Maryland Law Review

Volume 54 | Issue 3 Article 6

Residual Hearsay Exceptions: a New Opening?

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B. Residual Hearsay Exceptions: A New Opening?

In a significant change from Maryland's common law, the newly adopted Maryland Rules of Evidence[1] provide for the admission of hearsay evidence that does not fall within one of the commonly recognized exceptions to the hearsay rule.[2] These exceptions are known as the residual hearsay exceptions. Maryland Rule 5-803(b)(24) provides:

> Under exceptional circumstances, the following are not excluded by the hearsay rule, even though the declarant is available as a witness: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.[3]

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1. 21 Md. Reg. 1 (Jan. 7, 1994).

2. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MD. R. 5-801(c). Maryland Rule 5-803 lists 22 exceptions to the hearsay rule that are applicable even though the hearsay declarant is available to testify. MD. R. 5-803(b).

3. MD. R. 5-803(b)(24).

Maryland Rule 5-804(b)(5) is identical to rule 5-803(b)(24), except that it applies only when a declarant is unavailable as a witness.[4] A Rules Committee note, appended to Maryland Rule 5-803(b)(24) and cross-referenced at Maryland Rule 5-804(b)(5), makes clear the Committee's intention that such hearsay is to be admitted only in very limited situations.[5]

This Note will trace the history of both the Maryland and the federal residual hearsay exceptions and then discuss the different ways in which the federal circuit courts have administered the rule. The Note addresses interpretive questions that will arise in applying the Maryland Rule. Finally, the Note predicts how Maryland courts will apply the rules and their potential impact on trial practice in Maryland.

1. The History of Residual Hearsay in Maryland and the Federal System.—

a. Maryland Common Law Before July 1, 1994.—Prior to the adoption of the new Rules of Evidence, Maryland courts maintained that they did not recognize a residual, or "catch-all," exception to the hearsay rule.[6] Despite this express non-acceptance, Maryland courts have on rare occasions admitted hearsay evidence that does not fit into a traditional category. In *Foster v. State*,[7] the Court of Appeals reversed a murder conviction and ordered a new trial because the hearsay rule operated to exclude evidence "necessary to the accused's defense," and which bore "sufficient indicia of reliability . . . to assure . . . trustworthiness."[8] The court reasoned that "'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'"[9] The exclusion of the hearsay evidence in *Foster* violated the defendant's constitutionally mandated right to due process of law.[10]

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4. MD. R. 5-804(b)(5). Unavailability is defined as death, illness, lack of memory, operation of a privilege, a refusal to testify despite a court order, and absence from the hearing when the proponent has been able to procure attendance. MD. R. 5-804(a). A declarant is not unavailable as a witness if the absence is due to wrongdoing on the part of the proponent of the statement. *Id.* Maryland Rule 5-804 also lists four other exceptions that operate when the declarant is unavailable. MD. R. 5-804(b).

5. *See* MD. R. 5-803 committee note ("It is intended that the residual hearsay exception will be used very rarely, and only in exceptional circumstances.").

6. *See, e.g.*, Cain v. Maryland, 63 Md. App. 227, 234, 492 A.2d 652, 656 ("Maryland has yet to adopt" a catch-all hearsay exception), *cert. denied*, 304 Md. 300, 498 A.2d 1186 (1985).

7. 297 Md. 191, 464 A.2d 986 (1983) (plurality opinion), *cert. denied*, 464 U.S. 1073 (1984).

8. *Id.* at 211, 464 A.2d at 997.

9. *Id.* at 208, 464 A.2d at 995 (quoting Green v. Georgia, 442 U.S. 95, 96-97 (1979) (per curiam)).

10. *Id.* at 212, 464 A.2d at 997.

The Court of Appeals has also allowed the admission of "reasonably reliable," nontraditional hearsay in parole revocation hearings[11] and conditional release revocation hearings.[12] The court has noted, however, that "the rules of evidence, including rules against the admission of hearsay, are relaxed at [such] hearings."[13]

b. History of the Rules in the Committee.—In 1993, the Evidence Subcommittee of the Maryland Rules Committee recommended against including the residual exceptions in the new Maryland Rules of Evidence.[14] The full Committee later deadlocked on a motion to reject the Subcommittee's recommendation to exclude the residual exceptions.[15] Opposition to the exception encompassed two viewpoints: some feared that a residual exception would swallow up the hearsay rule with too many qualifying conditions while others on the Committee believed that a codified residual exception would unduly limit the development of hearsay jurisprudence and confine the use of hearsay too much.[16] The full Committee apprised the Court of Appeals of the Subcommittee's recommendation against the rule, and that the full Committee was split evenly on the issue.[17]

The court then reviewed two versions of the proposed rules, one substantively mirroring the federal rule, the second containing the limiting prefix, "Under exceptional circumstances."[18] The Court of Appeals voted to adopt the residual exceptions and opted to include the limiting prefix.[19]

c. History of Residual Hearsay in the Federal Rules of Evidence.—At the time initial work began on the codification of the federal rules of evidence, the Fifth Circuit handed down a landmark ruling in *Dallas County v. Commercial Union Assurance Co.*[20] that is widely viewed as the genesis of the movement to incorporate a residual hearsay excep-

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11. *See, e.g.*, Bailey v. State, 327 Md. 689, 612 A.2d 288 (1992) (holding hearsay evidence admissible for limited purpose of proving that probationer had not completed required program).

12. *See, e.g.*, Bergstein v. State, 322 Md. 506, 588 A.2d 779 (1991) (holding reliable hearsay admissible at conditional release revocation hearing).

13. *Bailey*, 327 Md. at 698, 612 A.2d at 292.

14. MD. RULES COMMITTEE, May 14, 1993, MINUTES, at 4.

15. *Id.* at 8.

16. *Id.* at 4.

17. *Id.* at 8.

18. *See* LYNN MCLAIN, MARYLAND RULES OF EVIDENCE 268 (1994).

19. *Id.* at 269.

20. 286 F.2d 388 (5th Cir. 1961).

tion into the Federal Rules of Evidence.[21] In *Dallas County*, the central issue concerned whether the collapse of the tower on the old county courthouse in Selma, Alabama, was caused by lightning, which was covered by insurance, or by existing weakness and deterioration, which was not covered.[22] The Fifth Circuit upheld the trial court's decision to admit a fifty-eight-year-old newspaper article, which described a fire in the courthouse, even though the article did not fit into one of the "happily tagged species of hearsay exception."[23] The circuit court held that the article was "necessary and trustworthy, relevant and material, and its admission is within the trial judge's exercise of discretion."[24] In the wake of *Dallas County*, the 1969 text of Proposed Federal Rule of Evidence 803—Hearsay Exceptions—was even more permissive than the rule as eventually adopted.[25] Proposed Federal Rule of Evidence 803(a) said only that "[a] statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy."[26] To mirror the established common-law exceptions to hearsay rule, Proposed Federal Rule of Evidence 803(b) listed twenty-three categories of admissible statements, but only "[b]y way of illustration . . . and not by way of limitation."[27] By 1971, this permissive approach to the hearsay rule was largely abandoned, with the adoption of the twenty-three "illustrations" as express exceptions in themselves.[28] The residual exception was added at this time.[29] The Supreme Court later approved this revised version in November 1972.[30] The Court then sent the proposed rules to Congress on February 5, 1973.[31] Before the rules could

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21. *See, e.g.*, James E. Beaver, *The Residual Hearsay Exception Reconsidered*, 20 FLA. ST. U. L. REV. 787, 791 (1993); David A. Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867, 868 (1982).

22. *Dallas County*, 286 F.2d at 390.

23. *Id.* at 397-98.

24. *Id.* at 398.

25. *See, e.g.*, Sonenshein, *supra* note 21, at 871; Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 345 (1969) (language of draft rule).

26. 46 F.R.D. at 345.

27. *Id.*

28. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315, 419-22 (1971).

29. *Id.* at 322.

30. H.R. REP. No. 52, 93d Cong., 1st Sess. 1 (1973).

31. Communication from the Chief Justice of the United States, *reprinted in* 1974 U.S.C.C.A.N. 7074, 7074-75.

take effect, however, Congress intervened and deferred their enactment.[32]

The House of Representatives elected to remove the residual exception to the hearsay rule altogether because it would inject "too much uncertainty into the law of evidence and impair[ ] the ability of practitioners to prepare for trial."[33] The Senate rejected this change, and reintroduced a residual exception, arguing that "without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed)."[34] The conference committee added a notice requirement to the Senate's version of the residual exception.[35]

d. Evolution of the Rule in the Federal Court System.—Even before Maryland adopted rules of evidence based on the scheme of the Federal Rules, the Court of Appeals had indicated a willingness to look to the Federal Rules for guidance in the resolution of evidentiary questions.[36] This history makes it likely that when novel questions arise with respect to the new Maryland Rules of Evidence, the Court of Appeals will again look to federal jurisprudence for insight.

An initial matter for the Maryland courts that the federal circuits have resolved is the admission of "near misses"—hearsay that is inadmissible although it very nearly meets the standards of a traditional

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32. Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9. The House Report recommending the intervention listed five concerns. H.R. REP. NO. 52, at 3-4. The Committee on the Judiciary questioned whether there were constitutional impediments to the promulgation of rules by the Supreme Court, whether the rules were within the purview of the authority of the Court, the wisdom of uniformity throughout the federal court system as opposed to uniformity between a federal court and the state locality in which it sits, and whether the proposed rules had been given enough exposure for commentary. *Id.* at 3. The Committee also recommended congressional examination of whether the rules should be adopted in their present form. *Id.* at 4. The House Report concluded:

> [I]t has become clear there is enough controversy wrapped up in the 168 pages of rules and Advisory Committee notes that the rules should not be permitted to become effective without an affirmative act of Congress, and then, only to the extent and with such amendments, as the Congress shall approve.

Id.

33. H.R. REP. NO. 650, 93d Cong., 1st Sess. 6 (1973).

34. S. REP. NO. 1277, 93d Cong., 2d Sess. 19 (1974).

35. H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 11 (1974).

36. *See* B&K Rentals & Sales Co. v. Universal Leaf Tobacco Co., 324 Md. 147, 158-59, 596 A.2d 640, 646 (1991) (changing Maryland law concerning whether statement by agent constitutes admission of party opponent to "place Maryland in accord with the clear majority of states that have adopted the principle embodied in FED. R. EVID. 801(d)(2)(D)"); Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581, 612, 495 A.2d 348, 363-64 (1985) (recognizing public records exception to hearsay rule in same form as it appears in FED. R. EVID. 803(8)).

exception.[37] The rationale given for the admission of near-misses is that, "[w]here evidence complies with the spirit, if not the l[e]tter of several exceptions, admissibility is appropriate under the residual exception."[38] Courts refusing to admit near-misses counter that the enumerated exceptions have specific requirements of reliability which must be satisfied in order to justify admission, and that failure to do so should preclude a finding of trustworthiness.[39] In an attempt to secure the foundation on which traditional exceptions are based, one commentator urges courts that admit near-misses to do so only "when the court can articulate a circumstance in the making of the statement that substitutes for the missing enumerated elements and thus provides equivalent guarantees of trustworthiness."[40]

To ensure the reliability of admitted residual hearsay evidence, the new Maryland Rules impose four substantive and one procedural requirement as a precondition to admission: (1) the statement must have equivalent circumstantial guarantees of trustworthiness; (2) be offered as evidence of a material fact; (3) be more probative on the point for which it is offered than any other evidence produced or procurable through reasonable efforts; and (4) serve the general purposes of the rules and interest of justice by its admission.[41] Finally, the adverse party must have notice of its opponent's intent to introduce the hearsay.[42] In practice, the circuits have interpreted several of the above criteria differently.[43]

The first requirement, that the proffered evidence have equivalent circumstantial guarantees of trustworthiness, is a broad standard, "limited only by the imagination."[44] Among the circuits, the evolution of this standard has followed three paths. Some courts will

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37. An example of a "near miss" would be a 19-year-old document. Such a document would fall just short of the 20 year age requirement proscribed by the "ancient documents" exception to the hearsay rule. *See* MD. R. 5-803(b)(16) (admitting "[s]tatements in a document in existence twenty years or more, the authenticity of which is established, unless the circumstances indicate lack of trustworthiness.").

38. United States v. McPartlin, 595 F.2d 1321, 1350 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979).

39. *See* United States v. Love, 592 F.2d 1022 (8th Cir. 1979) (holding statement made after charges were dropped was not made against interest even though declarant was still in custody). For a discussion of the "near-miss" question, see Gary W. Majors, Comment, *Admitting "Near Misses" Under the Residual Hearsay Exceptions*, 66 OR. L. REV. 599 (1988).

40. Sonenshein, *supra* note 21, at 888.

41. MD. R. 5-803(b)(24); MD. R. 5-804(b)(5).

42. MD. R. 5-803(b)(24); MD. R. 5-804(b)(5).

43. *See* Beaver, *supra* note 21, at 800-02 (discussing the Second, Fifth, and Sixth Circuits' interpretations). *See generally* Sonenshein, *supra* note 21 (interpreting the residual exceptions to allow for the growth and development of the hearsay exceptions).

44. Beaver, *supra* note 21, at 795-96.

look only to "extrinsic" facts concerning the reliability of the hearsay in question, such as the availability of the hearsay declarant for cross examination or the existence of other evidence corroborating the hearsay statement.[45] Other courts have considered "intrinsic" facts, which are the circumstances surrounding the actual making of the hearsay itself.[46] Still others will consider both extrinsic and intrinsic facts.[47] The Fourth Circuit has in different cases considered both extrinsic corroborative evidence[48] and intrinsic factors[49] to evaluate the equivalent circumstantial guarantees of trustworthiness.

The second requirement, that the offered hearsay be evidence of a material fact, is a redundancy and has rarely been considered.[50] If the evidence offered is not material it will not pass the threshold test of relevancy and materiality contained in Federal Rules of Evidence 401 and 402.[51]

The proffered evidence must also be more probative on the point for which it is offered than any other evidence produced or readily producible through reasonable efforts.[52] Although this is a potentially significant limitation to the admission of hearsay under the residual exceptions, this test has occasionally been weakened. Courts, however, have refused to admit hearsay either because it is not the most

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45. *See, e.g.*, United States v. Barnes, 586 F.2d 1052 (5th Cir. 1978) (upholding admission of evidence under residual hearsay exception because declarant was available for cross examination and statement was corroborated by other testimony).

46. *See, e.g.*, Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979) (holding that "circumstantial guarantees of trustworthiness . . . are those that existed at the time the statement was made and do not include those that may be added by using hindsight").

47. *See, e.g.*, United States v. Van Lufkins, 676 F.2d 1189 (8th Cir. 1982) (upholding admission of hearsay evidence under residual exception because statement was made under fortuitous circumstances shortly after incident and corroborated by other evidence).

48. *See, e.g.*, United States v. Garner, 574 F.2d 1141, 1144 (4th Cir.) (upholding admission of sworn grand jury testimony of witness who refused to testify at trial because testimony was corroborated by another witness and by airline tickets, customs declarations, passport declarations, and hotel records), *cert. denied*, 439 U.S. 936 (1978).

49. *See, e.g.*, United States v. Clarke, 2 F.3d 81, 83 (4th Cir. 1993) (approving the admission of testimony from suppression hearing because declarant, who later refused to testify, "'had no motive to lie at that hearing or to implicate his brother'") (quoting district court judge), *cert. denied*, 114 S. Ct. 1194 (1994).

50. *See* Joseph W. Rand, *The Residual Exceptions to the Federal Hearsay Rule: The Futile and Misguided Attempt to Restrain Judicial Discretion*, 80 GEO. L.J. 873, 881-83 (1992).

51. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. "Evidence which is not relevant is not admissible." FED. R. EVID. 402. It follows that evidence not pertaining to a material fact is not relevant and therefore, inadmissible. The Maryland Rules are identical. *See* MD. R. 5-401; MD. R. 5-402.

52. MD. R. 5-803(b)(24)(B); MD. R. 5-804(b)(5)(B).

probative on point[53] or because other evidence was reasonably available.[54] Other courts have eased the proponent's burden significantly, saying "the jury [is] entitled to all the help available."[55] The Fourth Circuit has strictly applied the probativeness requirement and indicated that evidence must be the most probative on the point for which it is offered.[56] The court has also excluded evidence where other similarly probative evidence was readily available.[57]

The fourth requirement, that admission of the hearsay must serve the general purposes of the rules and the interest of justice,[58] is essentially a redundant requirement. Courts hold that it "is simply a further emphasis upon the showing of necessity and reliability and a caution that the hearsay rule should not be lightly disregarded and the admission should be reconciled with the philosophy expressed in Rule 102."[59] One court, that believed a witness had been intimidated into refusing to testify at trial, allowed that witness's otherwise inadmissible grand jury testimony to be introduced under the residual exception.[60] The court used the "interest of justice" requirement, not as a test of admissibility, but as a central argument to allow the introduction of the grand jury testimony.[61]

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53. *See, e.g.*, Polansky v. CNA Ins. Co., 852 F.2d 626 (1st Cir. 1988) (holding that letter indicating plaintiff's belief not more probative when plaintiff was available to testify).

54. *See, e.g.*, United States v. Kim, 595 F.2d 755 (D.C. Cir. 1979) (reasoning that telex of bank verifying withdrawal not admissible because proponent did not demonstrate inability to produce admissible business records).

55. United States v. Iaconetti, 406 F. Supp. 554, 559 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977). In *Iaconetti*, the defendant, a government contract inspector, had been recorded soliciting a bribe from a potential contractor. *Id.* at 556. The defendant testified that the tapes had been misinterpreted but the court allowed the business partners of the contractor to testify that he had told them of the bribe attempt the day it occurred. *Id.* This testimony was allowed despite the availability of the tapes and the likelihood that tapes of the actual conversations in question were more probative as to defendant's intent than the contractor's perception. *Id.* at 557-59.

56. *See, e.g.*, United States v. Walker, 696 F.2d 277 (4th Cir. 1982) (indicating that grand jury testimony that was no more probative than another witness's testimony should have been excluded), *cert. denied*, 464 U.S. 891 (1983).

57. *See, e.g.*, United States v. Heyward, 729 F.2d 297 (4th Cir. 1984) (upholding district court's refusal to admit attorney's memorandum detailing decedent's bank transaction when bank official could have been called to testify), *cert. denied*, 469 U.S. 1105 (1985).

58. *See* MD. R. 5-803(b)(24)(C); MD. R. 5-804(b)(5)(C).

59. United States v. Friedman, 593 F.2d 109, 119 (9th Cir. 1979). Rule 102 states the purpose of the rules of evidence: "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." FED. R. EVID. 102.

60. *See* United States v. Carlson, 547 F.2d 1346, 1354-55 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

61. *Id.* at 1355.

In addition to the four substantive requirements, the residual hearsay exceptions impose a procedural notice requirement.[62] The language of the notice requirement would appear to leave little room for flexibility. But this has not been the case in several federal circuits, which have taken a relaxed view of the notice requirement.[63] Among the factors courts have weighed in the application of this requirement are whether the proponent knew of the need to use the particular evidence in advance of trial,[64] whether the offeror is blameless for failure to notify the opposite party,[65] and whether the opponent has "'a fair opportunity to prepare to contest the use of the statement.'"[66] The Second Circuit, however, has applied the notice requirement strictly.[67] The Fourth Circuit has taken note of this strict interpretation of the notice requirement, but has also recognized the practical reality that "[w]hen new evidence is uncovered on the eve of trial, . . .

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62. MD. R. 5-803(b)(24); MD. R. 5-804(b)(5).

63. Several commentators view this "flexible notice" approach to be more in line with the realities of litigation. *See* Thomas Black, *Federal Rules of Evidence 803(24) & 804(b)(5)-The Residual Exceptions—An Overview*, 25 HOUS. L. REV. 13, 55-56 (1988); Sonenshein, *supra* note 21, at 901-05.

64. *See, e.g., Carlson*, 547 F.2d at 1355. In *Carlson*, the government realized it needed to offer the hearsay testimony only when their witness refused a court order to testify. *Id.* The court allowed admission of the witness's grand jury testimony under Federal Rule of Evidence 804(b)(5). *Id.* The *Carlson* court noted that the defendant could have sought a continuance but chose not to do so. *Id.*

65. *See, e.g.*, United States v. Bailey, 581 F.2d 341, 348 (3d Cir. 1978). In a prosecution for bank robbery, the government did not learn until after the trial had begun that an accomplice would not testify in accord with statements he had made about the defendant's participation in the crime. *Id.* at 344. The court stated that "the purpose of the rules and the requirement of fairness to an adversary contained in the . . . notice requirement . . . are satisfied when . . . the proponent of the evidence is without fault in failing to notify his adversary prior to trial[.]" *Id.* at 348. The court ultimately ruled that the evidence should not have been admitted, but on grounds that the statement lacked trustworthiness and not because the notice requirement was violated. *Id.* at 349-50.

66. *Id.* at 348 (quoting H. CONF. REP. NO. 1597, 93d Cong., 2d Sess. (1974)). In an expansive application of the flexible notice approach, the First Circuit accepted the affidavit of a deceased lawyer under the residual exception even after noting that the offerors of the evidence could not "be presumed blameless" because they did not attempt to explain their failure to give pretrial notice. Furtado v. Bishop, 604 F.2d 80, 902 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980). The court inferred that the defense had prepared to meet the evidence because the defense had been in possession of the document for seven and one-half years and because defense counsel had indicated that he anticipated the introduction of the document. *Id.*; *see also* United States v. Leslie, 542 F.2d 285, 291 (5th Cir. 1976) (holding that even if government did not comply with notice requirement, defendant was not harmed because "his counsel had a fair opportunity to meet the statements").

67. *See, e.g.*, United States v. Ruffin, 575 F.2d 346, 358 (2d Cir. 1978) ("'There is absolutely no doubt that Congress intended that the requirement of advance notice be rigidly enforced.'") (quoting United States v. Oates, 560 F.2d 45, 72 n.30 (2d Cir. 1977)).

advance notice is obviously impossible."[68] In this particular situation the Fourth Circuit expressly accepted a flexible notice standard, although it limited its holding to "the exceptional circumstances of this case."[69]

2. Application of the Rule in Maryland.—The Committee note, adopted under both Maryland Rule 5-803(b)(24) and Maryland Rule 5-804(b)(5), gives a strong indication of the Committee's intention that residual hearsay is a very limited exception:

> The residual exceptions . . . do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 5-102.[70]

The language of the comparable federal advisory note, however, goes on to recognize that "all possible desirable exceptions to the hearsay rule have [not] been catalogued."[71] This language is conspicuously absent from the Maryland note. The Maryland note instead stresses the limited availability of the residual hearsay exception:

> It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 5-803 and 5-804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by amendments to the Rule itself. It is intended that in any case in which evidence is sought to be admitted under

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68. United States v. Heyward, 729 F.2d 297, 299 n.1 (4th Cir. 1984), *cert. denied*, 469 U.S. 1105 (1985).

69. United States v. Baker, 985 F.2d 1248, 1253 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 682 (1994). The court sustained admission of hearsay under the residual exception absent pretrial notice due to a "last-minute need for the testimony" and because the provision of such notice "was wholly impracticable." *Id.* at 1253 n.3. The government stated that the unavailable witness had been hidden to prevent her testimony. *Id.* The court deemed the government's subpoena and subsequent search for the woman as "reasonable efforts" because the government had no indication that her testimony would be necessary until the defense presented its case. *Id.*

70. MD. R. 5-803(b)(24) committee note; *cf.* Fed. R. Evid. 803(24) advisory committee's note (using substantially the same language).

71. FED. R. EVID. 803(24) advisory committee's note.

> these subsections, the trial judge will exercise no less care, reflection, and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.[72]

As an initial matter, the wording of the note makes it probable that the residual exceptions should not operate to allow admissions of "near-misses."[73] The exceptions, rather, are only for "new and presently unanticipated situations."[74] More significantly, the admission of a near-miss would be a de facto revision of the current hearsay rule and its exceptions. The Committee note specifically commands trial judges not to do so, saying that such revisions are best accomplished by actual amendments to the rules.[75]

While it is obvious that the residual hearsay exceptions will be used rarely, precisely how the Maryland courts will resolve interpretive questions already litigated in the federal courts is unclear. Based on the federal experience, it is likely that the materiality and interest of justice requirements for admissibility will not generate very much discussion. The interpretation of the remaining three criteria—the presence of equivalent circumstantial guarantees, whether other evidence is probative, and the flexibility of the notice requirement—is central to the future application of rules 5-803(24) and 5-804(b)(5).

a. Equivalent Circumstantial Guarantees.—In Maryland, nontraditional hearsay is already admissible in parole and conditional release revocation hearings "if the trial judge decides that it is reasonably reliable and determines that there is good cause for its admission."[76] The Court of Appeals inquiry into what makes hearsay reasonably reliable provides insight into what might constitute the equivalent circumstantial guarantees of trustworthiness called for by Rules 5-803(b)(24) and 5-804(b)(5).

In *Bailey v. State*,[77] the court considered whether a letter from petitioner's residential treatment center that indicated a violation of the terms of his parole was correctly admitted into evidence as "reasonably

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72. MD. R. 5-803(b)(24) committee note. The text of the paragraph essentially duplicates a paragraph of Senate Report 93-1277, which, in part, reintroduced the residual exception after it had been eliminated by the House of Representatives. *See* S. REP. NO. 1277, 93d Cong., 2d Sess. 20 (1974).

73. *See* McLain, *supra* note 18, at 269.

74. MD. R. 5-803(b)(24) committee note.

75. MD. R. 5-803(b)(24) committee note ("The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions.").

76. Bailey v. State, 327 Md. 689, 699, 612 A.2d 288, 292-93 (1992); *see supra* notes 11-13 and accompanying text.

77. 327 Md. 689, 612 A.2d 288 (1992).

reliable" hearsay.[78] To determine the letter's reliability, the court looked both to extrinsic guarantees of trustworthiness and to intrinsic circumstances that surround the creation of the statement.[79] In looking outside the actual creation of the hearsay statement, the court noted that the letter was corroborated by petitioner's "tacit admissions."[80] In consideration of the inherent trustworthiness of the statement, the court held that the treatment center's "special role in the State's probation system"[81] and its obligation to report any violations of petitioner to the Division of Parole and Probation gave the document the necessary degree of reliability and credibility.[82] This dual test of intrinsic reliability and extrinsic corroboration is identical to the test promulgated by several federal circuits for the consideration of residual hearsay in the context of Federal Rules of Evidence 803(24) and 803(b)(5).[83] It is plausible that the Maryland Court of Appeals could choose to follow the test it has used in parole hearings, but the Rules of Evidence are generally relaxed in those proceedings.[84] The court could also opt to re-examine its standards on the trustworthiness of hearsay in the context of the residual exceptions. Until the court definitively rules on this issue, the dual test it applied in parole hearings at least gives practitioners a framework from which to formulate arguments on the trustworthiness of residual hearsay.

b. More Probative than any Other Evidence.—An effective method by which the court can limit the application of the residual expectations would be to require, as the text of the rule commands, that any evidence proffered be the most probative on point. A test to determine the meaning of "more probative" remains an open question at this time. By setting this hurdle very high, as the Fourth Circuit has done,[85] Maryland courts can accomplish the Rule Committee's goal to restrict the residual exceptions to "exceptional

78. *Id.* at 696-97, 612 A.2d at 291-92.

79. *Id.* at 701-05, 612 A.2d 293-95; *see also* Beach v. State, 75 Md. App. 431, 541 A.2d 1012 (1988) (ruling that letters from state-sanctioned probation program were reliable because of trustworthy source and absence of motive to fabricate).

80. *Bailey*, 327 Md. at 709, 612 A.2d at 295.

81. *Id.* at 705, 612 A.2d at 295.

82. *Id.* at 704-05, 612 A.2d at 295-96.

83. *See, e.g.*, United States v. Van Lufkins, 676 F.2d 1189 (8th Cir. 1982) (looking both to circumstances surrounding making of hearsay and to outside corroboration); United States v. Bailey, 581 F.2d 341, 349 (3d Cir. 1978) ("[T]he trustworthiness of a statement should be analyzed by evaluating not only the facts corroborating the veracity of the statement, but also the circumstances in which the declarant made the statement and the incentive he had to speak truthfully or falsely.").

84. *See supra* notes 11-13 and accompanying text.

85. *See supra* notes 56-57 and accompanying text.

circumstances."[86] Similarly, the court could strictly require that there be no other evidence available through "reasonable efforts." This dual requirement of probativeness and availability offers the court a solid foundation on which to limit use of the residual hearsay exceptions significantly.

c. Notice Requirement.—The restrictive wording of the committee note suggests that the notice requirement also will be strictly applied. Strict adherence to the notice requirement would severely limit use of the residual hearsay exception by precluding its invocation once a trial has begun.

Despite this conclusion, it is not difficult to imagine circumstances under which courts would allow at least some flexibility in the notice requirement. Where a witness is suddenly unavailable or unwilling to testify, and the proponent is blameless, a court might reasonably allow the hearsay to be admitted even absent notice prior to trial.[87] Blind adherence to the notice requirement in such a situation would not further the interests of justice. A more advisable course would follow the Fourth Circuit and accept a flexible notice doctrine but limit its use to extreme circumstances.[88] In such a situation, a court could offer a continuance to allow the opponent to prepare for the evidence, as some of the federal circuits now do.[89]

3. Effect on Trial Practice.—To evaluate the effect the residual hearsay exception will have on trial practice in Maryland, it is important to keep in mind the limited situations in which the rule applies.[90] With the existence of twenty-seven well-established hearsay excep-

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86. "[M]ore probative . . . than any other evidence," MD. R. 5-803(b)(24), is akin to *most* probative. A strict application of such a standard would eliminate all redundant evidence and place a heavy burden on proponents to show why the evidence in question is essential to their case.

87. *See, e.g.*, United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976) (stating that the notice requirement should not be strictly construed), *cert. denied*, 431 U.S. 914 (1977); *see supra* note 64.

88. *See supra* notes 68-69 and accompanying text.

89. *See, e.g.*, United States v. Bailey, 581 F.2d 341 (3d Cir. 1978) (ruling that defendant was not prejudiced by admission of residual hearsay evidence because trial judge granted him adequate time to research and conduct interviews).

90. As of 1992, the residual hearsay exception has been reported in more than 140 federal and more than 90 state cases. Beaver, *supra* note 21, at 790 (citing STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL, 360-74, 436-38 (5th ed. 1990) & 78-81, 90-93 (Supp. 1992)). Beaver uses these figures to argue that the residual exceptions are being used generally, not in the rare and exceptional circumstances for which they were intended. *Id.* at 790-91. But, when one considers the enormous quantity of cases reported in all federal and state courts combined, fewer than 250 uses of the residual exceptions would seem quite rare indeed.

tions, each with a long history of case law detailing its application, a practitioner should turn to the residual exception only as a last resort.

Until the Court of Appeals or the Court of Special Appeals rules on whether Maryland will apply the notice requirement strictly or flexibly, any attempt to use the residual exceptions should be handled by a motion *in limine*.[91] Such a motion would satisfy the notice requirement and allow both parties to plan their trial strategy accordingly. In any case, the proponent should always notify the adverse party before trial if there is any possibility such evidence might be introduced at trial. Similarly, to satisfy the equivalent circumstantial guarantees of trustworthiness requirement, a practitioner should follow the two-pronged test of intrinsic reliability and extrinsic corroboration used by the Court of Appeals in *Bailey*.[92]

There is, of course, no guarantee against reversal for improper admission of hearsay under the residual exception. For example, should the Court of Appeals adopt a rule that looks only to intrinsic guarantees of trustworthiness, it could reverse a decision that admitted evidence when both intrinsic and extrinsic proof had been offered. The court could find reversible error, reasoning that a trial court was unduly influenced by the corroborative evidence that was, in hindsight, improperly introduced. But, until the court adopts a different policy, the most pragmatic course is to offer both intrinsic and extrinsic proof of trustworthiness.

The matter of the relative level of probativeness of the hearsay necessary for admission under the residual exceptions is also best handled by a motion *in limine*. In deference to the limiting language of the Committee note, it is probable that trial courts will apply this requirement strictly unless instructed to do otherwise by a higher court. It would be important that the offered evidence be the most probative on point and that no other similar evidence be reasonably available.

4. Conclusion.—The inclusion of the residual hearsay exceptions in the new Maryland Rules of Evidence represents a significant change from Maryland's common law. Residual hearsay exceptions are by their nature rules of limited application. While it is unlikely that the exceptions will be used on any regular basis, there is the potential to open the door to evidence previously inadmissible. How far

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91. A motion *in limine* is made pretrial and requests that the court prohibit opposing counsel from referring to or offering one or more pieces of evidence. BLACK'S LAW DICTIONARY 1013-14 (6th ed. 1990). The motion can also be used in a pro-active manner by a proponent of a particular piece of evidence to insure its later admission at trial.

92. *See supra* notes 76-79 and accompanying text.

this door opens and the degree to which the new exceptions change Maryland trial practice will depend entirely upon future decisions of Maryland's appellate courts.

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