

IN THE COURT OF APPEALS OF MARYLAND

No. 23

September Term, 1996

STATE OF MARYLAND

v.

LAWRENCE JOSEPH WALKER

Bell, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Raker
Wilner,

JJ.

Dissenting Opinion by Chasanow, J.

Filed: April 10, 1997

I respectfully dissent. This case presents a textbook example of the kind of hearsay evidence that should be admitted under the Maryland residual exception for "unavailable" witnesses. Maryland Rule 5-804(b)(5). That rule provides:

"(5) *Other Exceptions* -- Under exceptional circumstances, the following are not excluded by the hearsay rule, even though the declarant is unavailable 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."

This hearsay exception and its counterpart, Md. Rule 5-803(b)(24), which is identically worded but leaves out the requirement that the hearsay declarant be "unavailable," will be collectively referred to as the residual exceptions. When residual exception is referred to in the singular, I will be referring to the residual exception at issue in the instant case, Md. Rule 5-804(b)(5).

The majority opinion acknowledges that the trial judge found the hearsay statement at issue to be admissible under the residual exception after he "considered the six conditions [that are

required for admissibility under the residual exception] and found that each was satisfied." ___ Md. ___, ___, ___ A.2d ___, ___ (1997)(Majority Op. at 34). That finding was clearly supported and should be affirmed. As the majority concedes, the trial judge does not have to explain on the record how he or she arrived at these findings or the reasoning process employed. Even if the trial judge gave the wrong reason for admitting the hearsay, this Court would affirm if the evidence was admissible. *Robeson v. State*, 285 Md. 498, 502, 403 A.2d 1221, 1223 (1979)(stating "where the record in a case adequately demonstrates that the decision of the trial court [admitting evidence] was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm. In other words, a trial court's decision may be correct although for a different reason than relied on by that court."), *cert. denied*, 444 U.S. 1021, 100 S.Ct. 680, 62 L.Ed.2d 654 (1980).

APPELLATE REVIEW

It is interesting to note that the Evidence Subcommittee of the Standing Committee on Rules of Practice and Procedure (Rules Committee) apparently rejected the residual exceptions not because they might have let in too much unreliable hearsay, but because they might have kept out too much reliable hearsay. In the final Evidence Subcommittee Draft dated Spring, 1992, and sent to the

Rules Committee, as well as to each judge of the Court of Appeals, the Reporter's Note states:

"In recommending against these [residual] exceptions the Subcommittee is in agreement with the Rodowsky Committee, which was concerned that the 'catchalls' might be too restrictive. Because of the high substantive standard set by the Rule, as well as the rather elaborate procedural requirements, the Rodowsky Committee opined that 'it could be argued that this Rule will actually limit the authority of judges to admit reliable hearsay.'"

Court of Appeals Standing Committee on Rules of Practice and Procedure, Proposed Title 5 of the Maryland Rules of Procedure: Evidence, Subcommittee Draft, Spring 1992.

When a trial judge is asked to make a determination of admissibility of hearsay under the residual exceptions, Md. Rule 5-104(a) is applicable. That rule governs the trial judge in making factual findings and resolving questions relating to the admissibility of evidence. It provides that, in making fact findings necessary to resolve issues on admissibility of evidence, the judge "may, in the interest of justice, decline to require strict application of the rules of evidence, except those relating to privilege and competency of witnesses." Md. Rule 5-104(a). The preliminary fact findings made by the trial judge, in resolving whether residual exception hearsay is admissible, should be affirmed unless clearly erroneous. On the other hand, any decision to admit residual exception hearsay involves some weighing and determinations that, in effect, create new hearsay exceptions by

-serving as precedent or persuasive authority for admitting hearsay not within the traditional exceptions. These policy aspects of the decision to admit residual exception hearsay deserve heightened appellate scrutiny. I agree with the majority at least to the extent that they seem to require *de novo* appellate review of such factors as whether there are exceptional circumstances and equivalent guarantees of trustworthiness. These factors need *de novo* review because of their precedential effect, as well as the need for uniformity and predictability in the admission of residual exception hearsay. Other factors, such as weighing the materiality and relative probative value of the proffered hearsay, should be accorded more deferential review because of the trial judge's superior position to view the witnesses and gauge the relative impact and materiality of the evidence.

Federal appellate reluctance to reverse a trial judge's decision to admit residual exception hearsay may be a reason for the opinion expressed by several members of the Rules Committee that too much unreliable hearsay is being admitted in some federal courts. Federal appellate courts accord trial judge's great deference in decisions to admit hearsay under the residual exception. See, e.g., *U.S. v. North*, 910 F.2d 843, 909 (D.C. Cir. 1990) ("We agree with the Eleventh Circuit that an appellate court should be particularly hesitant to overturn a trial court's admissibility ruling under the residual hearsay exception absent a

"definite and firm conviction that the court made a clear error of judgment in the conclusion it reached based upon a weighing of the relevant factors." *Balogh's of Coral Gables, Inc. v. Getz*, 798 F.2d 1356, 1358 (11th Cir. 1986)(*en banc*)(quoting *Page v. Barko Hydraulics*, 673 F.2d 134, 140 (5th Cir. 1982)."); *S.E.C. v. First City Financial Corp., Ltd.*, 890 F.2d 1215, 1225 (D.C. Cir. 1989)("Since the residual hearsay exception depends so heavily upon a judgment of reliability, typically we would be particularly deferential to the trial court's determinations under Rule 803(24)."); *Page v. Barko Hydraulics*, 673 F.2d 134, 140 (5th Cir. 1982)(holding that the trial judge's "considerable discretion" in applying Rule 803(24) will not be disturbed absent a "clear error of judgment"); *Doe v. U.S.*, 976 F.2d 1071, 1076-77 (7th Cir. 1992)(quoting *Littlefield v. McGuffey*, 954 F.2d 1337, 1342 (7th Cir. 1992, in turn quoting *Geitz v. Lindsey*, 893 F.2d 148, 150-51 (7th Cir. 1990)(citations omitted, emphasis in original))("The relevant benchmark is not how we would have ruled had we been standing in the trial judge's shoes, but rather, `whether any reasonable person could agree with the district court.'"), *cert. denied*, 510 U.S. 812, 114 S.Ct. 58, 126 L.Ed.2d 28 (1993). The federal appellate abuse of discretion standard of review and reluctance to reverse a trial judge's decision to admit residual exception hearsay could have the effect of greatly expanding the use of the residual exception hearsay. With Maryland's increased

appellate scrutiny, there should be little danger that the residual exceptions will be abused or will swallow up the general hearsay prohibition.

FACTORS FOR ADMISSIBILITY

The six or seven conditions that must be satisfied in order to admit hearsay under the residual exceptions are:

(1) There must be exceptional circumstances that warrant the application of the residual exceptions;

(2) there must be trustworthiness surrounding the making of the hearsay statement equivalent to the trustworthiness of other enumerated hearsay exceptions. This is the most significant requirement and one which, on appeal, should always be reviewed *de novo*;

(3) there must be necessity for the hearsay established by a showing that the statement is more probative on the matter for which it is offered than any other evidence that could reasonably be procured by the proponent;

(4) the hearsay statement must be offered to prove a fact material to the litigation;

(5) the general purposes of the rules of evidence and the interests of justice must be best served by the introduction of the hearsay;

(6) reasonable advance notice of the intent to offer residual

exception hearsay must be given; and

(7) the witness must be unavailable for Md. Rule 5-804(b)(5) to apply, although this is not necessary for Md. Rule 5-803(24) to apply.

My analysis differs from the majority's primarily in my elimination of the majority's requirement that "the statement must not be specifically covered by any of the other exceptions." ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 30). The reference in the residual exception rules from which this is taken is meant as a description, not a limitation. There can be hearsay statements that overlap and fit within an existing hearsay exception and, because of the exceptional circumstances and additional factors enhancing its reliability, could also fit within the residual exception; the two need not be mutually exclusive. Trial judges or lawyers should not have to choose, at their peril, whether to use an existing exception or the residual exception. We should not prohibit hearsay from being offered and/or admitted by a trial judge under both theories.

The intermediate appellate court held that the trial judge erred in admitting the hearsay statements at issue because he failed to make a clear finding that there were exceptional circumstances and failed to consider all factors bearing on the circumstantial guarantees of trustworthiness. *Walker v. State*, 107 Md. App. 502, 526, 668 A.2d 990, 1002 (1995). This Court holds

that there are no "exceptional circumstances" and, therefore, does not address the "equivalent guarantees" of trustworthiness. I believe there are both exceptional circumstances and equivalent guarantees of trustworthiness justifying the admission of the residual exception hearsay offered in the instant case.¹

FACTS

On June 10, 1994, Mr. Jose Iraheta, an Hispanic male who speaks no English, was riding his bicycle to work along Twinbrook Parkway in Montgomery County, Maryland. Mr. Iraheta was accosted by a black male wearing a green, hooded shirt with the hood pulled tightly over his head. The man pushed Mr. Iraheta down and robbed him at knife point of \$60.00. Mr. Iraheta reported the robbery to the police, but told the officers he did not see the face of his assailant because of the hood and because Mr. Iraheta kept his head down during the robbery.

The next day, June 11, 1994, Robin Hammond, who was later to become Robin Walker (hereinafter Ms. Walker), was walking along Twinbrook Parkway in the same area as the robbery with her friend,

¹Technically the issue in the instant case involves double hearsay. Mr. Walker's confession of the armed robbery was an admission by a party-opponent under Maryland Rule 5-803(a)(1). Ms. Walker's hearsay statements were offered under Md. Rule 5-804(b)(5). Mr. Walker's admission by a party-opponent was clearly admissible if Ms. Walker's statement was admissible under the residual exception. See Md. Rule 5-805 (a hearsay statement containing another hearsay statement is admissible if both fall within any hearsay exception).

Mr. Walker, and their daughter. A police car drove past and Mr. Walker "hung his head down ... to hide his face." When questioned about this odd behavior, Mr. Walker told his companion that he had robbed an Hispanic male of \$60 the night before in the same area. Mr. Walker also indicated that he had discarded the green shirt he was wearing at the time of the robbery. Later, in Ms. Walker's presence, Mr. Walker retrieved a green, hooded sweatshirt, which he identified as the shirt he wore during the robbery; he then threw the shirt in a dumpster.

On June 15, 1994, Ms. Walker, nee Hammond, contacted the police and related Mr. Walker's confession to two detectives. Her statement was reduced to writing by each detective, and she signed both writings. Ms. Walker also indicated to the police that Mr. Walker was the father of her children and that she and Mr. Walker had lived together "intermittently" since 1989, but that about March 9, 1994, because of Mr. Walker's escalating drug use, she moved out of the residence they shared and moved into a shelter.

Five days later, on June 20, 1994, Mr. Walker was arrested and jailed in default of bond. The application for the statement of charges indicated that on June 10, 1994, Jose Iraheta was robbed of \$60 by a black male wearing a green, hooded sweatshirt pulled tightly over his head. The probable cause for the application was that on June 15, 1994, a "confidential source" heard Mr. Walker admit that he had robbed an Hispanic male of \$60 and that during the robbery he was wearing a green, hooded sweatshirt. On August

3, 1994, Mr. Walker, through defense counsel, filed several motions including a request for discovery, which included a request for the identity of any confidential informant, a motion to suppress evidence, a motion to sever counts, and a motion for "marriage leave" from the jail. The motion for marriage leave was denied.

Immediately before Mr. Walker's robbery case was called for trial on January 12, 1995, a pre-trial hearing was held at which Ms. Walker produced a marriage license showing that she and Mr. Walker were married by the Clerk of the Court on September 1, 1994, apparently without "marriage leave." Ms. Walker also told the State's Attorney that she refused to testify against her new husband. At that hearing, the judge found that Ms. Walker's hearsay statements to the police in which she related Mr. Walker's confession were admissible under the residual exception, Md. Rule 5-804(b)(5). In his findings, the trial judge concluded that one of the reasons that Ms. Walker's statements were reliable was that they were made by Ms. Walker to police in order to get Mr. Walker help for his drug problem. This finding was based on a proffer by defense counsel that "[i]t is my understanding that when the statements were made Ms. Hammond also at the time indicated or Ms. Walker indicated at the time that she was doing this because she wanted Mr. Walker to get some help for his drug problem." The State's Attorney agreed with the proffer stating: "I believe that is accurate."

Walker was convicted by a jury of robbery with a dangerous and

deadly weapon, and because of his "major" prior record, he was sentenced to 15 years incarceration.

EXCEPTIONAL CIRCUMSTANCES

In ordinary circumstances, hearsay is only admitted if it falls within one of our codified hearsay exceptions in Md. Rule 5-803 and Md. Rule 5-804. These codified exceptions are categories or pigeonholes that cover the generally encountered forms of trustworthy and necessary hearsay. Ordinarily, if hearsay does not fall within our codified hearsay exceptions, it is not trustworthy and not admissible. The codified hearsay exceptions are generally adequate to admit all trustworthy and necessary forms of hearsay.

The residual hearsay exceptions in Md. Rules 5-803(b)(24) and 5-804(b)(5) require "exceptional circumstances." This was made explicit by this Court when we expressly added the phrase "under exceptional circumstances" to our residual exception rules. A significant number of federal cases hold that "exceptional circumstances" is also a requirement of the residual exceptions in the federal rules based on the legislative history of the federal rules. The Senate Judiciary Committee, in its report to Congress, stated:

"It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances."

Senate Comm. on Judiciary, Fed. Rules of Evid., S. Rep. No. 93-1277, 93d Cong., 2d Sess. 18 (1974); 1974 U.S.C.C.A.N. 7051, 7066.

Some of the cases recognizing that the residual exceptions can only be used in exceptional circumstances are: *United States v. Kim*, 595 F.2d 755, 765 (D.C. Cir. 1979) ("The legislative history of this exception makes it very clear that this was intended to be a narrow exception to the hearsay rule, applying only in exceptional cases."); *Unites States v. Heyward*, 729 F.2d 297, 299-300 (4th Cir. 1984) ("The legislative history of the rules puts it more strongly: 'It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances.' Fed.R.Evid. 803 Senate committee note (quoted in *United States v. Kim*, 595 F.2d 755, 765 [(D.C. Cir. 1979)]"), *cert. denied*, 469 U.S. 1105, 105 S.Ct. 776, 83 L.Ed.2d 772 (1985); *United States v. Williams*, 809 F.2d 1072, 1083 (5th Cir.) ("Rule 804(b)(5) is 'to be used only rarely, in truly exceptional circumstances.' *United States v. Thevis*, 665 F.2d 616, 629 (5th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982)"), *cert. denied*, 484 U.S. 896, 108 S.Ct. 228, 98 L.Ed.2d 187, *cert. denied*, 484 U.S. 913, 108 S.Ct. 259, 98 L.Ed.2d 216, and *cert. denied*, *Orellana v. United States*, 484 U.S. 987, 108 S.Ct. 506, 98 L.Ed.2d 504 (1987); *In re Corrugated Container Antitrust Litigation*, 756 F.2d 411, 415 (5th Cir. 1985) ("We sounded a note of caution in the use of this hearsay exception in *United States v. Thevis*, 665 F.2d 616, 629 (5th Cir. 1982), observing that the language of the rule and the legislative history left no doubt of Congress' intent 'that

the 804(b)(5) residual exception was to be used only rarely, in truly exceptional circumstances."); *U.S. v. Collins*, 66 F.3d 984, 986-87 (8th Cir. 1995)("This rule applies only in `rare and exceptional circumstances.' *Stokes v. City of Omaha*, 23 F.3d 1362, 1366 (8th Cir. 1994)."); *Stokes v. City of Omaha*, 23 F.3d 1362, 1366 (8th Cir. 1994)("After reviewing the contents of and circumstances surrounding Swanson's affidavit, we do not find that it falls within the rare and exceptional circumstances required by our cases applying Rule 804(b)(5)."); *U.S. v. Gaines*, 969 F.2d 692, 697 (8th Cir. 1992)("Rule 804(b)(5) is to be used rarely, and only in exceptional circumstances.")(internal quotations omitted; citations omitted); *United States v. Love*, 592 F.2d 1022, 1026 (8th Cir. 1979)("The intent of Congress was that Rule 804(b)(5) would be used very rarely, and only in exceptional circumstances."); *U.S. v. Fernandez*, 892 F.2d 976, 982 (11th Cir. 1989)(quoting *United States v. Thevis*, 665 F.2d 616, 629 (5th Cir.)(footnote omitted), cert. denied, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982))("`The Senate Judiciary Committee's report on the Federal Rules of Evidence stated that the 804(b)(5) residual exception was to be used only rarely, in truly exceptional circumstances.'"); *contra United States v. American Cyanamid Co.*, 427 F.Supp. 859, 865-66 (S.D.N.Y.1977)("Neither the Rule, nor the cases in this Circuit interpreting the Rule, however, impose any express limitation concerning exceptional cases.").

The exceptional circumstances requirement should not be read as a bar to all hearsay except hearsay statements made under bizarre, unique, and never previously contemplated situations. The majority does not really tell us what could constitute exceptional circumstances or even what factors should be used to determine exceptional circumstances. We are only told that there are no exceptional circumstances in the hearsay statements offered in the instant case. Surely the kind of exceptional circumstances envisioned by the majority are not things like the hearsay declarant had natural green hair and spoke fifteen languages. Exceptional circumstances should be the threshold for, and related to, our analysis of all of the other factors required under the residual exceptions.

Exceptional circumstances, however, cannot be determined theoretically or out of context. When we speak of exceptional circumstances, we mean exceptional circumstances that justify making the proffered hearsay an exception to the prohibition against hearsay, even if it does not fit into the traditional exceptions. This requires some familiarity with what justifies the creation of a hearsay exception.

As Judge Learned Hand noted: "[T]he requisites of an exception of the hearsay rule [are] necessity and circumstantial guaranty of trustworthiness." *G. & C. Merriam Co. v. Syndicate Pub. Co.*, 207 F. 515, 518 (2d Cir. 1913)(citing WIGMORE, EVIDENCE §§ 1421, 1422 and

1690). Occasionally there are forms of hearsay that do not fit within the codified hearsay exceptions or pigeonholes but that should be admitted in the interests of justice and because the hearsay has at least the same circumstantial guarantees of trustworthiness and the same necessity inherent in the codified exceptions. In these exceptional circumstances, we compare the proffered hearsay to the reasons for creating a hearsay exception, which we have identified as the requirements for the residual exceptions; if those requirements are met, the hearsay may be admitted. The broad categories or pigeonholes of the codified hearsay exceptions are not meant to be a closed system; the residual exceptions are our recognition that there are equally reliable, equally necessary forms of hearsay that are too unique and too *sui generis* to be codified. The admission of hearsay statements under the residual exceptions is generally fact-specific and depends on the unique context surrounding the making of the statements that makes the statements especially reliable, as well as the unique necessity for the statement in the particular litigation. We cannot expect to have a separate hearsay exception for each unique, exceptional, and fact-specific circumstance that has occurred or could conceivably occur; instead, we have the residual exceptions.

Exceptional circumstances should include new and presently unanticipated situations, but should not be limited to those

situations exclusively. Congress and this Court, by providing that the residual exceptions are appropriate for new and unanticipated situations did not intend that, in any recurring situation, residual exception hearsay could only be used once, and thereafter, it must be added to our codified evidence rules because if that situation occurs a second time, it is not new and presently unanticipated. There are a few emerging, general areas where the residual exceptions have been used in repeated instances based on the facts of the case and the particular indicia of trustworthiness surrounding the statement. For example, in several cases the grand jury testimony of particularly reliable independent witnesses who have been murdered after appearing before the grand jury, but before the trial, has been admitted under the residual exception. Federal Rule 804(b)(5). *See, e.g., U.S. v. Zannino*, 895 F.2d 1, 6 (1st Cir.)(citing cases from other circuits), *cert. denied*, 494 U.S. 1082, 110 S.Ct. 1814, 108 L.Ed.2d 944 (1990). This form of residual hearsay should not be rejected merely because it has been admitted in prior cases, and therefore, it is no longer new and presently unanticipated.

Turning to the exceptional circumstances in the instant case, the majority states, "[t]he only circumstance that has even been suggested as being exceptional in this case is the fact that Ms. Walker married respondent after she spoke to the detectives and then invoked her privilege not to testify against him. No one has

offered any other circumstance as being exceptional, or even relevant; nor can we discern one." ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 40)(emphasis added). If the majority could not discern other exceptional circumstances in the instant case, it certainly did not look very hard.

The Walker marriage is the only arguably exceptional circumstance discerned by the majority, but that event is probably not an exceptional circumstance, because it is merely the fact that makes Ms. Walker unavailable to the State and does nothing to enhance the trustworthiness of Ms. Walker's hearsay statements. If, however, "exceptional circumstances" are not meant to be interrelated to the reasons for creating any hearsay exception, perhaps the Walker marriage might be an exceptional circumstance. Although living together "intermittently" for approximately six years and having children together had not motivated Mr. and Ms. Walker to marry, approximately six weeks after Mr. Walker was arrested and jailed as the result of information provided to police by Ms. Walker, Mr. Walker sought "jail leave" to marry Ms. Walker. As a result of Mr. Walker's marriage to the police informant, whose information resulted in Mr. Walker's incarceration, the informant was able to avoid testifying against her new husband. This is an unusual and unique marriage, but, because the marriage does not make Ms. Walker's pre-marital statements exceptional or trustworthy, I do not think it is what the Senate or this Court meant as an exceptional circumstance that would qualify for the

residual exception.

If a Maryland appellate court is going to review a trial judge's decision to admit residual exception hearsay *de novo*, the appellate court has an obligation to, at least, give some deference to the trial judge's superior position to view the case. Before an appellate court reverses a trial judge because it discerns no exceptional circumstances or no equivalent guarantees of trustworthiness, the appellate court should diligently search for those factors that support the trial judge's ruling. The circumstances that, collectively, make Ms. Walker's hearsay statements exceptional, trustworthy, and deserving of admission even though they do not fall within any of the other codified hearsay exceptions are:

(1) As stipulated by counsel and found by the trial judge, Ms. Walker's motive in recounting Mr. Walker's confession was to get help for Mr. Walker; her motives were not to hurt Mr. Walker. Her motive should inspire her to tell the truth to the police.²

(2) It is reasonable to assume that Ms. Walker knew or was

²Mr. Walker has continued to acknowledge that Ms. Walker's motives in reporting Mr. Walker's confession to the police were to get him help. In Mr. Walker's certiorari petition he states: "The parties agreed that Ms. Walker gave the statements for the express purpose of getting [Mr.] Walker `some help for his drug problem.'" Despite the stipulation concerning Ms. Walker's motives that led to the trial judge's findings, the majority seems to dispute the stipulation by counsel, for which it finds "no evidence," and the majority refers to "the possibility that her personal problems with respondent may have motivated her to fabricate a story out of anger or for some other purpose." ___ Md. ___, ___, ___ A.2d ___, ___ (1997)(Majority Op. at 8).

told by the police that a false statement to the police about the identity of a person who committed a crime could be punishable by a jail penalty. See Maryland Code, (1957, 1996 Repl. Vol.), Article 27, § 150. Knowing or even suspecting that you could be prosecuted and jailed for a false statement adds unique trustworthiness.

(3) Ms. Walker knew that, if she lied about the identity of the robber, her lie would almost certainly be revealed because the victim would tell the police that Mr. Walker was not the robber. The fact that her lie should be immediately brought to light when the victim and Mr. Walker meet is a unique circumstance inspiring truthfulness.

(4) The self-verifying details about the robbery in Ms. Walker's statements uniquely established the trustworthiness of her information. She related extensive details of this street robbery, which was not witnessed by anyone but the robber and the victim and was certainly not reported in the media. Ms. Walker recounted that the victim was an Hispanic male; \$60 dollars was taken in the robbery; the robber wore a green, hooded shirt, which Ms. Walker saw and could describe; the robbery occurred on June 10, 1994; and the robbery occurred in a designated area on Twinbrook Parkway. This information conclusively indicates that Ms. Walker must have talked to the robber or the victim. Ms. Walker could not have gotten these details from the victim because he did not speak

English. She must have either been the robber or been extensively confided in by the robber. The robber was a male, therefore, the only remaining possibility is that the robber confessed in great detail to Ms. Walker. Her statements about Mr. Walker's confession, accompanied by the self-verifying details and the other circumstances surrounding the making of her hearsay statements to the police, certainly support a finding of exceptional circumstances, as well as trustworthiness.

(5) Although Ms. Walker is unavailable to the State, she was present at the trial and could be called by and examined by Mr. Walker. Md. Code (1974, 1995 Repl. Vol.), Courts & Judicial Proceedings Art., § 9-106 provides that, with exceptions not relevant to this case, "[t]he spouse of a person on trial for a crime may not be compelled to testify as an adverse witness...." (Emphasis added). If Ms. Walker's hearsay statements were admitted into evidence, Mr. Walker, her husband, could call her to refute the statements if they were untruthful or inaccurately recorded by the police. At the hearing in the instant case, the State's Attorney pointed out that Ms. Walker "is only unavailable because she has made herself unavailable to the State, not to the defense. She is and has always been available to the defense to proceed." This case presents the exceptional circumstance of trustworthy hearsay offered under the residual exception for unavailable witnesses where the hearsay declarant becomes unavailable to only one side, but the declarant is available to, and may be immediately

called to contradict or explain her hearsay statement by, the opposing side.

These five circumstances, collectively, unquestionably justify the trial judge's decision to admit this 5-804(b)(5) residual hearsay. The two factors the majority found missing, (1) exceptional circumstances and (2) equivalent circumstantial guarantees of trustworthiness, certainly seem to have been satisfied in the circumstances presented in the instant case; indeed, I have been unable to hypothecate a better case for the residual exception.

Because this case involves exceptional circumstances, it is difficult to find very much authority directly on point. There is, however, one closely analogous case, *State v. Bailey*, 365 S.E.2d 46 (W.Va. 1987). *Bailey* was a murder trial. The defendant was involved in an affair with the victim's wife at the time he came to the victim's house and shot the victim. Immediately after the shooting, the wife/widow gave a statement to a deputy sheriff containing her account of the shooting and of earlier threats made by the defendant to the victim. Less than one week before trial, the victim's widow and the defendant were married. At trial, the new wife of the defendant exercised the privilege against adverse spousal testimony. *Bailey*, 365 S.E.2d at 47-48. The prosecution was permitted to use the wife's hearsay statement to the deputy sheriff under the residual exception. That ruling was affirmed on

appeal. *Bailey*, 365 S.E.2d at 48-50. The West Virginia Supreme Court of Appeals held that all of the criteria for admissibility under the residual exception were satisfied. The Court found that, because the wife was involved in an affair with the defendant at the time of the shooting and married him shortly thereafter, her statement had some of the trustworthiness of a declaration against her interest; the fact that the statement was given to police shortly after the shooting and she verified that it was accurate gave it added trustworthiness, as did the corroborative evidence that the defendant did come to the house as related in the statement. *Bailey*, 365 S.E.2d at 49-50. The Court also stated: "The trustworthiness of the statement is demonstrated further by [defendant's] failure to challenge the statement on cross-examination." *Bailey*, 365 S.E.2d at 50 n.4. Thus, the right of the defendant to have his new wife testify about her statement, even if she couldn't be called by the prosecutor, was a factor favoring the admissibility of the statement. Admittedly, most cases under the residual exception are unique to their own facts, and neither *Bailey* nor any other case is directly on point, but *Bailey* is persuasive.

I trust the majority is not inadvertently showing an inclination to be more restrictive when the State offers residual exception hearsay evidence than when any other litigant offers such evidence, and is not inadvertently confusing the Confrontation

Clause with the rules of evidence. No Confrontation Clause argument is raised in the instant case, and because of Mr. Walker's right to examine and impeach Ms. Walker, it is doubtful that the Confrontation Clause is even implicated.³ The instant case is a criminal case where the hearsay was offered by the State against a criminal defendant, but the residual exceptions do not make any distinctions among classes of litigants. The residual exceptions and this Court's construction of them should be uniformly applied to the State, to criminal trial defendants, and to plaintiffs and defendants in civil cases. If the Court is reading the residual exceptions one way for criminal defendants and another way for all other litigants, the Court is perpetrating a great injustice on the State and is creating a baseless evidentiary distinction in order to favor criminal defendants over all other litigants. If the same unattainable standard for "exceptional circumstances" applied in the instant case is going to be applied in civil cases and whenever

³*Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), held that the Confrontation Clause does not preclude hearsay from being admitted under the residual exception against a defendant in a criminal trial. In *Wright*, the Supreme Court made it clear that because the residual exceptions are not "firmly rooted hearsay exceptions," particularized guarantees of trustworthiness must be demonstrated. The Supreme Court also indicated that, although particular guarantees may be shown from the totality of circumstances, the relevant circumstances are the intrinsic circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. The Court rejected consideration of extrinsic corroboration of the truth of facts contained in the statement. Perhaps this is because such extrinsic corroborative circumstances are not relevant to admissibility of other hearsay exceptions.

criminal defendants try to admit residual exception hearsay, then Maryland has no residual exceptions. I would affirm the evidentiary ruling of the trial judge.