Sendor
7-17-89

Judges, District Attorneys,
Public Defenders and Assistants,
Sheriffs' Attorneys, Police
Attorneys

Administration OF JUSTICE Memorandum

Published by the Institute of Government, The University of North Carolina at Chapel Hill

June 1989 No. 89/01

The Open-Ended Hearsay Exceptions

Benjamin B. Sendor

The residual hearsay exceptions in both the North Carolina and the federal rules of evidence offer multiple delights to imaginative trial lawyers. First, they can be highly useful, opening the evidentiary door to vital hearsay that does not qualify under a specific hearsay exception. Moreover, because they must be applied with fresh eyes in each case, the residual exceptions can rouse lawyers to muster all of their creativity, analytic skill, and persuasive talent as proponents or opponents of evidence. This paper examines the residual exceptions under both sets of rules: G.S. 8C-1, Rules 803(24) and 804(b)(5), and FED. R. EVID. 803(24) and 804(b)(5). It discusses the common law background and legislative history of these exceptions, the criteria for admissibility of statements under the exceptions, and patterns developing in case law regarding the admissibility of a few categories of hearsay under the exceptions.

Common Law Background

Both the federal and the North Carolina residual exceptions represent legislative endorsement of common law trends. With respect to federal law, both the Advisory Committee's notes and the report of the Senate Committee on the Judiciary cite Dallas County v. Commercial Union Assurance Company Limited, 286 F.2d 388 (5th Cir. 1961), as a case illustrating the development of a residual hearsay exception even before the enactment of the Federal Rules of Evidence. In *Dallas County* the key factual question was the cause of the collapse of a county courthouse tower: did it collapse because of lightning's striking it (if so, insurance covered the damage) or because of structural weakness and deterioration (if so, insurance did not cover the damage)? To show that structural weakness, rather than lightning, might have been the cause, the insurer sought to introduce into evidence a copy of a local newspaper over 50 years old that reported a fire in the courthouse during its construction. The newspaper did not qualify for admission as a business record, as an ancient document, or under any other recognized hearsay exception. Nevertheless the court concluded that the article was admissible in light of its trustworthiness: it was inconceivable that a small town reporter would report a fire that had not occurred. Another influential federal case predating enactment of the Federal Rules of Evidence was United States v. Barbati, 284 F. Supp. 409 (E.D.N.Y. 1968) (Weinstein, J.). A barmaid's inability to identify an alleged counterfeiter at trial prompted the trial judge to admit a police officer's hearsay account of her on-the-scene identification of the defendant as one of two customers who had just given her counterfeit money to purchase drinks.

The commentary to North Carolina's Rule 803(24) cites State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971), as an influential state case predating

Note: This memorandum is an updated version of a paper delivered in March 1987 at the Sixth Annual North Carolina Evidence Seminar, sponsored by the School of Law of The University of North Carolina at Chapel Hill.

enactment of the state rules of evidence. In *Vestal*, a murder case, the trial court allowed the prosecution to introduce hearsay testimony by the decedent's wife that on the evening of the murder, he told her he was leaving on a business trip with the defendant. The Supreme Court upheld the trial court's ruling, finding that the circumstances in which the decedent made the statement clothed it with sufficient trustworthiness to merit its admission into evidence, even though it did not qualify under a specific hearsay exception. As another example of a case involving residual hearsay that predated enactment of the rules, *see* State v. Alston, 307 N.C. 321, 298 S.E.2d 631 (1983). This was a murder case in which the court upheld the admission of the victim's report to the sheriff, two days before the murder, that he had had a serious argument with the defendant, that he had told the defendant to stop selling drugs in the parking lot of his store, and that he feared serious trouble with the defendant. The court concluded that this hearsay evidence was properly admitted because it satisfied the key criteria for admissible hearsay—trustworthiness and necessity—even though it did not fit within an existing, specific exception.

Legislative History

Although FED. R. EVID. 803(24) and 804(b)(5) continued the trend of common law before their enactment, they did not sail smoothly through Congress. The House deleted the residual exceptions from the bill submitted by the Supreme Court to Congress out of concern that the exceptions would inject excessive uncertainty and unpredictability into the law of evidence. *See* H.R. REP. No. 650, 93d Cong., 2d Sess. (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7079. The Senate reinserted residual exceptions, the Senate Judiciary Committee explaining that although the specific exceptions "reflect the most typical and well recognized exceptions to the hearsay rule, [they] may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact." S. REP. No. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7065. However, in response to the concerns of House members that "an overly broad residual exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules" (*id.* at 7066), the Senate proposed a version of the residual exceptions that was narrower than the Supreme Court's proposed exceptions and declared its intention "that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances." *Id.* The conference committee adopted the Senate's position, though it added a notice requirement, to be discussed in a later section.

The Advisory Committee's note explains the role of the residual exceptions:

> The preceding 23 exceptions of Rule 803 and the first five exceptions of Rule 804(b) *infra* [only four of which were enacted] are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would, however, 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. Exception (24) and its companion provision in Rule 804(b)(6) [enacted as Rule 804(b)(5)] are accordingly included. They 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, consistent with the broad purposes expressed in Rule 102.

The commentary to G.S. 8C-1, Rule 803(24), states, "This exception makes admissible a hearsay statement not specifically covered by any of the previous twenty-three exceptions if the statement has equivalent guarantees of trustworthiness and the court makes the determinations required by the rule." Then, paraphrasing the Advisory Committee's note on FED. R. EVID. 803(24), the North Carolina commentary states in regard to Rule 803(24), "This exception does not contemplate an unfettered exercise of discretion, but it does provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions."

Criteria for Admissibility

In State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985), and State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986), the North Carolina Supreme Court identified the six criteria established for admissibil-

ity of hearsay statements under the residual exceptions of N.C. CODE EVID. 803(24) and 804(b)(5), respectively: (1) the statement must be evidence of a material fact; (2) the testimony cannot qualify for another, specific hearsay exception (because then the residual exception would be unnecessary); (3) the statement must have circumstantial guarantees of trustworthiness equivalent to the specific exceptions; (4) the statement must be more probative on the point for which it is offered than any other evidence the proponent can obtain through reasonable efforts; (5) admission of the statement would best serve the interests of justice and the general purposes of the rules; and (6) the proponent must comply with notice requirements. In addition, because Rule 804(b)(5) is a Rule 804 exception, evidence must satisfy a seventh criterion to be admissible under Rule 804(b)(5): the declarant must be unavailable to testify at trial.

The Supreme Court ruled in *Smith* and *Triplett* that to admit a statement under the residual exceptions, a trial judge must make and record detailed findings of fact and conclusions of law for these criteria, and record the reasoning that supports conclusions of law, as follows: findings, conclusions, and reasoning for criterion *(3)*; findings and conclusions for criteria *(4)* and *(7)*; conclusions and reasoning for criterion *(5)*; and conclusions for criteria *(1)*, *(2)*, and *(6)*. In a recent case the Court of Appeals reversed a conviction because the record did not contain such findings and conclusions. State v. Benfield, 91 N.C. App. 228, 371 S.E.2d 306, *rev. denied*, 323 N.C. 478, 373 S.E.2d 868 (1988).

With the exception of the notice requirement, these criteria are identical to the criteria of admissibility under FED. R. EVID. 803(24) and 804(b)(5), and the North Carolina Supreme Court has expressly turned to federal cases for guidance in interpreting them. Accordingly these criteria are examined together for both sets of rules. The different notice requirements are then examined separately.

Criterion *(1)*: Materiality

Although one commentator has characterized this criterion as merely a restatement of the general rule of relevancy in Rules 401 and 402 [M. Graham, HANDBOOK OF FEDERAL EVIDENCE § 803.24, at 885 (1981)] [*see also* Huff v. White Motor Corp., 609 F.2d 286, 294 (7th Cir. 1979)], Judge Weinstein has expressed doubt that the criterion was intended as a redundant repetition of that rule. Instead, in an early decision under the federal rules, he suggested that the purpose of the materiality requirement was to prevent the use of the residual exceptions for "trivial or collateral matters." 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).

Criterion *(2)*: Evidence Not Admissible under a Specific Exception

This criterion is suggested by the plain language of the federal and state rules. *See* State v. McElrath, 322 N.C. 1, 366 S.E.2d 442 (1988); State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985). An interesting question concerning this criterion is the admissibility of "near miss" hearsay evidence, that is, evidence that barely fails to qualify under a specific exception. As a general rule, courts have admitted evidence that does not fit a specific exception that best describes it, as long as the other criteria for admissibility of residual hearsay are satisfied. *See generally* In re Japanese Electronic Products, 723 F.2d 238, 302 (3d Cir. 1983). For example, in State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988), the declarant stated to the police that he had purchased drugs for the defendant with money the defendant had given to him that was linked to a robbery. Even though the statement lacked the requisite corroboration for admission as a declaration against penal interest under G.S. 8C-1, Rule 804(b)(3), the court ruled that the declarant's admission to police officers that he had committed felonies "provides the sort of indicia of reliability underlying the declaration against penal interest exception." Although the court did not rest the admissibility of the statement solely on this similarity [acknowledging that to do so would "vitiate the safeguards built into Rule 804(b)(3)"], it stated that "when a statement nearly fits an enumerated exception it has a degree of circumstantial trustworthiness which is relevant to the ultimate determination the trial court must make."

In several cases federal courts have admitted under the residual exceptions evidence that for reasons not impairing trustworthiness, does not qualify under the business records exception in FED. R. EVID. 803(6). *See, e.g.*, United States v. McPartlin, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979) (diary entries on businessman's desk calendar); United States v. Simmons, 773 F.2d 1455 (4th Cir. 1985) (trace records of Bureau of Alcohol, Tobacco and Firearms); United States v. Hitsman, 604 F.2d 443 (5th Cir. 1979) (defendant's college transcript); United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976) (delivery receipts filed and used by tire manufacturer, but prepared by common carriers). *See also* United States v. Barnes, 586 F.2d 1052 (5th Cir. 1978) [statement by defendant in

narcotics case implicating her and codefendant held admissible as substantive evidence against defendant as prior inconsistent statement under FED. R. EVID. 801(d)(1)(A) and as substantive evidence against codefendant under FED. R. EVID. 803(24)]; United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) [in prosecution against government contract inspector for soliciting bribe from government supplier, supplier's hearsay report of bribe to partner and attorney held admissible under FED. R. EVID. 803(24), even if not strictly admissible under FED. R. EVID. 801(d)(1)(B) or 803(d)(2)(C)]. *But see* Cook v. Hoppin, 783 F.2d 684 (7th Cir. 1986) [statements in hospital records about possible cause of plaintiff's fall not admissible under FED. R. EVID. 803(4) or 803(6) also held not admissible under FED. R. EVID. 803(24) because unknown identity of declarant and unknown circumstances of statement rendered statements insufficiently trustworthy]. It is important to keep in mind a caveat about near-miss hearsay: if a specific hearsay exception expressly bars a designated subcategory of hearsay [*see, e.g.*, G.S. 8C-1, Rule 803(8)(B), and FED. R. EVID. 803(8)(B)], the residual exceptions cannot be used to make an end run around the express prohibition. *See* United States v. Oates, 560 F.2d 45 (2d Cir. 1977).

Criterion *(3)*: Circumstantial Guarantees of Trustworthiness

This criterion lies at the heart of the residual exceptions. In contrast to the specific hearsay exceptions, which (with only a few exceptions) represent legislative determinations that certain categories of hearsay generally are sufficiently reliable to warrant virtually automatic admission, the residual exceptions require case-by-case scrutiny of the trustworthiness of proffered hearsay. North Carolina and federal courts in most circuits have assessed the trustworthiness of hearsay under the residual exceptions through two methods: examination of the circumstances in which the declarant made the statement and consideration of whether other evidence corroborates the hearsay statement.

To give a concrete feel for the nature of analysis used by courts to assess trustworthiness, this memorandum first discusses the factors that courts have used to probe the circumstances in which a statement was made. Then it considers examples of corroborative evidence.

One factor that courts have used to examine the circumstances in which a statement was made is the quality of the declarant's personal knowledge of the event in question. For example, in State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986), the court observed that a homicide victim's identification of the defendant as his assailant was based on the victim's personal knowledge. In State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988), the court found that the declarant had demonstrated personal knowledge of underlying events by accurately describing the defendant, identifying the defendant's hotel room, and relating personal statements the defendant had made to him. In United States v. Barlow, 693 F.2d 954 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983), the declarant testified before the grand jury under a grant of immunity in a prosecution against her boyfriend for theft of goods from an interstate shipment. Her grand jury testimony contradicted the defendant's alibi that he was with her at the time of the theft. The marriage of the declarant and the defendant paved the way for her assertion of the spousal privilege at trial, so the prosecution introduced the transcript of her grand jury testimony at trial. Plainly the declarant had personal knowledge of her own whereabouts at the time of the crime. In contrast, in Donavant v. Hudspeth, 318 N.C. 1, 347 S.E.2d 797 (1986), the court found statements in the plaintiff's medical records to be insufficiently trustworthy because they apparently were based upon hearsay rather than upon the doctor's firsthand knowledge. *See also* United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980), and Cook v. Hoppin, 783 F.2d 684 (7th Cir. 1986), in which the unknown identities of declarants precluded the required assessment of the quality of their knowledge.

Another factor that courts have used to examine the circumstances in which a statement was made is the declarant's motive to speak truthfully or falsely. For example, in State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986), in which the defendant was charged with murdering his mother, the court upheld the admission of statements by the victim to her friends that the defendant had threatened and assaulted her. The court reasoned that a mother was unlikely to accuse her own son falsely of threats and assaults and found that her motive was fear of her son. In State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986), a homicide victim on several occasions before his death identified the defendant—a stranger—as his assailant to the police. The court found that the victim's only motive in identifying the defendant was to tell the truth. In State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988), the court found that the need to receive treatment for an injury and the status of a physician and a social

worker as authority figures motivated a five-year-old victim of sexual abuse to speak truthfully to them. In Robinson v. Shapiro, 646 F.2d 734 (2d Cir. 1981), a wrongful death action stemming from a repairman's fall from an apartment house roof, the decedent's co-worker testified about the building superintendent's instructions to the decedent, instructions that made the job more hazardous and that the decedent immediately reported to the rest of the repair crew. The Second Circuit observed that the decedent had no motive to fabricate instructions that made the task more hazardous. The North Carolina Supreme Court ruled in State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988), that a declarant's admission of his own crimes in his statement demonstrated his motive to tell the truth. Finally, in several cases courts have found that a declarant who makes a statement under oath or under immunity might either have a motive to tell the truth or at least not have a motive to lie. *See, e.g.,* Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979), *cert. denied,* 444 U.S. 1035 (1980) (attorney's affidavit); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), *cert. denied,* 431 U.S. 914 (1976) (grand jury testimony given under oath); United States v. Barlow, 693 F.2d 954 (6th Cir. 1982), *cert. denied,* 461 U.S. 945 (1983) (grand jury testimony given under immunity).

Concerns about a declarant's motive in making a statement have played a significant role in several decisions against the admissibility of residual hearsay. For example, courts have found insufficient guarantees of trustworthiness when a plea bargain in a criminal case gives the declarant a motive to curry favor with the police [State v. McLaughlin, 316 N.C. 175, 340 S.E.2d 102 (1986)]; when a declarant's statement is self-serving [United States v. Ferri, 778 F.2d 985 (3d Cir. 1985)]; Land v. American Mutual Insurance Company, 582 F. Supp. 1484 (E.D. Mich. 1984)]; and when a declarant's statement appears to be boastful puffery [United States v. Hinkson, 632 F.2d 382 (4th Cir. 1980)]. Moreover, even a statement made under a grant of immunity can be insufficiently trustworthy when the record shows that such immunity could not counteract a declarant's motive to speak falsely. *See, e.g.,* United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977) (despite grant of immunity, record showed that declarant was reluctant to testify in grand jury narcotics investigation; declarant's fear for own and family's safety might have given him incentive to make false identification of his accomplices).

A factor related to a declarant's motive is the self-incriminating character of a statement. That is, a hearsay statement that tends to incriminate the declarant (even though not admissible as a party admission or as a declaration against interest) might be trustworthy because the declarant made the statement despite a natural incentive to remain silent. *See, e.g.,* State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988) (declarant's admission of his own narcotics purchases for defendant); United States v. McPartlin, 595 F.2d 1321 (7th Cir.), *cert. denied,* 444 U.S. 833 (1979) (businessman's self-incriminating diary entries on his desk calendar); Herdman v. Smith, 707 F.2d 839 (5th Cir. 1983) (identification of assailant by eyewitness long after witness had falsely disclaimed knowledge of his identity to police).

Another factor related to a declarant's motive is the relationships among the declarant, the witness, and parties to the litigation. For example, in State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986), the court considered the relationship between the murdered mother and her son to be a crucial factor in finding the mother's statements about her son's threats and assaults to be sufficiently trustworthy. In contrast, in Land v. American Mutual Insurance Company, 582 F. Supp. 1484 (E.D. Mich. 1984), the declarant—the plaintiff in a personal injury suit arising out of an industrial accident involving a cutting machine—gave a statement about the accident to the claims adjuster for her employer's workers' compensation insurer. In the statement she placed all blame for the accident on an alleged defect in the machine. In finding her statement insufficiently trustworthy, the court observed that the only people present when the statement was made—the plaintiff/declarant and the claims adjuster—had a common financial interest in pinning all fault on a defect in the machine.

In any case in which the hearsay statement of a young child is proffered, a trial judge should examine the circumstances in which the statement was made to ensure that the person to whom the child made the statement (generally the in-court witness) did not unduly lead the child into making it. Although no North Carolina case has turned on this issue on appeal, the North Carolina Supreme Court has considered defense allegations of improper leading of a child declarant in State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988), and State v. Hannah, 316 N.C. 362, 341 S.E.2d 514 (1986).

An important factor in evaluating the trustworthiness of a statement is the declarant's mental competency at the time he or she made the statement. In State v. Howard, 78 N.C. App. 262,

337 S.E.2d 598 (1985), a prosecution for practicing medicine without a license, the court upheld admission of a written statement that the declarant gave to the police before he died concerning his treatment by the defendants. The Court of Appeals ruled that the trial judge had properly allowed the defense attorney to engage in extensive cross-examination of the declarant's physician regarding the declarant's mental state at the time the statement was made, including the nature and the possible mental effects of any medication the declarant was taking.

In State v. Hollingsworth, 78 N.C. App. 578, 337 S.E.2d 674 (1985), the Court of Appeals ruled that six pretrial statements in which a woman alleged that her son had assaulted her were inadmissible. Among the factors contributing to the court's decision was the victim's testimony at trial that she had been intoxicated and had taken Valium on the night of the assault and that the next morning she did not know how she had been injured. In addition, the victim testified that she had been sleepy and on medication when she had made one of her statements (a written statement given to a detective while the victim was in the hospital). As another example, there is Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979), a personal injury suit in which the Seventh Circuit remanded the case to the trial court to consider the mental competency of the hospitalized plaintiff/declarant at the time he made a crucial statement to two friends about the cause of his ultimately fatal truck accident.

An assessment of the declarant's competency at the time he or she made a statement can be a key factor in determining the trustworthiness of a child declarant's statement, as in a child abuse case. *See* Ellison v. Sachs, 769 F.2d 955 (4th Cir. 1985); State v. Ryan, 103 Wash. 2d 165, 691 P.2d 197 (1984) (en banc).

Whether the declarant ever recanted his or her statement is plainly another factor in evaluating its trustworthiness. The declarant's recanting of hearsay statements played a vital role in leading the North Carolina Supreme Court and the North Carolina Court of Appeals to rule hearsay statements inadmissible in two recent cases, State v. McLaughlin, 316 N.C. 175, 340 S.E.2d 102 (1986), and State v. Hollingsworth, 78 N.C. App. 578, 337 S.E.2d 674 (1985). In *McLaughlin* a suspect in a prosecution for burglary, rape, and larceny made a statement to the police implicating himself and the defendant. He later entered into a plea bargain in which he agreed to testify against the defendant. At trial, however, the declarant refused to testify for the prosecution and recanted his earlier statement, contending that the police had drafted the statement and that his attorney had coerced him into signing it. In *Hollingsworth* an assault victim recanted three of six pretrial statements in which she had identified her son as her assailant. The Court of Appeals relied heavily on her recanting of those statements in ruling that they were inadmissible. *See also* United States v. Hinkson, 632 F.2d 382 (4th Cir. 1980) (citing declarant's denial that he made alleged hearsay statement as factor contributing to its lack of trustworthiness).

A factor similar to recanting is whether a declarant made a hearsay statement that conflicts with the hearsay statement in question. For example, in United States v. McCall, 740 F.2d 1331 (4th Cir. 1981), the Fourth Circuit ruled against the admissibility of a robbery victim's hearsay statement tending to implicate the defendant as the robber partly because it conflicted with a contemporaneous statement made by the victim. *Compare* State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988) (child's consistent reporting of basic events of sexual abuse and absence of recanting supported trustworthiness of her statements).

A declarant's recanting of a hearsay statement or evidence that another statement conflicts with the hearsay statement at issue, by itself, may not always render the statement unreliable. For example, in two cases the Fourth Circuit Court of Appeals found that strong corroboration of a declarant's grand jury testimony made the testimony sufficiently reliable to warrant its admission, even after the declarant recanted the testimony at trial. United States v. Murphy, 696 F.2d 282 (4th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); United States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978). The unknown and unknowable factor in both cases is the extent to which the court rested its rulings in part on a concern that the declarants had been pressured to recant. *See* M. Graham, HANDBOOK OF FEDERAL EVIDENCE § 804.5, at 933 (1981). Also, the mere fact of a conflict between a contested hearsay statement and another statement by a declarant does not render the contested statement untrustworthy if it is more credible than the other statement. *See, e.g.*, Herdman v. Smith, 707 F.2d 839 (5th Cir. 1983) (declarant's statement identifying defendant as perpetrator of assault held credible despite declarant's earlier denial that she knew who committed the assault).

As is discussed in a later section, both the residual exceptions and the Confrontation Clauses of the state and federal constitutions often (though

not always) require the unavailability of a declarant as a condition of admissibility of the declarant's statement. As the North Carolina Supreme Court explained in State v. Nichols, 321 N.C. 616, 625 n.2, 365 S.E.2d 561, 566–67 n.2 (1988), the reason for a declarant's unavailability also is a circumstantial factor that can be relevant to the trustworthiness of a statement. Some reasons for a declarant's unavailability, such as death [*see* State v. Triplett, 316 N.C. 1, 340 S.E.2d 746 (1986)], plainly do not affect credibility. However, as the court explained in *Nichols,* other reasons, such as a declarant's refusal to testify despite a judge's order to do so [*see* Rule 804(a)(2)], might well affect credibility. In *Nichols* the court found that the prosecutor's inability to locate a declarant who had no permanent home and who could be found only on the street or in motels, indicated that his character had an unstable quality that reduced (though not fatally, in this case) the trustworthiness of his statement.

A significant issue regarding the reason for a declarant's unavailability can arise in cases involving young children as declarants, such as child abuse cases. As North Carolina courts have ruled, incompetence satisfies the requirement of unavailability under the residual exceptions and the Confrontation Clauses of the federal and state constitutions. State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988); State v. Gregory, 78 N.C. App. 565, 338 N.C. 110 (1985), *rev. denied and appeal dismissed,* 316 N.C. 382, 342 S.E.2d 901 (1986). However, it is important to realize that the reason for a child's incompetence might affect the trustworthiness of the child's statement. For example, if a child is incompetent because the ordeal of appearing in court is so intimidating that he or she cannot testify, then a prior statement in a less formal setting (such as a physician's office) might well be trustworthy. But if a child is incompetent because he or she cannot communicate or cannot understand the importance of telling the truth, then the incompetence casts doubt on the trustworthiness of an earlier, out-of-court statement. *See* Ellison v. Sachs, 769 F.2d 955 (4th Cir. 1985); Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979); State v. Ryan, 103 Wash. 2d 165, 691 P.2d 197 (1984) (en banc).

A final circumstantial factor in assessing the credibility of a statement is whether it was generated in the regular or systematic way in which business records are generated, even though it does not strictly qualify under the business records exception. *See, e.g.,* United States v. McPartlin, 595 F.2d 1321 (7th Cir.), *cert. denied,* 444 U.S. 833 (1979) (diary entries regularly made by businessman on his desk calendar); United States v. Simmons, 773 F.2d 1455 (4th Cir. 1985) (trace records of Bureau of Alcohol, Tobacco and Firearms); United States v. Hitsman, 604 F.2d 443 (5th Cir. 1979) (defendant's college transcript); United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976) (delivery receipts filed and used by tire manufacturer, but prepared by common carrier). The systematic, statistically sound fashion in which data have been collected and analyzed has also led courts to admit statistical surveys and scientific studies under the residual exceptions. *See, e.g.,* Debra P. by Irene P. v. Turlington, 730 F.2d 1405 (11th Cir. 1984); Ark-Mo Farms, Inc., v. United States, 530 F.2d 1384 (Ct. Cl. 1976); Keith v. Volpe, 618 F. Supp. 1132 (C.D. Cal. 1985). *But see* Pittsburgh Press Club v. United States, 579 F.2d 751 (3d Cir. 1978) (statistically flawed survey held inadmissible).

As mentioned earlier, the second main criterion used by some courts to assess the trustworthiness of residual hearsay is whether other evidence corroborates the hearsay statement. The North Carolina Supreme Court and the Second, Third, Fourth, and Sixth Circuit Courts of Appeals all regard corroboration as a relevant criterion. *See, e.g.,* State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988); State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986); Robinson v. Shapiro, 646 F.2d 734 (2d Cir. 1981); United States v. Bailey, 581 F.2d 341 (3d Cir. 1978); United States v. Murphy, 696 F.2d 282 (4th Cir. 1982), *cert. denied,* 461 U.S. 945 (1983); United States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied,* 439 U.S. 936 (1978); United States v. West, 574 F.2d 1131 (4th Cir. 1976); and United States v. Barlow, 693 F.2d 954 (6th Cir. 1982), *cert. denied,* 461 U.S. 945 (1983). The Seventh Circuit is the only federal circuit court totally to reject the relevance of corroboration to the credibility of residual hearsay. *See* Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979). *See generally* Robinson v. Shapiro, 646 F.2d 734, 743 n.7 (2d Cir. 1981) (noting controversy over relevance of corroboration). However, both the North Carolina Supreme Court and the Third Circuit Court of Appeals have ruled that corroboration alone does not provide a sufficient basis of reliability under the residual exceptions. That is, even though corroboration is relevant in determining the credibility of a statement under the residual exceptions, a trial court must also find that the statement was made in circumstances indicative of trustworthiness in order to admit it. *See* State v. McLaughlin, 316 N.C. 175, 340 S.E.2d 102 (1986); United States v. Bailey, 581 F.2d 341 (3d Cir. 1978). In one case, State v. Agubata, 92 N.C. App. 651, 375

S.E.2d 702 (1989), the Court of Appeals held that the absence of any corroboration for the very existence of an unavailable declarant rendered inadmissible letters purportedly written by the declarant and proffered under G.S. 8C-1, Rule 804(b)(5). In that case a defendant charged with trafficking in heroin claimed that in two letters he had received from the phantom declarant after his arrest, the declarant had admitted ownership of heroin found by police while searching the defendant's residence. Evidently concerned about the substantial possibility that the defendant had fabricated this exculpatory evidence, the court rested its exclusion of the letters on the lack of any proof of the declarant's existence.

One final note about trustworthiness: in some cases the availability of a declarant for cross-examination at trial has led courts to apply a relatively lenient standard of required reliability. *See* United States v. McPartlin, 595 F.2d 1321 (7th Cir.), *cert. denied,* 444 U.S. 833 (1979); United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y.), *aff'd,* 540 F.2d 574 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977). *See generally* State v. Smith, 315 N.C. 76, 94, 337 S.E.2d 833, 845 (1985).

Criterion *(4)*: Probative Value

Both the North Carolina and the federal rules of evidence require as a condition of admitting hearsay under the residual exceptions that the statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." FED. R. EVID. 803(24), 803(b)(5); G.S. 8C-1, Rules 803(24), 803(b)(5). This criterion establishes necessity as a condition for introducing hearsay under the residual exceptions. Necessity is best analyzed by separating cases into two types: those in which the declarant testifies at trial about the subject matter of his or her hearsay statement and those in which the declarant does not testify at trial about the subject matter of his or her hearsay statement.

If the declarant testifies, his or her hearsay statement might nevertheless be crucial evidence to support his or her testimony and to counter the adverse party's position. For example, in United States v. McPartlin, 595 F.2d 1321 (7th Cir.), *cert. denied,* 444 U.S. 833 (1979), and United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y.), *aff'd,* 540 F.2d 574 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977), hearsay statements played key roles in bolstering the declarant's trial testimony in the face of sharply conflicting testimony offered by adverse parties. *See also* United States v. Barnes, 586 F.2d 1052 (5th Cir. 1978) [in narcotics prosecution, prior inconsistent statement of defendant held admissible as crucial substantive evidence against defendant under FED. R. EVID. 801(d)(1)(A) and as crucial substantive evidence against codefendant under FED. R. EVID. 803(24)].

When the declarant does not testify, courts appear to use a sliding-scale test of necessity: If a proponent seeks to introduce highly credible hearsay to prove a relatively uncontested fact, then a court is apt to admit the hearsay evidence if its use is convenient, though not strictly necessary. *See, e.g.,* United States v. Simmons, 773 F.2d 1455 (4th Cir. 1985) [trace records of Bureau of Alcohol, Tobacco and Firearms held admissible under Rule 803(24) to prove that firearms had been shipped in interstate commerce, because not reasonable to require prosecution to subpoena records custodians from entire East Coast to prove this simple fact]. *Cf.* Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963 (7th Cir. 1983) (in personal injury suit, to rebut plaintiff's claim that company refused to hire him because of his injury, defendant sought to present testimony by private investigator that he did not see plaintiff's name on log of company's job applicants; testimony held inadmissible as not more probative than copies of company's records and trial or deposition testimony of custodian of records).

However, if a proponent seeks to introduce hearsay to prove a controversial factual point, courts generally have required the proponent to make substantial efforts to procure the declarant's trial testimony before they will admit the declarant's hearsay testimony as a substitute. Indeed, in such cases courts often have required proponents of hearsay to establish that the declarant is unavailable to testify and that no other witness is available to testify about that factual issue. It is important to realize that this interpretation of the requirement of necessity in effect requires use of federal or North Carolina Rule 804(b)(5) rather than Rule 803(24). As the fifth circuit court noted in United States v. Mathis, 559 F.2d 294, 299 (5th Cir. 1977),

> While it has been contended that unavailability is an immaterial factor in the application of Rule 803(24), this argument is wide of the mark. Although the introductory clause of Rule 803 appears to dispense with availability, this condition re-enters the analysis of whether or not to admit statements into evidence under the last subsection of Rule 803 because of the requirement that the pro-

ponent use reasonable efforts to procure the most probative evidence on the points sought to be proved. Rule 803(24), thus, has a built-in requirement of necessity.

In *Mathis* the declarant gave sworn statements to federal agents and testimony before the grand jury implicating the defendant—her ex-husband—on a charge of receiving stolen firearms. After considerable inducement and pressure from the defendant, she remarried him and asserted the spousal privilege at trial. However, on *voir dire* she testified that her previous statements were true and that she would testify if the trial judge ordered her to do so. Instead of determining whether the remarriage was a sham so as to preclude assertion of the spousal privilege and, if necessary, ordering her to testify, the trial judge simply allowed the federal agents to testify about the declarant's pretrial statements. The Fifth Circuit reversed, commenting that "[t]here was no necessity to use the statements when the witness was within the courthouse." 559 F.2d at 299 (5th Cir. 1977). A more precise explanation of the court's ruling is that the witness was within the courthouse *and* that the trial judge had failed to determine whether her assertion of the spousal privilege was valid so as to make her unavailable. Citing *Mathis* with approval, the North Carolina Supreme Court explained in State v. Smith, 315 N.C. 76, 95, 337 S.E.2d 833, 846 (1988), that even under Rule 803(24), "[u]sually, but not always, the live testimony of the declarant will be the more (if not the most) probative evidence on the point for which it is offered."

In Donavant v. Hudspeth, 318 N.C. 1, 347 S.E.2d 797 (1986), the court ruled that hearsay proffered under G.S. 8C-1, Rule 803(24), regarding a crucial, hotly contested factual question failed the test of necessity because other witnesses testified about the same question on the basis of either personal knowledge or at least more direct evidence. Of course, unavailability of eyewitness testimony on a critical issue is quite often easy to prove and, indeed, is the circumstance that triggers a proponent's request to introduce residual hearsay. *See, e.g.*, State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986); State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985); United States v. West, 574 F.2d 1131 (4th Cir. 1976).

A decision by the Fourth Circuit resting on the same rationale underlying *Donavant* but—I believe—subject to serious criticism is United States v. Welsh, 774 F.2d 670 (4th Cir. 1985), a prosecution for interstate transportation of stolen property. A truck driver involved in the alleged scheme gave a written statement to the FBI in which he implicated the defendants. His suicide before trial prompted the prosecution to request admission of the statement. However, the trial court and the Fourth Circuit ruled against admissibility. The court observed that another truck driver who had cooperated with the government was available to testify. The government contended that the available driver was not credible because he had lied to the FBI, committed perjury in his own trial, and testified for the government in two trials ending in acquittals. The court disagreed, concluding that credibility is not a facet of the probative quality of evidence, that evidence is probative as long as it tends to prove the issue in dispute. If one assumes *arguendo* that the prosecution made a sufficient showing of the second driver's unreliability, the holding in *Welsh* seems incorrect, as argued in dissent by Judge Hall. Followed to its extreme, the logic of the holding would favor patently perjured testimony by an available eyewitness over unimpeachably trustworthy hearsay by an unavailable declarant—surely an undesirable result.

Criterion *(5)*: Interests of Justice and Purposes of Rules

This criterion obviously is vague. One common situation in which courts have invoked the criterion is when the opponent of proffered hearsay might have procured the declarant's unavailability. *See, e.g.*, United States v. Barlow, 693 F.2d 954 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983) (declarant's grand jury testimony implicating defendant held admissible after declarant married defendant between grand jury appearance and trial and then asserted spousal privilege at trial). *See also* M. Graham, HANDBOOK OF FEDERAL EVIDENCE § 804.5, at 933 (1981).

Criterion *(6)*: Notice

The North Carolina and the federal rules of evidence contain similar, though slightly different, notice requirements. Both sets of rules require the proponent of residual hearsay to notify adverse parties of the "intention to offer the statement and the particulars of it, including the name and address of the declarant . . . ." The state and federal rules differ, however, in their requirements about the timing and the form of such notice. Under G.S. 8C-1, Rules 803(24) and 804(b)(5), notice must be given "sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement," and the

notice must be in writing. FED. R. EVID. 803(24) and 804(b)(5) require that notice be given "sufficiently in advance of the *trial or hearing* to provide the adverse party with a fair opportunity to prepare to meet it . . . ." (emphasis added). The required notice need not be given in writing. Both North Carolina and federal courts have applied the notice requirements flexibly, permitting proponents of residual hearsay to introduce evidence despite technical noncompliance if the proponent was not at fault in failing to give adequate notice (e.g., if the proponent could not reasonably have anticipated the need to use the evidence) or if the adverse party in fact had sufficient opportunity to prepare to meet the evidence (e.g., if the court offered a continuance, if the adverse party did not request a continuance, or if the adverse party knew about the statement even without receiving formal notice from the proponent). *See, e.g.*, State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988); State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986); State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989); State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985); Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980); United States v. Bailey, 581 F.2d 341 (3d Cir. 1977); United States v. Medico, 557 F.2d 309 (2d Cir.), *cert. denied*, 434 U.S. 986 (1977); *contra* United States v. Ruffin, 575 F.2d 346 (2d Cir. 1978).

Criterion *(7)*: Unavailability

Unavailability of the declarant, as defined by G.S. 8C-1, Rule 804(a), and FED. R. EVID. 804(a), is an express condition of admissibility under G.S. 8C-1, Rule 804(b)(5), and FED. R. EVID. 804(b)(5). As discussed earlier, despite the preamble to Rule 803, the requirement of necessity can sometimes make the unavailability of the declarant also a condition of admissibility under G.S. 8C-1, Rule 803(24), and FED. R. EVID. 803(24).

The Confrontation Clauses

Even if a statement fits a statutory hearsay exception, it must clear the constitutional hurdles of the Confrontation Clauses of the Sixth Amendment to the United States Constitution and Art. I, Sec. 23, of the North Carolina Constitution to be admissible in a criminal trial. In State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988), the court indicated that the federal and state clauses should be interpreted identically on this point.

No confrontation problem arises if the declarant testifies at trial. California v. Green, 399 U.S. 149 (1970). However, if the declarant does not testify at trial, then his or her hearsay statement must pass the two-part test established by the United States Supreme Court in Ohio v. Roberts, 448 U.S. 56 (1978), to satisfy the Confrontation Clauses: the proponent of the statement must show that it is trustworthy and that it is necessary. The court explained that the requirement of necessity normally is satisfied by showing that the declarant is unavailable. However, a showing of unavailability is not always required. *Id.* at 65 n.7. For example, in United States v. Inadi, 475 U.S. 387 (1986), the court found that the hearsay statement of a coconspirator that satisfied the federal hearsay exemption for coconspirators' statements also satisfied the Confrontation Clause—despite the prosecution's failure to establish the declarant's unavailability—because it was the most probative evidence on the matters for which it was offered [*Inadi* and *Roberts* together modify the apparently strict holding of State v. Kerley, 87 N.C. App. 240, 360 S.E.2d 464 (1987), *rev. denied and appeal dismissed*, 321 N.C. 476, 364 S.E.2d 661 (1988), in which the Court of Appeals cited unavailability, rather than the more flexible and easily satisfied test of necessity, as a criterion of admissibility of any hearsay statement under the Confrontation Clauses]. A hearsay statement admissible under the residual exceptions readily passes the *Roberts* test. As the North Carolina Supreme Court observed in *Deanes*, the criteria of trustworthiness and necessity for admissibility of a statement under both residual exceptions incorporate the *Roberts* test.

Trends

The language of the residual exceptions seems to preclude the judicial development of new categories of hearsay entitled to the virtually automatic admissibility that graces the specific exceptions. The residual exception rules appear instead to require case-by-case scrutiny of all evidence proffered under them. Nevertheless some categories of residual hearsay have received favorable treatment by the courts in a number of cases. One category is grand jury testimony of an unavailable declarant. *See, e.g.*, United States v. Murphy, 696 F.2d 282 (4th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); United States v. Barlow, 693 F.2d 954 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); United States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1976); United States v. West, 574 F.2d 1131 (4th Cir. 1976). *But see* United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977). In addition, courts have often looked favorably upon

near-miss residual hearsay—for example, records of regularly conducted activities [*see, e.g.*, United States v. McPartlin, 595 F.2d 1321 (7th Cir.), *cert. denied,* 444 U.S. 833 (1979); United States v. Simmons, 773 F.2d 1455 (4th Cir. 1985); United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976)]; prior inconsistent statements admitted as substantive evidence against a party other than the declarant [*see, e.g.*, United States v. Barnes, 586 F.2d 1052 (5th Cir. 1978)]; and prior consistent statements used as substantive evidence [*see, e.g.*, United States v. McPartlin, 595 F.2d 1321 (7th Cir.), *cert. denied,* 444 U.S. 833 (1979); United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y.), *aff'd,* 540 F.2d 574 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977)]. These patterns can make analysis of proposed residual hearsay easier in some cases. However, the criteria of trustworthiness and necessity continue to require attorneys and judges to engage in rigorous case-by-case analysis of hearsay proffered under the residual exceptions.

A total of 690 copies of this public document were printed by the Institute of Government, The University of North Carolina at Chapel Hill, at a cost of $249.85, or $0.36 per copy. These figures include only the direct costs of reproduction. They do not include preparation, handling, or distribution costs.