categorical exceptions. The more honest way of doing it, in itself, serves the interests of truth and justice.

This article is about the residual exception; the one hearsay exception that keeps the whole rule from exploding. Part II begins with the rule itself, quoted and then reduced to its essential elements. Part III continues with a discussion of the scope of the rule and the putative problem of “near miss” evidence. The question here is whether the residual exception is available for evidence that barely misses fitting under one of the specific exceptions found elsewhere in the rules. First, there is a general discussion of near-miss evidence. This is followed with a discussion of one of the most common situations in which the near-miss question arises, that is, the introduction of grand jury testimony against a defendant in a criminal prosecution, who, of course, did not have an opportunity to cross-examine (or even be in the room with) the grand-jury witness.

Part IV addresses the question of notice. This section begins with a discussion of the fact that the rule requires notice of an intention to use the evidence in question (but not necessarily of an intention to use this exception). It moves to a discussion of the fact that text of the rule requires that the notice be pretrial or prehearing, but many cases allow notice after the trial or hearing has started. The article then discusses just how formal the notice must be and what it must include. The discussion of the question of notice concludes with a warning to counsel: You run a great risk if you do not take this notice requirement seriously.

The residual exception requires that the evidence be somewhat trustworthy, and this is the subject of Part V of the article. This section of the article discusses just how trustworthy the evidence must be. It discusses the fact that the trustworthiness requirement focuses on the out-of-court statement and its declarant, and not on the

excluding otherwise trustworthy hearsay evidence which may make it impossible to best serve the interests of justice.

11. See infra Part III.A.
12. See infra Part III.B.
13. See infra Part IV.A.
14. See infra Part IV.B.
15. See infra Part IV.C.
16. See infra Part IV.D.
17. See infra Part IV.E.
18. See infra Part V.A.
testifying witness, and that the focus is on the circumstances that existed at the time the statement was made, and not on what we know in hindsight. This section discusses what specific evidence counsel might produce to support or counter a trustworthiness argument. This section concludes with a discussion of how it is that an out-of-court declarant can have been incompetent at the time the out-of-court statement was made and the out-of-court statement can nonetheless be sufficiently trustworthy to qualify for admission under this exception—a competent statement produced by an incompetent declarant.

Part VI discusses the rule's "probative value" requirement. First, there is a general discussion of the requirement. Second, there is a discussion of the problem of the turncoat witness. Can this exception be used to introduce an out-of-court statement by a declarant who takes the stand and denies a fact stated in the out-of-court statement? Can it be said that an out-of-court statement is more probative than an in-court statement that is under oath and subject to cross-examination? Most courts say no. This article argues that the correct answer is yes, this exception can be used to introduce a prior statement by a turncoat witness.

Part VII discusses the use of this exception to make the hearsay rule come out the way we want it to come out in cases involving the current social agenda. That is followed, in Part VIII, by a discussion of the closely related issue of the use of this exception in cases involving child abuse. Finally, Part IX discusses miscellaneous uses of the residual exception.

II. TEXT OF RULE 807 AND ITS FOUNDATIONAL ELEMENTS

A. TEXT

The place to begin is with the text of the rule:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice

19. See infra Part V.B.
20. See infra Part V.C.
21. See infra Part V.D.
22. See infra Part V.E.
23. See infra Part VI.A.
24. See infra Part VI.B.
will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

B. Five Foundational Elements

According to the text of the rule, use of the catchall exception requires five findings on the part of the trial court.

1. Trustworthiness

While an 807 statement does not fit under Rule 803 or 804, the court must find it as trustworthy as the statements that are covered by Rule 803 and 804. (How to determine which evidence is sufficiently trustworthy is discussed below.25)

2. Relevance

The rule requires "that the statement be offered as evidence of a material fact, which we take to be a requirement of relevance."26

3. Relative Probative Value

The court must find that the evidence in question has more probative value on the point to which it is offered than does any other evidence (presumably, any other admissible evidence) the proponent can procure through reasonable efforts.

4. Justice

The exception applies only when the court determines that admission of the evidence will serve "the general purposes of these rules and the interests of justice."27

5. Notice

The proponent of the evidence must give advance notice of his or her intention to introduce the particular out-of-court statement into

25. See infra Part V.
27. The general purposes of a set of evidence rules written to be used in the courts in the United States should include service to the interests of justice. Perhaps the two concepts are separated in order to emphasize the latter.

Regarding the general purposes of these rules, see Fed. R. Evid. 102.
evidence. The notice must be sufficiently in advance of the trial or hearing to prevent surprise and to allow the adverse party an opportunity to prepare a counter argument.

C. THOSE FIVE FOUNDATIONAL ELEMENTS CAN BE REDUCED TO THREE

Finding number 2—relevance—is always required, whenever any evidence is admitted. Finding number 4—truth and justice—adds nothing to the general rules regarding the application of these rules of evidence as a whole. That means the list of foundational elements over and above what is already required in any event, can be reduced to three:

1. Trustworthiness.
2. Relative probative value.
3. Notice.

But, of course, nothing to do with the hearsay rule is that simple.

III. NEAR-MISS EVIDENCE—THE RELATIONSHIP BETWEEN THE RESIDUAL EXCEPTION AND THE SPECIFIC EXCEPTIONS OF RULES 803 AND 804

A. NEAR-MISS EVIDENCE GENERALLY

One of the important residual-exception questions has been this: How do we handle the cases at the intersection of the specific excep-

28. Just what this requirement means is discussed infra Part IV.A-E.
29. See Fed. R. Evid. 102.
30. This requirement tends to guarantee the reliability of the evidence admitted under this exception. The guarantee of reliability is not inherent in Rule 807 evidence, as it tends to be in Rule 803 and 804 evidence, but is a matter of reference back to Rule 803 and 804. This requirement that residual-exception statements have circumstantial guarantees of trustworthiness equivalent to those of the exceptions in Rule 803 and 804 seems to be an aggregate standard that relates to the 803 and 804 exceptions as a whole, rather than to any single exception. The trustworthiness requirement is discussed infra Part V.
31. This requirement tends to guarantee the need for the evidence admitted under this exception.
tions and the residual exception? What do we do about a statement that almost qualifies under one of the specific exceptions, but falls just short regarding one of the foundational elements?

Consider, for example, grand jury testimony as an out-of-court statement offered against the defendant in the subsequent criminal trial. What if the out-of-court declarant's in-court testimony is unavailable? The declarant had previously testified regarding the matter on trial, under oath, as a witness at another hearing, i.e., in front of the grand jury. Assume that the party against whom the statement is now offered was similarly motivated to cross-examine the declarant then (before the grand jury) and now (at the trial). The party against whom the statement is offered, however, did not have an opportunity to examine the declarant (or even an opportunity to be in the room while the declarant testified). The upshot of that rather long example is that all of the elements of the former testimony exception are present, but one: opportunity to cross-examine. Must this evidence be judged against the former testimony exception only, and excluded as inadmissible hearsay, or can it also be offered and perhaps admitted under the residual exception? Is there something about evidence coming so close to one of the specific exceptions that forecloses consideration of the residual exception?

This is referred to as the "near miss" problem. The question is this: Is the residual exception available for "near miss" evidence?

1. One Approach

The seemingly more reasonable, and apparent majority approach to answering the near-miss question recognizes that each exception is different, and all that is required is that the person offering hearsay evidence establish the foundational elements for any one of them. It does not matter which one. Evidence very nearly, but just not quite, a present sense impression, can be an excited utterance. Evidence very nearly, but just not quite, an excited utterance, can be a present sense impression or a statement for purposes of medical diagnosis or treatment. Evidence very nearly, but just not quite, admissible as an ancient document, can be admissible as a record of a regularly conducted activity, and vice-versa.33

These things seem self-evident. In addition, they are supported by interpretative case law: "[M]erely because a statement suffers some impediment under one hearsay exception does not preclude the propo-

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33. United States v. Donlon, 909 F.2d 650, 654 (1st Cir. 1990) (Breyer, C.J.).
ment of the evidence from satisfying a court that a different, better-fitting exception fully applies."  

Once these things are accepted as true, then how does one draw the line at any of the exceptions, the residual exception included? How does one say that it is quite right that there are no bright lines between the various specific exceptions of Rules 803 and 804, but there are bright lines between the residual exception and each of the others? How does one say that evidence not quite an excited utterance can be an ancient document, but evidence not quite an excited utterance or an ancient document cannot fit under the residual exception?

It also seems appropriate for a trial court to find evidence admissible both under a Rule 803 or 804 exception and under the residual exception. A trial court may do this, for example, where there is a question of law regarding the coverage of the specific exception. If the appellate court agrees with the trial court, then it affirms admitting the evidence under the specific exception. If the appellate court determines that the evidence is not legally admissible under the specific exception, then it may nonetheless affirm admitting the evidence under the residual exception.

The residual exception and the other hearsay exceptions are not mutually exclusive. The appropriate limitations for the residual exception are found in the residual exception, and not in the residual exception plus all of the other exceptions.

The residual exception was included in the rules for application in either of two situations. First: things change. The residual exception is available to deal with new situations and new kinds of situations—and kinds of evidence unanticipated at the time the rules were written. Second: the lines drawn to create the categorical exceptions in Rules 803 and 804 are not perfect lines. There will be times when the imperfections of the lines drawn will exclude—sometimes only barely exclude—needed and reliable evidence. The residual exception recog-

34. People v. Buie, 658 N.E.2d 192, 198 (N.Y. 1995). Accord United States v. Pelullo, 964 F.2d 193, 202 (3d Cir. 1992) (noting that "the residual exception may not be used as a substitute for the business records exception when counsel has not complied with the requirements of 803(6) unless the requirements of [807] have been met") (emphasis added); Donlon, 909 F.2d at 654; United States v. McPartlin, 595 F.2d 1321, 1350 (7th Cir. 1979) (stating that "[w]here evidence complies with the spirit, if not the latter [sic] of several exceptions, admissibility is appropriate under the residual exception").

35. See, e.g., State v. Walker, 691 A.2d 1341, 1353 n.9 (Md. 1997).

36. See Williamson v. United States, 512 U.S. 594, 604 n.* (1994) (holding that when a narrative is both self-incriminating and non-self-incriminating, only the self-incriminating parts fit under the statement against interest exception, but the non-self-incriminating parts might fit under the residual exception).

37. See State v. Luzanilla, 880 P.2d 611, 617 (Ariz. 1994) (citing Morris K. Udall, et al., Law of Evidence 556 (3d ed. 1991)). If this were the only reason for the residual exception, this would support the near-miss school of interpretation.
nizes the imperfection of this kind of categorizing and allows ad hoc decisions to ameliorate these imperfections. The residual exception is available to deal with evidence anticipated at the time the rules were written and not considered sufficiently reliable or necessary as a category of evidence, but specific examples of which may be sufficiently reliable and necessary on an ad hoc basis.

Excluding near-miss evidence from the residual exception would place the rules of evidence back in the straightjacket from which the residual exception was intended to free them.\textsuperscript{38}

2. \textit{The Other Approach}

The other approach to the residual exception draws the line between Rules 803 and 804, on the one hand, and Rule 807, on the other, by quoting this part of Rule 807: The residual exception applies to "[a] statement not specifically covered by Rule 803 or 804." This approach draws the line by arguing that the near-miss statement is "specifically covered by" the exception it nearly hits—specifically covered, and specifically rejected, by the exception it nearly hits.

This approach to the near-miss problem recognizes that the advisory committee that drafted the rules stated that the residual exception is meant to be a very narrow exception, "used rarely and only in exceptional circumstances."\textsuperscript{39} This approach argues that the residual exception was included solely to cover "new and presently unanticipated situations."\textsuperscript{40} Upon review of specific types of statements, the drafters decided that certain elements must be met before a statement can be admitted under an exception. The proponent must establish

\begin{itemize}
  
  Additionally, excluding near-miss evidence from the hearsay rule "promises much litigation over how close a statement can come [to a specified objection] before it is rendered inadmissible." United States v. Clarke, 2 F.3d 81, 84 (4th Cir. 1993). "Both litigants and courts spend their time more productively in analyzing the trustworthiness of the particular statement, rather than debating the abstract question of 'How close is too close?' to a specified hearsay exception." \textit{Id.}
  
  
  \textsuperscript{40} \textit{Luzanilla}, 880 P.2d at 617 (citing \textbf{Morris K. Udall, et al., Law of Evidence} 556 (3d ed. 1991)).
\end{itemize}
each and every foundational element of a hearsay exception. Four out of five is not good enough. If a party attempts to introduce a statement of a type covered by one of the specific exceptions, and it meets all but one of the foundational elements, then the drafters specifically considered, and rejected, that type of statement.

Under this approach, an out-of-court statement that falls just barely short of fitting under one of the specific exceptions is a statement that has been rejected by that exception. “Specifically covered” statements include those specifically included, and those specifically rejected for inclusion. (The trick, then, of course, is determining which kinds of statements were specifically rejected.) Allowing in near-miss evidence, it is further argued, undermines the exception narrowly missed.

This approach to near-miss evidence seems to some to enforce Rule 807's language that it is to apply to statements “not specifically covered by Rule 803 or 804.” This is consistent with the drafter’s admonition to use the residual exception rarely and only in exceptional circumstances, and it works against the undermining of the specific exceptions.

Rule 807 states that it applies to statements “not specifically covered by Rule 803 and 804.” Perhaps, then, the resolution of the near-miss problem depends on what is meant by “specifically covered.” That, in turn, depends on specific definitions and general approaches.

3. Specific Definitions

Specific is defined as “a: constituting or falling into a specifiable category b: sharing or being those properties of something that allow it to be referred to a particular category.” “Specifically covered” by one of the exceptions in Rule 803 or 804, then, seems to mean falling within one of those exceptions. It does not seem to mean falling outside the exception. No matter how close it came, a miss is still a miss. This seems to be the plain meaning of the rule, as written.

That is, each exception has certain foundational elements, and if there is sufficient evidence of each foundational element for any one

41. The evidentiary burden of showing that a statement is hearsay is on the party opposing the admission of the evidence. That is, the party who seeks the benefit of the rule against hearsay must show that the evidence is hearsay. Once that is done, the evidentiary burden of showing that a hearsay statement fits under an exception to the rule is on the proponent of the evidence. The party seeking the benefit of an exception must lay the foundation for the exception. See Pittsburgh Press Club v. United States, 579 F.2d 751, 757-60 (3d Cir. 1978); United States v. Bartelho, 129 F.3d 663, 670 (1st Cir. 1997); State v. Stonaker, 945 P.2d 573, 578 (Or. Ct. App. 1997).
43. And a near miss counts only in horseshoes and hand grenades, not hearsay exceptions.
exception then the statement is “specifically covered” by the exception. It is specifically covered by this exception whether it fits under any other exception or not. And, if one of the foundational elements is missing, then it is not “specifically covered” by this exception\(^4\)—no matter how close it comes. In fact, in this latter situation, the statement is specifically not covered by the barely missed exception.

4. General Approaches

How one resolves this dispute depends on one’s own approach to these rules. The basic premise of these rules favors the admissibility of evidence that is relevant and competent. The general rule is that evidence is admissible if it is relevant and competent, unless there is a rule that keeps it out. If this is the case, then, when in doubt, the rules should be interpreted so as to admit relevant, competent evidence. When in doubt, let it in and trust the lawyers to explain it to the jury and the jury to get it right.\(^5\)

Further regarding general approaches, Rule 102 states that “[t]hese rules shall be construed to secure . . . elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”\(^6\) If the out-of-court statement is reliable, and if it is the most probative evidence on point that is reasonably available, then admitting it does seem consistent with the rule of interpretation enacted in Rule 102.\(^7\) If there is other probative evidence of the point, but obtaining that evidence is unreasonably expensive, then letting in reliable near-miss evidence does eliminate unjustifiable expense. If the other evidence is time-consumingly difficult to obtain, then letting in reliable near-miss evidence does eliminate unjustifiable delay. If the near-miss evidence is reliable and alternative methods of proof are either unavailable or unreasonably expensive and time-consuming to obtain, then letting in the reliable near-miss evidence does promote the “growth and development of the

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44. United States v. Clarke, 2 F.3d 81, 83 (4th Cir. 1993).
45. Regarding most hearsay decisions, Rule 403 and the due process clause serve as the ultimate backstop against the same evil as is addressed by the hearsay rule. This is not the case here, however. Rule 807 only applies when the judge finds the statement sufficiently reliable, finds that it has sufficient relative probative value, and finds that admitting the evidence serves the interest of justice. Evidence that satisfies those three requirements could not run afoul of either Rule 403 or the due process clause.
law of evidence to the end that the truth may be ascertained and pro-
ceedings justly determined.”

What, then, is meant by Rule 807’s first clause defining its cover-
age in terms of “statement[s] not specifically covered by Rule 803 and
804?” “[S]pecifically covered’ means exactly what it says: if a state-
ment does not meet all of the requirements for admissibility under one
of the prior exceptions, then it is not ‘specifically covered.’” It means
that out-of-court statements specifically covered by the more specific
exceptions should be admitted under those exceptions, and not the
residual. It means: Do not turn to the residual exception first. It
means: Rely on the residual exception only when you cannot rely on
any other.

B. Near-Miss Grand Jury Testimony

A common example of the near-miss problem involves the admis-
sibility against a defendant of grand jury testimony, and the intersec-
tion of the former testimony exception and the residual exception.
Grand jury testimony offered against the defendant in a criminal case
can never fit under the former testimony exception, because the de-
fendant has no opportunity to examine witnesses before the grand
jury. The question, then, is whether it can even be considered under
the residual exception.

Most courts say that grand jury testimony can fit under the
residual exception. The argument against using the residual exception
for grand-jury testimony is the “near miss” argument. In this
context, the near miss argument proceeds as follows: The former testi-
mony exception covers former testimony offered at a subsequent hear-
ing. Grand jury testimony that is offered at a trial is former testimony
offered at a subsequent hearing. The residual exception does not ap-
ply to statements covered by the former testimony exception (or any
other Rule 803 or 804 exception). Therefore, the residual exception
does not apply to grand jury testimony offered at a trial. This con-

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48. Fed. R. Evid. 102. See Huff v. White Motor Corp., 609 F.2d 286, 295 (7th Cir. 1979) (stating that “[a]dmission of the evidence will best serve the interests of justice by increasing the likelihood that the jury will ascertain the truth about the cause of the accident”).

49. Clarke, 2 F.3d at 83.

50. For discussion of the residual exception and the admissibility of grand jury testi-
mony, see infra Part III.B.

51. See supra Part III. B text immediately preceding this footnote for the discus-
sion of the relationship between the residual exception in Rule 807 and the specific ex-
ceptions in Rule 803 and 804, and the problem of near-miss evidence.

52. And, since cross-examination is not allowed at the grand jury, grand jury testi-
mony offered against the defendant in a criminal trial cannot fit under the former testi-
mony exception.
clusion is supported by reference to the legislative history of the rules. The residual exception was included to "provide for treating new and presently unanticipated situations." At the time the rules were written and passed into law, offering grand jury testimony at trial, in the face of a hearsay objection, was hardly new and certainly could have been anticipated. As noted above, however, most courts reject any argument that the residual exception cannot be used for grand jury testimony.

*United States v. Earles,* is an example of this problem in action—from both sides. The gravamen of the indictment was arson. The defendant’s son testified before the grand jury on three separate occasions. The first time he said he did not know anything about the fire. The second time he gave lots of testimony that pointed to his

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54. The advisory committee that drafted the Federal Rules of Evidence and whose note is quoted in the text accompanying note 39 circulated its preliminary draft in 1969, 46 F.R.D. 161, and its revised draft in 1971, 51 F.R.D. 315. The many cases addressing the hearsay rule and grand jury testimony prior to those dates, include the following: *United States v. Capaldo*, 402 F.2d 821, 823-24 (2d Cir. 1968) (assuming arguendo grand jury testimony can fit under statement against interest exception, this grand jury testimony does not); *Young v. United States* 214 F.2d 232, 239 (D.C. Cir. 1954) (finding admission of grand jury testimony in this case "comes within no exception to the rule excluding hearsay"); *United States v. Kelinson*, 205 F.2d 600, 601 (2d Cir. 1953) (holding grand jury testimony in question not admissible as coconspirator’s statement); *United States v. Freundlich*, 95 F.2d 376, 379 (2d Cir. 1938) (L. Hand, J.) (using grand jury testimony at trial "may amount in reality to its substitution for the witness’s upon the stand, and... while the hearsay rules remains, the error may be enough for reversal"); *People v. Johnson*, 441 P.2d 111, 116 (Ca. 1968) (holding grand jury testimony inadmissible under former testimony exception); *Hollingsworth v. State*, 211 S.W. 454, 455 (Tex. Crim. App. 1919) (stating that "[t]estimony before the grand jury was hearsay and inadmissible"); *State v. Patton*, 164 S.W. 223, 225 (Mo. 1914) (admitting grand jury testimony violates hearsay rule); *Williford v. State*, Tex. Crim. App. LEXIS 180, at 8 (Tex. Crim. App. Nov. 11, 1896) (summary of defense counsel’s argument states that, regarding admitting grand jury testimony into evidence at trial, he said "it seems too plain for argument that it was simply proving against the defendant the purest hearsay").

55. In addition to simply generally rejecting the near-miss argument, Justice Breyer, when he was Chief Justice of the United States Court of Appeals for the First Circuit, said that the former testimony exception was written to apply to statements made in "those kinds of proceedings for which cross-examination was potentially available," *United States v. Donlon*, 909 F.2d 650, 654 (1st Cir. 1990), and that excludes grand jury proceedings. If then-Chief Justice Breyer meant that statement literally, i.e., meant that the former testimony exception does not apply to any testimony at grand jury proceedings, this has been shown to be incorrect. See *United States v. Salerno*, 505 U.S. 317 (1992). If he meant that the former testimony exception can apply against the prosecutor but not the defendant, then this is no more than a recasting of the foundational elements: the exception applies to statements at grand jury proceedings so long as each of the foundational elements is present; because the prosecutor can question witnesses, the foundational elements may be made against the prosecutor and because the defendant is not allowed to examine witnesses, the foundational elements can never be made against the defendant.

56. 113 F.3d 796 (8th Cir. 1997).
father and his father's girlfriend as the arsonists. The third time, he stated he would not testify further on the fire; neither would he testify against his father or his father's girlfriend. The government wanted to introduce the son's second grand jury testimony. Over the defendants' objection the trial court admitted the grand jury testimony. The jury returned a guilty verdict. After the verdict, the defendants filed motions arguing that the trial court erred in admitting the son's grand jury testimony and that without that testimony there was not sufficient evidence to support the convictions. The trial judge agreed, reversed his earlier ruling, and entered a judgment of acquittal. So in the end, the judge held the evidence inadmissible, acquitted the defendant, and, because of the way it all happened, the prosecutor was able to appeal the acquittal.

The trial court held that the grand jury testimony did not fit under the residual exception. The court reasoned as follows: The residual exception applies to an out-of-court statement that is "not specifically covered by any of the [other exceptions]." Grand jury testimony is "former testimony." As former testimony, it is "specifically covered" by the former testimony exception. Therefore, the residual exception does not apply. Because there is no opportunity to cross-examine grand jury testimony, it is not admissible under the former testimony exception; nonetheless, it is covered by the exception.

The Eighth Circuit reversed and remanded for reinstatement of the jury verdict. The court held that if a statement does not meet the requirements for admission of a particular exception, then that statement is not "specifically covered" by that exception, and the residual exception may be considered. What then is meant by the language limiting the residual exception to statements "not specifically covered" by other exceptions? "[T]he majority of circuit courts have held that the phrase 'specifically covered' means only that if a statement is admissible under one of the . . . [other exceptions], such . . . [other exceptions] should be relied upon instead of . . . [the residual exception]."

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57. United States v. Earles, 113 F.3d 796, 799 (8th Cir. 1997) (quoting Fed. R. Evid. 804(b)(5)).
58. Earles, 113 F.3d at 799-800.
59. Id.
60. Id. at 800.

On the subject of the grand jury testimony's admissibility under the residual exception, see cases cited in Earles, particularly United States v. Marchini, 797 F.2d 759, 763 (9th Cir. 1986) (compiling cases). See also, e.g., United States v. Dent, 984 F.2d 1453, 1462-63 (7th Cir. 1993) (noting grand jury testimony not specifically covered by former testimony exception; properly considered under residual exception).

On the subject of testimony from suppression hearing, see United States v. Clarke, 2 F.3d 81, 83-84 (4th Cir. 1993) (testimony from suppression hearing admissible; opponent had neither opportunity nor similar motive to develop testimony at suppression hearing).
IV. NOTICE—USE OF THE RESIDUAL EXCEPTION Requires Notice in Advance of the Trial or Hearing

The residual exception is not available unless offering counsel gives opposing counsel advance notice of his or her intention to offer the out-of-court statement in question, and the particulars of the statement, including the name and address of the out-of-court declarant. By the terms of the rule, this notice must come in advance of the trial or hearing at which counsel is offering the out-of-court statement. The question of the timing of the notice is not, however, as simple as the text of the rule declares. Some jurisdictions, as discussed below, allow notice well into the trial or hearing.

A. Notice of an Intention to Offer the Evidence

Rule 807 does not require pretrial notice of an intention to use Rule 807. All it requires is notice of an intention to offer the particular statement; not notice of an intention to use any particular hearsay exception. Once counsel has notified opposing counsel of an intention to offer the statement in question, then it can be offered under Rule 807.62

There is at least one situation, however, where notice of an intention to rely on this specific exception might factor into whether the evidence fits under this exception. The rule states that the notice must come “sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it.” If counsel advises the adverse party of an intention to offer rooms full of documents, and does so the week before the trial, that might not be “sufficiently in advance.” If, however, the week before the trial counsel advises the adverse party of an intention to offer rooms full of documents, and singles some of them out as documents that will be offered under Rule 807, that might be “sufficiently in advance . . . to provide . . . a fair opportunity to prepare to meet it.”

61. See infra Part IV.B.

62. The relevant part of the rule is written as follows: “[U]nless the proponent of [the statement] makes known to the adverse party . . . the proponent's intention to offer the statement . . .” Fed. R. Evid. 807. See also, e.g., Alexander v. Conveyors & Dumpsters, Inc., 731 F.2d 1221, 1229 (5th Cir. 1984) (notice requirement not a problem here “since the [statement] was listed as an exhibit in [the proponent's] pre-trial order”); United States v. One 1968 Piper Navajo Twin Engine Aircraft, 594 F.2d 1040, 1041 (5th Cir. 1979) (though specific reference to the residual exception is the better practice, notification of an intention to offer the statement, without specific reference to the residual exception, is enough; here, however, counsel made specific reference “to a different rule, one with a different purpose and effect” and, for that reason, “fair notice was not given” in this case). But see, Kirk v. Raymark Indus., Inc., 61 F.3d 147, 167 (3d Cir. 1995) (the proponent must give notice of the intention to rely on this specific rule as a grounds for admission), cert. denied, 516 U.S. 1145 (1996).
B. THE TIMING OF THE NOTICE

Some courts interpret the notice requirement more in accord with what they see as its spirit than with its letter. The rule states that the notice must be “sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet [the evidence].” Some courts stress the “fair opportunity” part of the notice requirement over the “in advance of the trial or hearing” part. One influential court has said that in cases where the need to use this exception does not become apparent until after the trial has begun, mid-trial notice given enough in advance of the actual use of the evidence can satisfy the rule’s pretrial notice requirement. Variations of this flexible approach predominate, even though they are not consistent with the plain meaning of the rule.

63. United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y. 1976) (Weinstein, J.), aff’d, 540 F.2d 574 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977). The United States Court of Appeals for the Second Circuit softened Judge Weinstein’s blow to plain meaning: “Our holding should in no way be construed as in general approving the waiver of [the rule’s] notice requirements. Pre-trial notice should clearly be given if at all possible, and only in those situations where requiring pre-trial notice is wholly impracticable, as here, should flexibility be accorded.” Iaconetti, 540 F.2d at 578 n.6. See also, Fenner, 62 UMKC L. Rev. at 41-44. Even in the Second Circuit, the course has been a wavering one. E.g., United States v. Oates, 560 F.2d 45, 72 n.30 (2d Cir. 1977) (no notice in advance of trial, through no fault of proponent, and no notice during trial until authenticating witness called to stand; “the advance notice requirement leaves no doubt that it was the intention of Congress that the requirement be read strictly”; no mention of Iaconetti).

64. See, e.g., United States v. Benavente Gomez, 921 F.2d 378, 384 (1st Cir. 1990) (in criminal cases, flexible approach used only when pretrial notice “wholly impractical,” proponent not responsible for delay, and adverse party has adequate opportunity to examine and respond to evidence in question); Furtado v. Bishop, 604 F.2d 80, 92-93 (1st Cir. 1979) (even under “prevailing flexible approach” to pretrial notice, these plaintiffs never explained their failure to give pretrial notice; nonetheless, record—including defense counsel’s comments indicating he had anticipated use of statement—indicated that defense “counsel had prepared to meet the evidence in question”; liberal reading of rule more appropriate in civil case where right to confrontation not in play); United States v. Bailey, 581 F.2d 341, 348 (3d Cir. 1978) (discussing indications requirement to be strictly followed and, nonetheless, allowing statement in when proponent of evidence not at fault in failing to provide notice in advance of trial and continuance granted to allow opponent sufficient time to prepare to contest admission of the evidence); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976) (scheduled witness refused to testify on eve of trial; government allowed to use residual exception to introduce grand jury testimony), cert. denied, 431 U.S. 914 (1977).

It does seem pretty clear, however, that, no matter how far you stretch it, pretrial notice is missing if counsel raises the residual exception for the first time on appeal. See, e.g., United States v. Guevara, 598 F.2d 1094, 1100 (7th Cir. 1979).

65. Though one does not turn to legislative history when text is clear, it can be argued that the legislative history supports reading the exception restrictively, rather than flexibly. The legislative history states that the residual exception is to “be used very rarely, and only in exceptional circumstances.” S. Rep. No. 93-1277, at 18 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7056.
The lesson here is that the rule requires pretrial or prehearing notice but many courts do not—particularly when the lack of pretrial notice was through no fault of the lawyer now offering the evidence. A lawyer who only just learned of the evidence, or a lawyer whose next witness has just refused to testify, or a lawyer who only just found herself in a position where she needs the evidence to rebut surprise evidence from the other side has a lot of case law supporting an argument that, in spite of the plain meaning of the words of the statute, pretrial notice is not required. Even a lawyer who only just realized that the statute requires pretrial notice has an argument that the court need not require pretrial notice. On the other hand, a lawyer who knows of the evidence in question and knows that she may want to get it in, takes a huge risk if she does not give pretrial notice of the evidence.

C. THE NOTICE NEED NOT BE FORMAL

When the "pretrial" part of the notice requirement is enforced, the pretrial notice may be more or less formal. That is, it may be by a document filed with the court and styled "Notice of Intention to Use Rule 807 of the Federal Rules of Evidence." And it may be less than that. A letter sent to opposing counsel stating an intention to introduce particular statements, and including the names and addresses of all witnesses to the statements may satisfy the requirement.\(^\text{66}\) Regarding a written statement, listing it as an exhibit in a pretrial order may satisfy the rule\(^\text{67}\) (so long as the other party has access to knowledge of the particulars of the statement, including the name and address of the out-of-court declarant). Upon retrial, notice may spring from the fact that the evidence in question was used against the defendant at the first trial.\(^\text{68}\) In one case, one party filed a motion in limine requesting a ruling that certain statements were admissible; the court denied the motion; the party offered the statements again at trial and this time the court found the evidence to be admissible under the residual exception. The motion in limine provided the required pretrial notice.\(^\text{69}\) In another case, a party filed a pretrial motion to

\(^{66}\) United States v. Vretta, 790 F.2d 651 (7th Cir. 1986) (letter to opponent stating intention to introduce statements and names and addresses of all witnesses to statements; apparently, residual rule not specifically mentioned).

\(^{67}\) Alexander v. Conveyors & Dumpsters, Inc. 731 F.2d 1221, 1229 (5th Cir. 1984).

\(^{68}\) State v. Robinson, 735 P.2d 801, 812 (Ariz. 1987) (defendant aware of evidence in question because it was used against him at first trial; defendant's attorney knew it would be used at second trial).

have certain evidence suppressed; this indicated, said the court, that he had sufficient pretrial notice to satisfy the residual exception.\textsuperscript{70}

D. **NOTICE MUST INCLUDE THE PARTICULARS OF THE STATEMENT AND THE NAME AND ADDRESS OF THE DECLARANT**

The notice must include the particulars of the statement and the name and address of the declarant. This precludes the use of this exception where the declarant’s identity is unknown. It does not preclude the use of this exception when the declarant is unavailable—dead, for example—so long as the declarant’s name and address—Shady Rest Cemetery, for example—are given. The residual exception has always been available for out-of-court declarations by unavailable declarants, including those unavailable by reason of death.\textsuperscript{71}

E. **TAKE CARE WITH THIS NOTICE REQUIREMENT**

On the one hand, an attorney may be able to get away with not giving pretrial notice under Rule 807. On the other hand, any attorney who has any evidence that may be hearsay and, if it is hearsay, it may not fit under any of the specific exceptions, should give specific notice of an intention to offer the evidence and include the other identifying information required by the rule. This notice should be given unless, as regards the particular piece of evidence, there is some specific, overbearing reason not to do so. (Perhaps surprise is critical, and outweighs the risk that the residual exception will be needed and will not be available.) The “Notice of Intention to Offer Evidence” should become a standard part of the trial attorney’s arsenal. That way, there is no question, and counsel avoids that embarrassing moment when client reads the opinion saying that a key piece of evidence would have been admissible, if only counsel had given pretrial notice.\textsuperscript{72}

V. **TRUSTWORTHINESS**

To fit under the residual exception, the out-of-court statement must have circumstantial guarantees of trustworthiness equivalent to those of the exceptions in Rule 803 and 804.

\textsuperscript{70} State v. McCafferty, 356 N.W.2d 159, 162 (S.D. 1984).
\textsuperscript{71} Prior to the 1997 amendments to the rules of evidence, this residual exception appeared at the end of Rule 803 and 804. As Rule 804(5), the residual exception applied to statements by declarants whose in-court testimony was unavailable and, under Rule 804(a)(4), one of the grounds of unavailability is death.
\textsuperscript{72} See United States v. Davis, 571 F.2d 1354, 1360 n.11 (5th Cir. 1978) (noting that the only other exception conceivably available is residual, but the government did not attempt to give the required pretrial notice); see also Cummins v. State, 516 So. 2d 869, 874 (Miss. 1987) (stating that “[o]ne day before trial is not sufficient notice”).
Some evidence let in under Rule 803 and 804 seems quite reliable: The former testimony exception, with its full opportunity for a well-motivated cross-examination, comes to mind. Some of the evidence let in under Rule 803 and 804 does not seem terribly reliable: The ancient documents exception, under which documents only need be sufficiently old and found where you would expect to find them, comes to mind. The reliability requirement of the residual exception does not seem to be saying "Pick the weakest, least reliable of the exceptions and use it as the standard." The standard of trustworthiness—guarantees of trustworthiness equivalent to those of the exceptions in Rule 803 and 804—seems instead to be some sort of aggregate standard, a standard that relates to the exceptions as a whole rather than to any single exception.

What, then, is the aggregate standard? How can we quantify it? We cannot. It seems to lack any specific meaning. It is more an admonition to the trial judge and the lawyers that the judge must consider the reliability of the out-of-court statement and that, in some vague way, the Rule 803 and 804 exceptions serve as a guide. The reliability requirement seems to boil down to this: The trial judge must find—and the proponent must argue—that the evidence is reliable enough to allow the jury to hear it. One way to do this is to take the various guarantees of trustworthiness that apply to the Rule 803 and 804 exceptions, assemble them, and see which, if any, apply to the out-of-court statement in question.

The logical place to start, when looking for trustworthiness, is with the indicia of untrustworthiness that led to the creation of the hearsay rule. Important guarantees of trustworthiness, then, would include appropriate cross-examination—appropriate cross-examination of the declarant when the statement was made (as with the former testimony exception) or of the declarant as a witness when the

73. "Statements in a document in existence twenty years or more the authenticity of which is established." FED. R. EVID. 803(16). Whatever the document in question, whether reliable or not, keep it in the right place long enough and it becomes an ancient document and the hearsay rule no longer is a bar to its admission.

74. On the other hand, some courts make statements such as this: "The instant case is one where the statement's very close resemblance to an excited utterance enhances its trustworthiness and admissibility under [the residual exception]." United States v. Grant, 38 M.J. 684, 693 (A.F.C.M.R. 1993), aff'd, 42 M.J. 340 (A.F.C.M.R. 1995).

75. See Idaho v. Wright, 497 U.S. 805, 815 (1990) (regarding Confrontation Clause, statement "bore sufficient indicia of reliability, particularly because defense counsel had an adequate opportunity to cross-examine the declarant" when statement made) (citing Mancusi v. Stubbs, 408 U.S. 204, 216 (1972)).
statement is offered (as with the recorded recollection exception)\(^7\) or anywhere in between. If the statement was made under oath, that would tend to guarantee its trustworthiness. The declarant’s ability to have perceived the facts recorded in the statement—declarant’s personal knowledge—can be an important consideration. As can factors affecting the declarant’s memory of the facts stated—factors such as the time between the event and the statement, as with the first few exceptions in Rule 803.\(^7\) These are all part of what makes hearsay categorically unreliable and therefore presumptively inadmissible in the first place.

The logical second step is this. Each of the exceptions in Rule 803 and 804 is based on some factors that tend to make that category of evidence reliable. Look at the things that led the drafters of the rules to conclude those kinds of statements were reliable enough to be admissible hearsay. This would include the following: spontaneity (as with present sense impressions\(^7\)); lack of capacity to fabricate (as with excited utterances\(^7\)); self-interest and other incentives to be accurate (as with statements for purposes of medical diagnosis or treatment,\(^8\) records of a regularly conducted activity,\(^8\) and statements against interest\(^8\)); pressures exerted at the time of the declaration that tend to make it more or less reliable (as with the pressure towards truth exerted by the knowledge death is imminent\(^8\) or the pressure away from truth exerted by a suggestive interrogation of a child allegedly under the stress of a sexual assault\(^8\)); and cultural factors inherent in the situation that tend to produce truthful statements (as with statements under belief of impending death\(^8\)).\(^8\)

\(^7\) Cross-examination of the out-of-court declarant in the trial where the out-of-court statement is offered also supplies some demeanor evidence.

\(^7\) FED. R. EVID. 803(1)-(3), (5).

\(^7\) FED. R. EVID. 803(1).

\(^7\) FED. R. EVID. 803(2).

\(^8\) FED. R. EVID. 803(4).

\(^8\) FED. R. EVID. 803(6).

\(^8\) FED. R. EVID. 804(b)(3).

\(^8\) FED. R. EVID. 804(b)(2).

\(^8\) Idaho v. Wright, 497 U.S. 805, 826-27 (1990) (referring to the Confrontation Clause and the hearsay exceptions for excited utterances, FED. R. EVID. 803(2), and statements for purposes of medical diagnosis and treatment, FED. R. EVID. 803(4)).

\(^8\) FED. R. EVID. 804(b)(2). The guarantee of reliability for statements under belief of impending death is the tendency in our culture for people to tell the truth in those last moments when they are conscious of their own impending death. One can argue whether that is true as a general rule and one can argue whether these same pressures apply to members of other cultural groups whose statements will be admitted under this exception. Nonetheless, if this exception is founded on anything, it is founded on the belief “that no one ‘who is immediately going into the presence of his Maker will do so with a lie upon his lips.’” Commonwealth v. Smith, 314 A.2d 224, 225 (1973) (quoting Regina v. Osman, 15 Cox C.C. 1, 3 (Eng. 1881) (Luch, L.J.)). The drafters of this statutory version of the exception stated this: “While the original religious justification for
Court’s have also considered other factors, such as whether there have been inconsistencies in various retellings of the story; self-interest and other incentives to be inaccurate, such as the declarant’s relationship with the parties; the character or mental state of the out-of-court declarant; the use of appropriate language, for example, age-appropriate language in a statement by a child; influences exerted on the declarant, including, if the statement was a product of an interview, the suggestive manner of that interview, and more.

If the testimony of the declarant is unavailable, the reason for this unavailability may be a consideration. If, for example, the declarant “’[p]ersists in refusing to testify concerning the subject matter of his statement despite a court order to do so’ the court might weigh this as a factor against admitting declarant’s statement.”\(^8\) If, for example, it can be shown that the declarant and the party married just so the rule of spousal incompetence would keep the declarant from having to testify against the party, that might be evidence of trustworthiness. Or, in a jurisdiction that has not adopted the relatively new federal exception for statements offered against a party whose wrongdoing secured the unavailability of the declarant, a showing that a party killed or threatened a witness into silence might be evidence that the declaration is trustworthy.\(^8\) A court may conclude that if the evidence was untrustworthy, there would be less severe ways of dealing with it than killing or threatening the witness—that evidence of threats is evidence that the out-of-court statement is trustworthy.\(^8\)

Unavailability per se, however, does not indicate trustworthiness.\(^8\)

The standard seems to be an aggregate standard that sometimes is established by reference to particular specific exceptions.

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8. In a broader sense, the United States Court of Appeals for the Seventh Circuit has stated the following: “Where evidence complies with the spirit, if not the latter [sic], of several exceptions, admissibility is appropriate under the residual exception.” United States v. McPartlin, 595 F.2d 1321, 1350 (7th Cir. 1979).


88. For example, United States v. Ruffin, 12 M.J. 952 (A.F.C.M.R. 1981) involved a man convicted of sexually abusing his stepdaughter. At trial, after the stepdaughter refused to testify, the prosecutor offered into evidence a statement she had given to the military police. It was received under the residual exception. The court’s list of factors guaranteeing the trustworthiness of the statement ended as follows: “Lastly, we can only conclude that K. L. D.’s refusal to testify on behalf of the Government was motivated by a desire to help her step-father.” United States v. Ruffin, 12 M.J. 952, 955 (A.F.C.M.R. 1981).

89. The silence of unavailability results from such divergent things as senility, on the one hand, and threats, on the other.
B. Trustworthiness Focuses on the Out-of-Court Statement and Its Declarant, Not the Testifying Witness

The requirement that the statement have circumstantial guarantees of trustworthiness focuses on the out-of-court statement and the out-of-court declarant, and not on the trustworthiness of the witness who is testifying in court and subject to cross-examination. On this issue, the United States Supreme Court has held that "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief."90

Take, for example, Mashburn v. Wright.91 This was an action to recover the value of a certificate of deposit in the deceased's name and found among the deceased’s possessions. The plaintiff testified that the deceased had handed him the certificate and stated "this is yours, I want you to have it."92 He testified that the deceased told him "the certificate would mature in February," and that the two of them would go to the bank then and have it signed over to plaintiff. Finally, he testified that the deceased kept possession of the certificate, in the meantime, because he had a safe place to keep it. The court admitted these statements into evidence under Georgia’s version of a residual exception. The out-of-court declarant’s death created the need for the evidence. The trustworthiness of the statements “was provided by the fact that the statements were against [the deceased’s] own interest, i.e., [the deceased] was consciously divesting himself of ownership of the certificate of deposit.”93 These out-of-court statements certainly served the interest of the in-court declarant. “The fact that [the out-of-court] statements were in the best interest of the propounding witness, [the plaintiff], is not relevant to the admissibility of the declarant’s statement.”94

C. Hindsight

The requirement that the statement have circumstantial guarantees of trustworthiness focuses on the circumstances that existed at

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90. See, e.g., Idaho v. Wright, 497 U.S. 805, 819-20 (1990) (noting a statement made in context of hearsay rule, and then held to apply also to Confrontation Clause); United States v. Juvenile NB, 59 F.3d 771, 776 (8th Cir. 1995) (citing United States v. Dorian, 803 F.2d 1439, 1444 (8th Cir. 1986); United States v. Grooms, 978 F.2d 425, 427 (8th Cir. 1992); and United States v. Renville 779 F.2d 430, 440-41 (8th Cir. 1985)).
93. Mashburn, 420 S.E.2d at 381.
94. Id. (quoting Swain v. C & S Bank of Albany, 372 S.E.2d 423 (Ga. 1988)).
the time the out-of-court statement was made. It does not take into account factors "that may be added by using hindsight." 95

D. OTHER EVIDENCE OF THE FACT ASSERTED IS NOT A CIRCUMSTANTIAL GUARANTEE OF TRUSTWORTHINESS

Corroborating evidence in the form of other evidence of the facts asserted in the out-of-court statement is not a circumstantial guarantee of trustworthiness—this seems to be the prevailing and the preferred rule. 96 In fact, the more of this kind of corroborating evidence there is, the less likely the residual exception will apply: To be admissible under the residual exception, there must be a need for the evidence—it must be more probative on its point than other admissible evidence; the more other admissible evidence of the facts asserted, the less need for the residual evidence. 97

This kind of corroborating evidence does play some role in Rule 807 analysis. The United States Supreme Court, in a different, but closely related context, described that role thusly: "The presence of [this kind of] corroborating evidence more appropriately indicates that any error in admitting the statement might be harmless, rather than that any basis exists for presuming the declarant to be trustworthy." 98

There is a second kind of evidence that can be labeled corroborating evidence: evidence indicating that the declaration itself is trustworthy, that is, evidence that the declarant had the ability to perceive the facts recorded, evidence of the declarant's inability to have en-

95. United States v. Tome, 61 F.3d 1446, 1452 (10th Cir. 1995) (quoting Wright, 497 U.S. at 820). "When applying this exception, the circumstantial guarantees of trustworthiness that we consider 'are those that existed at the time the statement was made and do not include those that may be added by using hindsight.'" Id. (quoting Wright, 497 U.S. at 823, in turn quoting Huff v. White Motor Corp., 609 F.2d 286, 292 (7th Cir. 1979)).

An out-of-court statement that was self-serving when it was made may not be sufficiently trustworthy, e.g., Hill v. Brown, 672 S.W.2d 330 (Ark. 1984) (an out-of-court statement concerning the declarant's ownership of a disputed piece of property was self-serving, could easily have been fabricated, and was insufficiently trustworthy), while an out-of-court statement that is self-serving at the time of the trial or hearing, but was not self-serving when made, may well be sufficiently trustworthy. See Mashburn, 420 S.E.2d at 381.

96. Tome, 61 F.3d at 1452. But see, e.g., United States v. Bailey, 581 F.2d 341, 349 (3d Cir. 1978) (holding that trustworthiness of statement offered under residual exception should not be judged solely on basis of corroboration of facts asserted in statement); United States v. Doerr, 886 F.2d 944, 955-56 (7th Cir. 1989) (stating that when assessing trustworthiness of hearsay evidence, court can consider "the existence of corroborating evidence") (citation omitted).

97. See Bailey, 581 F.2d at 349.

gaged in deception,\textsuperscript{99} and the like. This kind of evidence is a circumstantial guarantee of trustworthiness. In fact, as noted above,\textsuperscript{100} this kind of evidence may be particularly important when looking for guarantees of trustworthiness. When we say that corroborating evidence is not a circumstantial guarantee of trustworthiness, we must be careful how we define "corroborating evidence."

\section*{E. TRUSTWORTHINESS AND THE DECLARANT’S INCOMPETENCE TO BE A WITNESS}

The fact that the declarant was incompetent at the time the statement was made—would not, at that time, have been allowed to testify—does not automatically mean the statement lacks the requisite guarantees of trustworthiness.\textsuperscript{101} It "might be relevant to whether the earlier hearsay statement possessed particularized guarantees of trustworthiness,"\textsuperscript{102} but it does not render the statement per se, or even presumptively, untrustworthy.

Admitting into evidence excited utterances or medical diagnosis or treatment statements when made by children too young to be competent witnesses is not a new thing.\textsuperscript{103} There is no apparent reason why the residual exception should be treated any differently in this

\begin{itemize}
\item \textsuperscript{99} United States v. West, 574 F.2d 1131, 1135 (4th Cir. 1978).
\item \textsuperscript{100} See supra notes 75-86 and accompanying text.
\item \textsuperscript{101} The incompetencies of youth, for example, often mean that the child is too young to understand the oath, too young to understand about telling the truth and the need to do just that while testifying. The problem with these witnesses is that the guarantee of reliability of the oath is not present. Hearsay exceptions take care of that. Part of the point of the rule is that we prefer evidence given under oath, but when the foundational elements of an exception are present we allow evidence go be given without the oath. When the foundational elements of an exception are present, there are guarantees of reliability that substitute for the oath. See, e.g., \textit{Wright}, 497 U.S. at 824; Doe v. United States, 976 F.2d 1071, 1082 (7th Cir. 1992); United States v. Napier, 518 F.2d 316, 317-18 (9th Cir. 1975) cert. denied, 423 U.S. 895 (1975) (noting an oath-based incompetency in an adult whose mental deterioration was severe); State v. Wagoner, 506 S.E.2d 738, 742 (N.C. Ct. App. 1988) (noting that under the residual exception, prior statements made with personal knowledge do not automatically lack guarantees of trustworthiness just because the declarant, was and still is, incompetent to testify); W.C.L. v. People, 685 P.2d 176, 178 (Colo. 1984) (stating that even though declarant-child incompetent to testify because she did not know what it meant to tell the truth, her statements have circumstantial guarantees of trustworthiness equivalent to specific exceptions and would fit under residual exception had Colorado adopted residual exception).
\item \textsuperscript{102} \textit{Wright}, 497 U.S. at 825.
\item \textsuperscript{103} See supra note 101 and accompanying text.
\end{itemize}
regard than the excited utterance or medical diagnosis or treatment exceptions. *Incomplete is not synonymous with untrustworthy.* There are many reasons for incompetence, and a testimonially terminal untrustworthiness is one of them. Incompetence does not, however, create per se or presumptive untrustworthiness.

VI. PROBATIVE VALUE

A. Probative Value in General

The residual exception requires that the evidence offered thereunder have "more probative value on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." In general, this is simply a matter of determining if there is other evidence available and, if there is, whether it is reasonably available, and, if it is, whether the offered evidence is more probative on the point than the other available evidence. It is function of the availability of other evidence, the cost of securing the other evidence, the relative probative value of the other evidence, and the like. It is a cost-benefit analysis comparing the evidence offered under the hearsay rule with all other available evidence on the point.

B. The Residual Exception and the Turncoat Witness—Using the Residual Exception to Admit Prior Statements by Witnesses Who Take the Stand and Change Their Stories

Once again, the residual exception requires that the out-of-court statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." In *Lovejoy v. United States*, the out-of-court declarant

104. FED. R. EVID. 807(B).
105. See, e.g., Phan v. Trinity Reg'l Hosp., 3 F. Supp. 2d 1014, 1022 (N.D. Iowa 1998) (ruling on motions in limine in this employment case alleging race discrimination, the court finds an out-of-court statement more probative than other evidence plaintiff can procure through reasonable efforts because the only other evidence would be the testimony of the alleged wrongdoers and it is unlikely they will acknowledge their wrongdoing).
106. As an example, take a civil action with a maximum value of $8,000, an out-of-court statement would seem more probative on a point than any other evidence reasonably available if the only other evidence at all available is the live testimony of a person who could be brought into court at a cost $4,000 (from, say, the mountains of Nepal). The added benefit of the live testimony instead of the out-of-court statement may be small, particularly when the cost of getting that witness into court will eat up one-half of the maximum recovery; in the context of the $8,000 case, the cost of the live testimony certainly is high.
107. 92 F.3d 628 (8th Cir. 1996).
testified at the trial. Her in-trial testimony contradicted her out-of-court statement. The court found that the out-of-court statement was more probative on the fact asserted than was her in-court statement, and, using the residual exception, it let the out-of-court statement in as substantive evidence of the facts asserted.

Lovejoy was convicted of attempted sexual assault of his 13-year-old daughter. The jury accepted the following version of the facts: The victim's mother (Lovejoy's common-law wife) interrupted the assault, got Lovejoy out of the room, and preserved the victim's clothing for evidence. The next day, the mother took the victim and the clothing to a nurse and told the nurse what had happened to her daughter.108

At Lovejoy's trial, the daughter was unable to testify; the daughter was blind, could speak not more than a few words, and could not write. Lovejoy could not be made to testify. The victim's mother—defendant's wife—did testify, but she told an entirely different story from what she had told the nurse. The mother testified that the assault never happened.109 The trial court allowed the nurse to tell the jury what the mother had told her—allowed the mother's out-of-court statement in for the truth of the matter asserted.110 The United States Court of Appeals for the Eighth Circuit held that the nurse's testimony "was more probative on the conduct of Lovejoy than any other evidence because the mother testified differently at trial, the victim could not testify and no other person witnessed the attempted assault."111 The only other person with personal knowledge of the fact of the assault was the mother, whose out-of-court statement was considered more probative than her in-court statement. (Not more trustworthy, though it may be that too, but more probative.)

108. Lovejoy v. United States, 92 F.3d 628, 630-32 (8th Cir. 1996).
109. Lovejoy, 92 F.3d at 631.
110. The nurse's testimony was substantively admissible under Rule 803(4), because the mother's statement was for purposes of medical treatment. Lovejoy, 92 F.3d at 632. The part of the opinion authorizing use of the residual exception is dictum.

The nurse's testimony would have been admissible to impeach the mother's testimony, as a nonhearsay prior inconsistent statement. There are two problems with that approach, however. First, there was almost no other evidence of the crime and no other evidence of the identity of the perpetrator. The prosecutor needed this evidence as substantive evidence. Second, I have argued elsewhere that if a lawyer calls a witness knowing she is going to recant, has her recant, and then argues she is not telling the truth—when the lawyer calls the witness only to impeach her—the witnesses testimony on direct examination is irrelevant and inadmissible. G. Michael Fenner, Handling the Turncoat Witness Under the Federal Rules of Evidence, 55 Notre Dame L. Rev. 536, 536-38 (1980).

Since the mother's statement to the nurse was not under oath, it is not a nonhearsay prior statement by a witness, under Fed. R. Evid. 801(d)(1)(A). Part of the mother's statement may be nonhearsay as a statement of identification of a person made after perceiving that person, under Fed. R. Evid. 801(d)(1)(C), but not all of it—not enough of it.

111. Lovejoy, 92 F.3d at 632.
How can it be that her out-of-court statement is “more probative on the point for which it [was] offered” than her in-court testimony? Only by saying that in all probability she is lying now and was telling the truth then, but is this the kind of “more probative” analysis the rule contemplates? Everyone suspects that, for the most part, such a next-day statement is more likely to be credible than the later re-canting testimony. But the exception calls for probative value—and aren’t probative value and credibility two different things? Additionally, the residual exception requires an examination of the declaration’s trustworthiness and its probative value. Does not credibility relate to trustworthiness more than to probative value?

Can we say that the former statement is more probative because we suspect it is more credible? Professor Norman M. Garland suggested that we cannot. He has stated that “[i]f the declarant is available to testify, the argument is that the declarant’s live testimony is more probative than an out-of-court, hearsay statement.”¹¹² The United States Court of Appeals for the Fifth Circuit seems to agree with Professor Garland:

The live testimony of the available witness, whose demeanor the jury would have been able to observe and whose testimony would have been subject to cross-examination, would have been of more probative value in establishing the truth than [the out-of-court statement.] Although [the residual exception, then in Rule 803 and 804, now in Rule 807,] appears to dispense with availability, the condition re-enters the analysis of whether or not to admit statements into evidence . . . because of the requirement that the proponent use reasonable efforts to procure the most probative evidence on the points sought to be proved.¹¹³

In a similar vein, the United States Court of Appeals for the Fourth Circuit stated that “as a general rule, the credibility of a witness has nothing to do with whether or not his testimony is probative with respect to the fact which it seeks to prove.”¹¹⁴

Intuitively, it seems that the judge cannot say that the former statement is more probative just because the judge finds the former statement more credible. Instinctively, as lawyers, we distinguish probative value and credibility: The former is a question of law for the judge and the latter is a question of fact for the jury. On reflection,

113. United States v. Mathis, 559 F.2d 294, 298-99 (5th Cir. 1977) (citing California v. Green, 399 U.S. 149 (1970); United States v Williams, 447 F.2d 1285 (5th Cir. 1971); United States v. Lynch, 499 F.2d 1011 (D.C. Cir. 1974)).
114. United States v. Welsh, 774 F.2d 670, 672 (4th Cir. 1985).
however, it seems that the Eighth Circuit Court of Appeals may have hit on something very important.

When Professor Garland and the Fourth and Fifth Circuits discussed this element of relative probative value, they equated probative value with testability. They are not concerned with whether the out-of-court statement is more probative because it is more likely true, but whether it is more probative because it is more testable than the in-court statement.\footnote{115}

If "[t]he probative value of testimony is determined upon the assumption that the testimony is true,"\footnote{116} and the judge assesses the probative value of the "true" live testimony and the "true," but contradictory, out-of-court statement, then which of these two "true" but contradictory statements is more probative? Is it the one that is presented live in court, is not hearsay, and can be cross-examined? If so, then as regards which statement is more probative, the in-court statement always wins.

If this is the rule, then, when a witness takes the stand and lies, recanting her earlier true telling of the facts, her contradictory out-of-court statement will never be admissible under the residual exception. On the other hand, when a witness has no memory of the event\footnote{117} or is too frightened to testify\footnote{118} or when, for whatever reason, the witness's in-court testimony is unavailable, then the out-of-court statement may be admissible under the residual exception. It may be trustworthy and it may be more probative than other evidence reasonably available. The lie—taking the stand and telling a false version of the events on trial—takes the residual exception off of the table. The non-lie\footnote{119}—refusing to testify—leaves the residual exception on the table. Advantage to the lie.

These rules are to be interpreted "to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."\footnote{120} Giving the greater advantage to the greater lie

\footnote{115}{In the case of the turncoat witness, that out-of-court declarant will be on the stand. There is demeanor evidence and there is plenty of opportunity for each side to examine the witness. As regards the hearsay rule's preference for live testimony, we have the live testimony of the declarant—live testimony plus, with all of the opportunity in the world to explain the plus.}
\footnote{116}{Eleanor Swift, A Response to the "Probative Value" Theory of Hearsay Suggested by Hearsay From a Layperson, 14 CARDOZO L. REV. 103, 116 (1992).}
\footnote{117}{United States v. Lyon, 567 F.2d 777, 783-84 (8th Cir. 1977).}
\footnote{118}{E.g., United States v. Dorian, 803 F.2d 1439, 1444-45 (8th Cir. 1986) (discussing that an out-of-court statement made by a five year-old victim of sexual abuse who was unable to testify meaningfully because she was frightened).}
\footnote{119}{Or the lesser lie, for a whole new story seems a greater lie than "I don't remember."}
\footnote{120}{Fed. R. Evid. 102.}
hardly seems to serve those goals. I see no reason why, in service of the lying witness, we must give such a narrow reading to the residual exception.

And we do not have to. There is another way to look at this issue. The dictionary definition of probative has to do not with whether the item is testable, but, rather, with whether the item contributes to testing the proposition to be proved. Probative is defined as “[h]aving the quality or function of proving or demonstrating; affording proof or evidence; demonstrative, evidential.” The probative value of evidence, then, seems to have to do with both whether the evidence is testable and whether it is credible. It seems to have to do with the mass or consequence of the evidence, the testability of the evidence, and the credibility of the evidence. The trial judge has to decide whether the out-of-court evidence is more probative than any other reasonably available evidence. This seems to allow room for the trial judge to consider, among other things, the relative credibility of the out-of-court evidence versus that of the other available evidence.

The interpretation that keeps this evidence out from under the residual exception seems to focus on credibility and to say that credibility is someone else's concern, not the judge's. The better interpretation may be the one that focuses on probative value and recognizes that if the judge is called upon to assess the relative probative values of two pieces of evidence, that comparison includes many things, and sometimes it includes a comparison of credibility. Credibility standing alone is for the trier of fact. Probative value, including sometimes an element of credibility, is for the trier of law. Decisions regarding admissibility of evidence not infrequently call for the trier of law to consider credibility and even to make credibility decisions.


122. At a Daubert hearing, for example, in the process of deciding whether expert testimony is admissible or not, the trier of law may well consider credibility—not the credibility of the opinion, but the credibility of evidence of various of the factors that go into the decision of whether the evidence (including the opinion) will be admissible in the first place. E.g., Claar v. Burlington N. R.R. Co., 29 F.3d 499, 501 (9th Cir. 1994) (“It is true that, whenever a court rejects expert testimony because it is based on faulty methodology or reasoning, it follows implicitly that the expert's conclusions are not to be credited. But as long as the court's analysis focuses on the expert's methods and reasoning, and not on the expert's conclusions, its actions are proper”) (citing Daubert v. Merrell Dow Pharm’s, Inc., 509 U.S. 595-96 (1993); National Bank of Commerce v. Dow Chem. Co., 965 F. Supp. 1490, 1516 (E.D. Ark. 1996) (“[I]n a Daubert hearing the expert's scientific credibility cannot be avoided”), aff'd, 133 F.3d 1132 (8th Cir. 1998); Tucker v. Nike, Inc., 919 F. Supp. 1192, 1196 (N.D. Ind. 1996) (expert testimony “is not admissible unless the expert credibly links his or her testimony to an issue in the case”); Chapple v. Ganger, 851 F. Supp. 1481, 1496 n.14 (E.D. Wash. 1994) (“A credible link must be established between the reasoning and the conclusion”).

The trial judge need not believe a putative expert's testimony that his tests had sufficient scientific rigor, or that there in fact is a sufficient link between his reasoning
The conditions of admission under the residual exception include not an assessment of credibility (and, therefore, persuasive value) standing alone, in order to decide which witnesses to believe. Rather, the conditions include an assessment of relative credibility (and, therefore, relative probative value), as measured against other admissible evidence, in order to decide whether to admit more evidence.\textsuperscript{123}

Judges must be careful not to take credibility decisions from the jury. Here, trial judges are not taking credibility decisions from the jury. The jury still decides whether the evidence is believable. The jury may have to make an extra credibility decision: the decision regarding the credibility of the first statement. But nothing is being taken from the jury.

This interpretation is in service of the guiding principles of the rules: “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”\textsuperscript{124}

The approach I am espousing does not destroy the hearsay rule by making all prior inconsistent statements admissible under the residual exception. It simply recognizes that each exception stands on its own foundational elements—the residual exception included. And that some prior inconsistent statements will satisfy the foundational elements of the residual exception; principally, they will be sufficiently trustworthy and their relative probative value will be greater than that of other available evidence.

This is an approach that takes into account the following scenario: First, a young girl is assaulted by a man living with her and her mother, and the mother wants treatment for her injured daughter. This creates certain pressures to tell the truth. Second, as the daugh-

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\textsuperscript{123} Perhaps Professor Eleanor Swift put her finger on the problem when she said that “the same term—probative value—should not be used to denote the different acts that are performed by the judge and by the jury.” Swift, 14 Cardozo L. Rev. at 111 (citing D.H. Kaye, Quantifying Probative Value, 66 B.U. L. Rev. 761,763 (1986)). She would use probative value for “the mental operation and data that the judge uses . . . [l] and persuasive value for “the mental operation and data that the jury—or any factfinder—uses.” Id. Still, that does not mean that “probative value” cannot sometimes contain an element of credibility.

\textsuperscript{124} Fed. R. Evid. 102 (emphasis added).
ter's condition improves, the initial pressure is relaxed. Third, the assailant begs the mother's forgiveness and threatens to leave. This creates a new and different pressure, this time pressure to lie. This approach to the residual exception recognizes not only that the first statement can be more trustworthy, but that it can have greater probative value than any other evidence reasonably obtainable.

This approach also recognizes that the first statement, i.e., the out-of-court statement, can have less probative value than the second one, i.e., the in-court statement. Sometimes the first statement seems to be the lie. Staying with the situation in Lovejoy, sometimes the allegation of abuse is a lie, perhaps concocted out of revenge and designed to hurt its object. Whichever statement is the lie and whichever is the truth, the judge decides relative probative value and, if the judge believes one of the statements to be true and the other to be false, the judge can take that into account when making this decision.

Take this situation. A gang member witnesses a shooting by a member of a rival gang. Originally, the witness provides a detailed, credible description of the shooter. At trial, the witness recants. He says that the shooter was someone else, someone unknown to him, someone whose description he does not much remember, but it definitely was not the rival gang member he had originally implicated. He states that he had made up his original identification as a kind of "payback." The prosecution offers expert testimony discussing a gang phenomenon known as "ratting off." Ratting off is gang code that requires that one gang member never implicate another in a crime—even when the other is a member of a rival gang.125 And perhaps there is other evidence, such as a statement the witness made to a friend or relative, saying, essentially, that he was afraid for his life if he did not recant. Given these facts, the question is not so much Can we say that the earlier statement is more probative? Rather, the question seems to be How can we possibly say that the first statement is not more probative? The first statement can be more trustworthy and more probative. And a judge can find it so. And it can fit under the residual exception.

If the federal rules apply, or if the rules that do apply are identical to the federal rules in relevant part, then the out-of-court statement I have just described, or at least part of it, will not be hearsay in the first place. "A statement is not hearsay if... the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is... one of identification of a person

125. So far, these facts are based on People v. Cuevas, 906 P.2d 1290, 1293-94 (Cal. 1995).
made after perceiving the person.” 126 Still, that definitional exclusion may not cover the entire statement, and there are some jurisdictions that have not made this definitional exclusion part of their code. 127 In any event, this scenario is not included here to show that the residual exception will be needed on these facts. Rather, it is included because it shows that a prior out-of-court statement can be more probative than a later, contrary, in-court statement subject to cross-examination, made after the intervention of “other circumstances.”

The earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness’ mind . . . . The failure of the witness to repeat the extrajudicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extrajudicial identification tends to connect the defendant with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available at the trial for cross-examination. 128

Is the former statement more probative of the truth? Not always, perhaps, but a significant amount of the time it is and the judge knows it and the parties know it and everyone in the room knows it. I am suggesting that while Justice can be blind, it need not be ignorant.

The definition of “probative” espoused here has not received much attention and most of the attention it has received is contrary. I believe, however, that the United States Court of Appeals for the Eighth Circuit is onto something. When a witness makes an out-of-court statement and then takes the stand and recants, the out-of-court statement may be admissible under the residual exception—admissible as substantive evidence of the facts declared therein. 129 If this


This recanted statement will not fit under the relatively new forfeiture by wrongdoing exception, Fed. R. Evid. 804(b)(5), because that requires that the out-of-court declarant’s in-court testimony be unavailable. Some of the kinds of statements I am talking about here will be “near miss” statements in that they will satisfy all but one of the foundational elements of the forfeiture by wrongdoing exception; the one they will not satisfy is unavailability. Others will not, because they will not involve any specific wrongdoing directed at silencing the witness.

127. For a discussion of the adoption of this definitional exclusion by state legislatures, as of 1994, see Cuevas, 906 P.2d at 1298-99 n.2.


129. It may also be that the trial and appellate courts in Lovejoy were bending the rules here because of the nature of the case: child abuse. I discuss this phenomenon infra Part VIII.

The Confrontation Clause will, of course, not be a problem here because this situation does not arise unless the out-of-court declarant is testifying and can be confronted.
view of the residual exception is correct, it provides prosecutors with a terrific weapon to combat hearsay in the case of a witness who gives a statement and then takes the stand and testifies to a different version of events. More than that, however, its ramifications are not limited to the turncoat witness. If it is appropriate to assess the credibility of the out-of-court statement in the turncoat witness cases, then it is appropriate to consider it in any residual exception case where credibility is apparent. When assessing the statement's probative value, the court may consider the credibility of the evidence.

VII. SOCIAL AGENDAS

Each generation has its own set of cases where the rules of evidence do not accomplish what we want to accomplish—they don't favor the civil rights worker over the red-neck city administration; they don't favor the government and the child over the one charged with beating, sexually abusing, or murdering the child.

When it is the hearsay rule that is standing in the way of what we want to accomplish, it is often the residual exception that is called into play.

Most of the foundational elements of this exception are particularly flexible, if not amorphous: trustworthiness; relevance; probative value relative to other evidence that is both reasonably obtainable and admissible; and service to justice. The most circumscribed founda-

130. It will be a powerful weapon in cases where the out-of-court statement can be gotten around the Confrontation clause, which should not be a problem when the out-of-court statement is used in a case where the out-of-court declarant testifies but recants: The person is available to confront. See generally Idaho v. Wright, 497 U.S. 805 (1990).

When the out-of-court declarant testifies but recants, there is this further potential problem. The newest exception in Rule 804, Fed. R. Evid. 804(5), provides a hearsay exception when the evidence is offered against a party whose wrongdoing was intended to and succeeded in making the out-of-court declarant's in-court testimony unavailable. In a jurisdiction applying the “near miss” approach to the scope of the residual exception, see supra Part III, the recanting witness' out-of-court statement might be considered a near miss of Fed. R. Evid. 803(5) and therefore not admissible under the residual exception. As discussed above, however, the near-miss approach to the residual exception is not the preferred approach.

131. This is, in fact, just what the court did in Phan v. Trinity Regional Hospital, 3 F. Supp. 2d 1014 (N.D. Iowa 1998). This is an employment case alleging race discrimination. Ruling on motions in limine, the court stated that an out-of-court statement evidencing the wrongdoing fit under the residual exception. The only other evidence on the point would be the testimony of agents of the defendant hospital and the person allegedly given a preference over the plaintiff. Regarding the relative probative value of the out-of-court statement, on the one hand, and the live testimony, on the other hand, the court stated that the extra-judicial statement is more probative “because of the unlikelihood that [the alleged wrongdoers] will now acknowledge [their wrongful acts].” Phan v. Trinity Reg’l Hosp., 3 F. Supp. 2d 1014, 1022 (N.D. Iowa 1998).

132. Fenner, 62 UMKC L. Rev. at 64.

133. See supra Part I.
tional element is advance notice and, as discussed above, even this element is not as circumscribed as it appears on its face. The more flexible the foundational elements, of course, the easier it is to find them in a given set of facts. This exception, then, is the perfect exception into which to fit a social agenda.

If we want to spare a witness from having to take the stand, for example, all we have to do is find a relevant out-of-court statement, give the requisite notice, find that the evidence is trustworthy and that its admission serves justice, and decide that the evidence is more probative on the point than is any other evidence reasonably obtainable. In the case of victim witnesses such as abused children, battered spouses, or persons being intimidated by gangs, it should not be too difficult for a lawyer to argue, and for some judges to find, that this application of the exception is in the service of justice. It should also not be too difficult to argue and to find that the out-of-court statement is relevant, trustworthy, and more probative on the point for which it is offered than is any other evidence reasonably obtainable.

It serves justice to admit the statement because it enables the proceeding to go forward without forcing the abused child or the battered spouse or the intimidated witness to take the stand and relive the trauma. When the rule states that this exception should be used in the interest of justice, it is not limited to justice for the accused, or even justice for the parties. The interest of justice also includes justice for the victim and for society in general.

Is it not questionable justice, for example, to force a young victim of abuse to take the stand and suffer further abuse at the hands of those who staff the justice system? Does a just system avoid piling on the abuse, the

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134. Fenner, 62 UMKC L. Rev. at 67-68.
battering, the intimidation? Does a just system take care of its powerless citizens, including its children, its battered spouses, its honest citizens intimidated by gangs of hoodlums? Or does it force them to relive the abuse, the battering, the intimidation, most often in the presence of the abuser, batterer, or intimidator and at the hands of the perpetrator's attorney?

The victim's interest in justice pulls one way. The defendant's interest in justice pulls the other way. Society's interest in justice takes both of those competing interests into account. The weighing of the competing interests of the victim and the defendant comes up with justice for society.

The argument that the out-of-court statement is more probative than any other evidence reasonably obtainable is that it is unreasonable to require the live testimony. It is unreasonable to force the child to relive the abuse in the face, and under the glare, of the abuser, and at the hands of the abuser's attorney; unreasonable to require that the powerless battered spouse stand up to the power of the batterer; unreasonable for one under threat of death at the hands of gang members to have to take the stand and testify under the death stare of the defendants. It is an argument that fits nicely with the notion that everyone is a victim and that it is government's job to protect everyone from victimization, including protecting complaining witnesses from further victimization by those whom they accuse of past victimization.

This is not to say that these arguments are right or wrong. This is not to say that this generalization applies throughout the judicial system. It is to say that judges are people, like everyone else, and, like everyone else, they are subject to their own prejudices and predilections. It is to say that our sympathy is for the victim and the residual exception will flow in the direction of the victim.\textsuperscript{136} It is to say that there are inevitable pressures to protect our most vulnerable citizens—children, abused spouses, those suffering gang intimidation, whomever—while simultaneously punishing our most scorned citizens—child abusers, spouse batterers, gang members. It is to say that when the subject is today's major societal concern, very many courts find a way to enforce that concern, hearsay notwithstanding—and it is

\textsuperscript{136} This is not a new phenomenon. In another forum, I have argued that around mid-century, the victim was the government and the rules were bent to put Communists in jail; in the 60s, the victims were civil-rights workers and demonstrators and the rules were bent to keep them out of jail; in the 70s, the victims were anti-war demonstrators, and the rules were bent to keep them out of jail; in the 80s, the victims were drug users—"Just say 'No'"—and the rules were bent to put drug dealers in jail; and in the 90s, the victims include abused children, and the rules are bent to put child abusers in jail. See Fenner, 62 UMKC L. REV. at 64.
the residual exception that allows some judges the flexibility to do just that.

VIII. CHILD ABUSE

Today, the residual exception is frequently used to admit out-of-court statements made by children who are alleged to have been victims of child abuse, and to admit them in lieu of live testimony from the child.137 Much of the discussion in these cases has had to do with the foundational element of trustworthiness. Courts have focused on the suggestiveness of leading questioning by parents or other authority figures, including whether the child has been prompted, coached, or manipulated by others.138 They have focused on the child's age as related to the child's ability to fabricate such a statement.139 They have focused on the amount of time that passed between the alleged act and the making of the statement,140 on spontaneity, and on consistent repetition.141 They have focused on the "use of terminology unexpected of a child of similar age,"142 on the mental state of the out-of-court declarant, and on any motive the child might have either to tell the truth or to lie.143 In other words, they focus on all of the things they should focus on: anything that increases the trustworthiness of the statement, prominently including those things that go into making trustworthy the various evidence in the Rule 803 and 804 exceptions. As with all statements evaluated for trustworthiness under the

137. "The residual exception appears to find its greatest use in trials where children are the victims of alleged sexual abuse. It is axiomatic, of course, that society has a deep and compelling interest in protecting the welfare of its children." Barror, 20 M.J. at 503. See also, e.g., Truman v. Watts, 598 A.2d 713, 722 (Del. Fam. Ct. 1991) (citing cases).

The residual exception is not the only exception called into play to help put away child abusers. The excited utterance exception, for example, is sometimes stretched right up to (and even beyond) its breaking point in order to protect children and put child abusers away. See, e.g., State v. Plant, 461 N.W.2d 253, 263-69 (Neb. 1990) (admitting an excited utterance made by a child two days after the triggering event); State v. Padilla, 329 N.W.2d 263, 266-68 (Wis. Ct. App. 1982) (admitting an excited utterance made by a child three days after the triggering event); People v. Lovett, 85 Mich. App. 534, 272 N.W.2d 263 (1976) (admitting an excited utterance made by a child one week after the triggering event); In re Marriage of Theis, 460 N.E.2d 912, 915-18 (Ill. App. Ct. 1984) (admitting an excited utterance made by a child two months after the triggering event); People v. Gage, 28 N.W. 835, 835-37 (Mich. 1886) (admitting an excited utterance made by a child three months after the triggering event).


139. Cree, 778 F.2d at 477; Norris, 788 S.W.2d at 70-72.

140. E.g., People v. District Court of El Paso County, 776 P.2d 1083, 1088-90 (Colo. 1989).

141. Lonergan, 505 N.W.2d at 355; Conklin, 444 N.W.2d at 276.

142. Lonergan, 505 N.W.2d at 355.

143. Conklin, 444 N.W.2d at 276.
residual exception, the focus is not on the witness, but on the statement. That is, the proper focus is not on whether the particular out-of-court declarant, here a child, is trustworthy, but rather on whether the particular out-of-court statement is trustworthy. The trustworthiness of the particular child may, of course, be relevant to the trustworthiness of his or her statement, but the latter is the key that unlocks this exception, not the former.

Beyond trustworthiness, admission of the statement in question must serve the interests of justice. Some courts rely on the notion that it is questionable justice to force an extremely young victim of abuse to take the stand and relive the traumatic experience. It is true that this serves the child’s interest in justice. It surely does not serve the defendant’s interest in justice. Society’s interest in justice would combine the two, and how much weight is to be given to each of these competing interests—the child’s and the defendant’s—is one of the ways in which this residual exception is so flexible.

So, justice is a factor in the foundational elements of this particular rule. And perhaps we do serve the interests of justice when we help the child victim escape yet another traumatizing attack, this one in the courtroom, on the witness stand, by an agent of the defendant and in front of any number of perfect strangers plus the defendant himself.

Beyond trustworthiness and the interests of justice, the out-of-court statement must have more probative value on the point in question than does any other evidence the proponent can procure through reasonable efforts. The theory for admission is that a reasonable effort to secure the evidence elsewhere does not require making the abused child take the stand and subjecting the child to yet another kind of abuse, this time in the presence of the alleged perpetrator of the initial abuse, and at the hands of a lawyer who is working for the alleged perpetrator. That is to say, if an “effort” involves subjecting a child-victim to further abuse in open court, then, in our society, it is not a “reasonable effort.”

Having found the evidence trustworthy and more probative on the point than any other evidence obtainable through reasonable efforts, and having found its admission under the residual exception to serve justice, then there are only two questions left. Is the evidence relevant (and we can assume it is; otherwise we would never get to the hearsay question) and was advance notice given?

144. Cree, 778 F.2d at 478-79.
145. See, e.g., id. at 478 n.7 (stating that “[t]he rights of defenseless child abuse victims must be protected”).
146. See supra Part VII.
IX. MISCELLANEOUS USES OF THE RESIDUAL EXCEPTION

Various uses of the residual exception include the following:

- The report of a deceased fingerprint examiner offered to prove that the fingerprint on the marijuana bag was defendant's.147
- A list of property taken in a burglary, compiled by the now-deceased victim, offered to prove what items were taken.148
- Polls and surveys offered to prove the truth of the assertions of those polled or surveyed.149
- Police reports offered to prove the truth of the facts recorded thereon.150
- A judgment in a civil action offered to prove the truth of the fact adjudicated.151
- A postmark offered to prove that a letter was mailed from a particular place.152
- A police officer's testimony as to what a sign-language interpreter told him the defendant was signing to the interpreter.153
- A child's statement to a social worker regarding sexual abuse, offered to prove the truth of the facts asserted by the child.154
- Statements in a diary offered to prove the truth of the facts recorded.155

This kind of a list can, however, be misleading. The point here is not the kind of out-of-court statement involved, but whether the proponent has satisfied the foundational elements of the exception. This is, of course, the point with every one of the exceptions. Here, however, there is not even a categorical label that can be applied to the evidence covered, such as "excited utterance." It is that the circumstances sur-

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149. Pittsburgh Press Club v. United States, 579 F.2d 751, 757-60 (3d Cir. 1978) (survey in question not trustworthy because not objective, scientific, or impartial; surveys generally fit residual exception when conducted in accordance with generally accepted survey principles and results used in statistically correct way).
152. United States v. Cowley, 720 F.2d 1037, 1044-45 (9th Cir. 1983) (postmarks generally fall under residual exception; error to admit postmark here under residual exception because no advance notice; harmless error).
153. State v. Letterman, 616 P.2d 505 (Or. Ct. App. 1980) (defendant's statements to the interpreter are nonhearsay admissions; interpreter's statements to police officer are hearsay, but fit under residual exception), aff'd, 627 P.2d 484 (Or. 1981).
154. United States v. Juvenile NB, 59 F.3d 771, 778 (8th Cir. 1995). On the facts of United States v. Tome, 61 F.3d 1446, 1453 (10th Cir. 1995), that court found that a child's statement to a caseworker for Child Protection Service did not fit under the residual exception.
rounding the making and the offering into evidence of some out-of-court statements will satisfy the residual-exception foundation, no matter what kind of statement it is, or where it is found. What is misleading about it is this. Let us say that you have a case that holds that statements in a diary, offered to prove the truth of the facts recorded therein, are admissible under the residual exception.\textsuperscript{156} This does not mean that diaries generally fit under the residual exception, the way the excited utterance exception means that excited utterances are generally admissible under that exception. It only means that the trial judge found that these particular diary entries were trustworthy and had high relative probative value, and that the required notice was given.\textsuperscript{157}

There is nothing categorical about this exception, as there is with the exceptions in Rules 803 and 804. This exception is entirely ad hoc.

X. CONCLUSION

The residual exception is the safety valve of the hearsay rule. Without some residual exception, a statutory set of rules of evidence simply would not work. The pressure to admit hearsay evidence that does not fall under one of the fixed, specific exceptions would inevitably lead to one of two things: the evidence would not be admitted and injustice would be done, or one of the other exceptions would be misread to say that it does cover the evidence in question. As to the former—doing injustice—it would not be long before some judge came up with a palatable interpretation of one of the specific exceptions that would allow courts generally to ignore the violation of the plain meaning rule and do justice by allowing the evidence in (much in the way some courts violate the plain meaning of the requirement that there be pretrial or prehearing notice of an intention to use this excep-

\begin{itemize}
  \item \textsuperscript{156} Letterman, 616 P.2d 505.
  \item \textsuperscript{157} In the following cases, the residual exception did not apply to: a suicide note, State v. Brown, 752 P.2d 204, 206-07 (Mont. 1988) (note implicated defendant in crime, offered to prove defendant committed crime; statement in note insufficiently probative of point to which offered); an affidavit, State v. Hughes, 584 P.2d 584, 587 (Ariz. Ct. App. 1978) (affidavit claiming signatures on check were forgeries, offered to prove truth of fact asserted; not shown more probative than other evidence reasonably available and, as statement in favor of declarant’s pecuniary interest, lacking guarantees of trustworthiness); a police officer’s note on an envelope, State v. Garvey, 283 N.W.2d 153, 156-67 (N.D. 1979) (undercover agent’s note on outside of envelope that envelope contained marijuana, offered to prove truth of fact asserted; no pretrial notice and lacking guarantees of trustworthiness), overruled by State v. Himmerick, 499 N.W.2d 568 (N.D. 1993); a letter from a doctor, deMars v. Equitable Life Assurance Soc’y of the U.S., 610 F.2d 55, 59-60 (1st Cir. 1979); (letter from now-deceased doctor to plaintiff’s attorney, concerning plaintiff’s symptoms, offered to prove truth of doctor’s statements; lacking guarantees of trustworthiness).
\end{itemize}
If not today or tomorrow, then inevitably someday, judges would give in to the pressure to do justice and begin to misread the hearsay definition or the exceptions. It is the residual exception that allows courts to breathe common law common sense into the hearsay part of the statute. Because it allows us to admit near-miss evidence, because it allows us to admit some out-of-court statements by persons who, when they made the statements, were incompetent to be witnesses, because it allow us to admit pretrial statements by turncoat witnesses—because it enacts that kind of flexibility, it is this single ad hoc exception that saves this part of this statute.

158. See supra Part IV.B.
159. See supra Part III.
160. See supra Part V.E.
161. See supra Part VI.B.