The Equivalent Circumstantial Guarantees of Trustworthiness Standard for Federal Rule of Evidence 803(24)

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I. Introduction

The Federal Rules of Evidence define hearsay 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. Hearsay is not admissible in court except as provided by the common law in state courts and by the Federal Rules in the federal courts. The rule against relying on hearsay was an outgrowth of the development of the jury system. Courts recognized the unreliability or impropriety of using hearsay by persons not called. For a time, this rule against hearsay was qualified by the notion that hearsay,

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1. **FED. R. EVID. 801(c).**
2. **FED. R. EVID. 801(a).** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the declarant as an assertion.
3. **FED. R. EVID. 801(b).** A declarant is a person who makes a statement.
4. **FED. R. EVID. 802.**
5. In its earliest form, the jury functioned as a committee or special commission of qualified persons in the neighborhood to report on facts or issues in dispute. C. McCormick, Handbook of the Law of Evidence §§ 244-246 (3rd ed. 1984) [hereinafter cited as McCormick]. To the extent necessary, its members conducted informal investigations among those who had special knowledge of the facts. Witnesses who could attest to writings were summoned with the jurors and apparently participated in their deliberations, but the practice of calling witnesses to appear in court and to testify publicly about the facts developed later. Although systems similar to juries existed as early as the 1100's, the practice of hearing witnesses in court remained infrequent until the later 1400's. *Id.* at 724-25. The gradual emergence of in-court testimony of witnesses signalled a need for exclusionary rules of evidence. Early witnesses could speak only of what they saw and heard, a requirement that would naturally apply to the new class of testifying witnesses. However, a new problem arose when the witness heard firsthand X's out-of-court statement that he saw and heard a blow with a sword, or witnessed a trespass on land, as evidence of the blow or the trespass. The earlier first-hand knowledge requirement may have contributed to the judicial skepticism on the value of hearsay. *Id.* By the second decade following the Restoration, the notion received a fairly constant enforcement, both in civil and criminal cases. While no precise date or ruling is decisive, it appears that between 1675 and 1690 the fixing of the doctrine [against hearsay] occurred. 5 Wigmore on Evidence § 1364 (Chadbourn rev. 1974).
6. **McCormick, supra note 5, §§ 244-246.**
while not independently admissible, could come in as confirmatory of other evidence. This qualification survived to the end of the 1700's in the limited form of admitting a witness's prior consistent out-of-court statements to corroborate his testimony.

As the jury system developed and the rules of evidence evolved, it became clear that not all evidence classified as hearsay should be excluded. Professor Wigmore maintains that the requisites of an exception to the hearsay rule are necessity and a circumstantial guarantee of trustworthiness. The necessity requirement acknowledges that, unless the hearsay statement is admitted, the facts it establishes may be lost, either because the person whose assertion is offered may be dead or unavailable, or because the assertion is of such a nature that one could not expect to obtain evidence of the same value from the same person or from other sources.

Wigmore recognizes three circumstances under which hearsay is trustworthy enough to serve as a practical substitute for the ordinary test of cross-examination: first, when a sincere and accurate statement would naturally be uttered and no plan of falsification would be formed; second, when the danger of easy detection or fear of punishment would probably counteract the desire to falsify; and third, when the statement was made under such conditions of publicity that any errors would probably have been detected and corrected.

Most of the common law exceptions follow Wigmore's guidelines. The Federal Rules of Evidence adopted many of the common

8. Id.
10. Id. at § 1421. According to Wigmore, "necessity" does not uniformly demand a showing of total inaccessibility of firsthand evidence as a condition precedent to the acceptance of a particular piece of hearsay. Necessity exists when great practical inconvenience would otherwise be experienced in making the desired proof. Dallas County v. Commercial Union Assurance Company, 286 F.2d 388, 396 (5th Cir. 1961) quoting 5 Wigmore on Evidence §§ 1421, 1702 (3rd ed. 1959).
11. 5 Wigmore on Evidence § 1422 (3rd ed. 1959).
12. Promulgated by the Supreme Court on November 30, 1972, the Federal Rules of Evidence formed a major project of the 1959 United States Judicial Conference's rules-study program. Proposed Rules of Evidence: Hearings before the Special Subcommittee of Reform of Federal Criminal Laws of the Committee on the Judiciary of the House of Representatives, 93rd Cong., 1st Sess. 11 (1973). The Supreme Court's rule-making authority dates back to 1792, when Congress empowered the Court to prescribe the procedure in common law, equity, and admiralty cases. 1 Stat. 276 (1792). The Act of August 23, 1842, in 5 Stat. 518 (1842), reaffirmed this power. After the conformity Act of June 1, 1872 withdrew the Court's statutory authority, the federal courts continued to either conform to state common law procedure, or develop their own principles. 17 Stat. 197 (1872). In 1923, following a Voluntary Committee Report on establishing a Permanent Organization for the Improvement of the Law, headed by the late Elihu Root, the American Law Institute (ALI) was organized. W. Draper Lewis, History of the Proposed American Law Institute's Model Code of Evidence, (1942). The ALI members argued that a Restatement of the Laws of Evidence was impractical because: 1) reconciling conflicting case law would prove difficult; 2) since the existing law was bad its restatement would not enhance the cause of justice; and 3) the existing rules of
law hearsay exceptions, including present sense impression;\textsuperscript{13} excited utterance;\textsuperscript{14} then-existing mental, emotional, or physical condition;\textsuperscript{15} and statements for purposes of medical diagnoses or treatment.\textsuperscript{16} In Rule 803(24), the Federal Rules created a new exception, the so-called "catchall" hearsay exception, which "allows in under certain circumstances hearsay not covered by other exceptions."\textsuperscript{17}

Rule 803(24) allows in evidence which might otherwise be excluded because of the unusual situations in which the out-of-court statement was created.\textsuperscript{18} Thus, determining whether a statement meets the equivalent circumstantial guarantees of trustworthiness is not always a simple task. Courts have occasionally strayed from and confused the traditional approach to evaluating whether hearsay is trustworthy. This article will trace the development and application of Federal Rule of Evidence 803(24) and will examine the decisions

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13. \textit{Fed. R. Evid. 803(1)}.
14. \textit{Fed. R. Evid. 803(2)}.
15. \textit{Fed. R. Evid. 803(3)}.
16. \textit{Fed. R. Evid. 803(4)}.
17. \textit{Fed. R. Evid. 803(24)} provides that:
   A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, [is admissible] if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative of 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. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 803(24) was not originally included in the proposed Rules of Evidence, but various members of both the judiciary and Congress saw a need to allow in hearsay evidence that could not be classified under any specific exception. After a split between the House and the Senate, Congress enacted a compromise hearsay exception to allow in statements not specifically covered by any of the other twenty-three exceptions. As part of the compromise, five requirements must be met in order to admit the statement. See infra note 54 and accompanying text. One requirement is that the statement have equivalent circumstantial guarantees of trustworthiness.

Other hearsay exceptions include: 803(5) Recorded Recollection; 803(6) Records of regularly conducted activity; 803(7) Absence of entry kept in accordance with provisions of paragraph (6); 803(8) Public records and reports; 803(9) Records of vital statistics; 803(10) Absence of public record or entry; 803(11) Records of religious organizations; 803(12) Marriage, baptismal and similar certificates; 803(13) Family records; 803(14) Records of documents affecting an interest in property; 803(16) Statements in ancient documents; 803(17) Market reports, commercial publications; 803(18) Learned treatises; 803(19) Reputation concerning personal or family history; 803(20) Reputation concerning boundaries or general history; 803(21) Reputation as to character; 803(22) Judgment of previous conviction; and 803(23) Judgment as to personal, family or general history.

18. The parallel hearsay exception to Rule 803(24) is Rule 804(B)(5). Unlike 803(24), 804(b)(5) can only be used when the out-of-court declarant is unavailable.

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of these courts in light of 803(24)'s legislative purpose.

II. Background

The impetus for the residual hearsay exceptions derived from a Fifth Circuit Court of Appeals decision. In Dallas County v. Commercial Union Assurance Co., a county in Alabama sought recovery for the loss of a collapsed courthouse clock tower. The county claimed that the clock tower collapsed five days after it was struck by lightning, as evidenced by witnesses and charred timbers. The insurer, denying liability, argued that the tower collapsed because of structural defects, and that the charred timbers resulted from a fire which occurred during the tower's construction. The insurance company offered as evidence a fifty-eight-year-old newspaper article about the fire. Although the article failed to come within any of the established exceptions to the hearsay rule, the trial judge admitted it into evidence. The jury found for the insurer.

The introduction of the article and the decision of the court below survived appeal. The court dismissed the plaintiff's argument that "you cannot cross-examine a newspaper" and instead relied on Wigmore's guidelines for determining hearsay exceptions by the yardsticks of necessity and trustworthiness. The circumstances in Dallas County met the necessity condition because the fire occurred more than fifty years prior to the tower's collapse. Any person who witnessed that fire with sufficient understanding to observe it and describe it accurately would have been a young child at the time.

20. 286 F.2d 388 (5th Cir. 1961).
21. Id. at 390.
22. Id. at 390-91.
23. Id.
24. Id.
25. Id. at 398.
26. Id. at 391. This familiar argument misapprehends the origin and nature of the hearsay rule. The rule is not an ancient principle of English law recognized at Runnymede, and gone is its odor of sanctity. Id. n.1. The Dallas County court further stated that:

Wigmore is often quoted as stating 'cross-examination is beyond any doubt the greatest legal engine ever invented for the discovery of the truth.' 5 Wigmore § 1367 (3rd ed. 1959). In over 1200 pages devoted to the hearsay rule, however, he makes it very clear that '[t]he rule aims to insist on testing all statements by cross examination, if they can be... No one could defend a rule which pronounced that all statements thus untested are worthless; for all historical truth is based on uncross-examined assertions; and every day's experience of life gives denial to such an exaggeration — and with profound verity — is that all testimonial assertions ought to be tested by cross examination, as the best attainable measure; and it should not be burdened with the pedantic implication that they must be rejected as worthless if the test is unavailable.'

1 Wigmore § 8(c) cited at 286 F.2d at 391, n1.
27. See supra notes 9-10 and accompanying text.
28. Dallas County, 286 F.2d at 396.
Presumably, an eyewitness to an event fifty years in the past would be either dead or incapable of testifying due to the dimming of faculties by the passage of time.\(^\text{29}\)

The trustworthiness aspect further supports admitting the newspaper article, primarily on the basis of common sense.\(^\text{30}\) As the Dallas County court reasoned, it is inconceivable that a small town newspaper reporter would claim there had been a fire in the dome of the new courthouse if no fire had occurred. The reporter is without motive to falsify, and a false report would have subjected both the newspaper and the reporter to embarrassment within the community. Lack of memory, faulty narration, intent to influence the court proceedings, and plain lack of truthfulness, the usual dangers inherent in hearsay evidence, did not figure in this case.\(^\text{31}\) Therefore, the court held that the evidence was admissible because it was necessary and trustworthy, relevant and material. Additionally, its admission was within the trial judge's exercise of discretion in holding the hearing within reasonable bounds.\(^\text{32}\)

Against the background of this and similar cases,\(^\text{33}\) the Preliminary Draft of the Proposed Rules of Evidence adopted a general provision allowing the admission of hearsay if there was an assurance of accuracy.\(^\text{34}\) This was followed by a list of twenty-three examples,\(^\text{35}\)
which are now the first twenty-three exceptions to Rule 803.38

Critics of this first draft feared that the “illustration” approach would unduly minimize the predictability of rulings at trial, increase the hazards of trial preparation, and give too great a measure of discretion to the trial judge.37 Nevertheless, many conceded that “some flexibility in judicial assessment must be allowed in order to permit necessary growth of evidence law.”38

Two years later, the Advisory Committee revised the proposed rules.39 The residual exceptions limited judicial discretion more than the predecessor draft by allowing statements not specifically covered by an articulated exception to the hearsay rule to be admitted if they had “comparable circumstantial guarantees of trustworthiness.”40 While recognizing the dangers of unbridled judicial discretion and the need for definite rules, the committee appreciated that trial judges must have broad discretion. The new Rule 803(24) reflected the understanding that 1) detailed rules cannot account for all contingencies; 2) the hearsay rule had never been and never should be a closed system; and 3) in certain cases, hearsay evidence not falling within one of the exceptions may have greater probative value than evidence which fits within an enumerated exception.41

When the United States Supreme Court submitted the revised proposed Rules of Evidence to Congress on February 5, 1973,42 the House and the Senate views on the catchall hearsay exceptions diverged. The House Subcommittee on Criminal Justice, after balancing the need to provide for growth, development, and flexibility of the hearsay rule against the fear of injecting too much uncertainty into trial preparation,43 voted to delete both residual exceptions.44 The Committee found that proposed Rule 10245 countenanced a suf-
icient grant of judicial discretion to innovate should the need arise.\textsuperscript{46} Additionally, the House Committee feared that the residual exceptions would inject an undesirable amount of uncertainty into the law of evidence, thus impairing the practitioner's ability to predict trial court rulings.\textsuperscript{47}

The Senate Judiciary Committee did not believe that Rule 102 would provide sufficient flexibility for the courts to admit trustworthy hearsay\textsuperscript{48} and feared that without the residual exception, trial judges would be confronted with the necessity of rejecting reliable and necessary evidence.\textsuperscript{49} Consequently, the Senate Committee decided to reinstate a residual exception for rules 803 and 804.\textsuperscript{50} The Senate Committee narrowed the scope of the residual exceptions\textsuperscript{51} by requiring that Rule 803(24) have a trustworthiness standard equivalent\textsuperscript{52} to that of the previously enumerated exceptions, that the statement be offered to prove a material fact, that the statement be more probative on the point for which it is offered than other reasonably available evidence, and that its admission be consistent with the other Rules and the interests of justice.\textsuperscript{53}

The Rules were referred to a Senate House Conference Committee, which added a proviso requiring that the use of a statement under the residual exception had to be preceded by pre-trial advance notice of the offeror's intent to introduce the evidence.\textsuperscript{54} Congress adopted the Conference Committee's version of the residual hearsay exceptions and the rule became law.\textsuperscript{55}

\textsuperscript{46} H.R. REP. NO. 650, 93rd Cong., 1 Sess. 6 (1973).
\textsuperscript{47} Id. The House Committee speculated that lawyers would have little pre-trial certainty about what evidence might be offered and ultimately admitted under a requirement of guarantees of trustworthiness comparable to the enumerated exceptions.
\textsuperscript{49} "Strangulating Hearsay, supra note 41 at 591. The Senate Committee believed that "there are certain exceptional circumstances where evidence is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of probativeness and necessity could properly be admissible." Id. quoting from S. REP. NO. 1277, 93rd Cong., 2nd Sess. 6 (1974).
\textsuperscript{50} S. REP. NO. 1277, 93rd Cong., 2nd Sess. (1974).
\textsuperscript{51} Id.
\textsuperscript{52} Id. The Senate Committee stated that "[a]n overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules." Id.
\textsuperscript{53} The Senate Judiciary Committee cautioned that:

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 exceptions. 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.

\textsuperscript{54} S. REP. NO. 1277, 93rd Cong., 2d Sess. 20 (1974).
III. The Equivalent Circumstantial Guarantees of Trustworthiness Criteria For Rule 803(24).

A. The Traditional Standard in Determining the Trustworthiness of Hearsay

Federal Rule of Evidence 803(24) is one of the few rules with an explicit trustworthiness requirement. The text of its parallel rule, 804(B)(5), as well as Rules 803(6), 803(7) and 803(8) also mention trustworthiness. Common law or legislative history easily defines the trustworthiness standard in 803(6), 803(7), and 803(8). However, the residual exceptions, particularly 803(24), are recent statutory inventions, based in part on a few common law cases. Their existence derives from a recognition that different or unusual factual situations require a rule flexible enough to allow in otherwise inadmissible evidence. This raises the issue of whether the trustworthiness standard should be flexible. A statement admitted under 803(24) should have “equivalent circumstantial guarantees of trustworthiness.” While undefined by the Rule, the term “equivalent” seems indicative of the Senate’s desire to meet the critics’ demands for tighter standards. However, “equivalent” might also be read as imposing a qualitative rather than a mechanical standard. If a state-

56. FED. R. EVID. 803(6) states: “The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(6) Records of regularly conducted activity. A memorandum, reports, records, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, reports, record, or data compilation, all as shown by the testimony of the custodian or other qualified witnesses unless the source of information of the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in these paragraphs includes businesses, institutions, associations, professions, occupations, and callings of every kind, whether or not conducted for profit.

57. FED. R. EVID. 803(7) provides:

Absence of entry in records in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions, of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, records, or data compilation was regularly made or preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

58. FED. R. EVID. 803(8) provides:

Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.
ment appears under the circumstances to be trustworthy, it should make no difference that the factors leading to that conclusion differ markedly from those underlying any or all of the specific exceptions.

The more traditional approach in judging the trustworthiness standard for the admission of hearsay is to examine the credibility of the extra-judicial declarant and not that of the witness. The trier of fact must be able to determine the extra-judicial declarant's credibility at the time he made the statement attributed to him. To accomplish this, the fact-finder must view the statement as part of the other evidence in the case, assessing such factors as the character of the statement, the nature of the statement, whether written or oral, the relationship of the parties, the probable motivation of the declarant in making the statement, and the circumstances under which it was made. For example, in the pre-Federal Rules case United States v. Barbati, the court examined the circumstantial trustworthiness of a witness at the time she identified two men who gave her counterfeit currency. At trial she was unable to identify the men. The court, however, allowed in the identification of the men which she had provided to the police at the time of the incident. Since there was no reason for her to lie, nor a likelihood that she was mistaken when she identified the men, as there was no time for a lapse of memory, the identification was held admissible.

61. Id. at 370.
62. 284 F. Supp. 409 (E.D.N.Y. 1968). See also the discussion supra note 33.
63. Id. at 412. The court noted that:

The critical testimony of the barmaid was as follows: A . . . they [the police] came and they asked me where I got the money, I showed them. Q. Did you point out the two men? A. Yes, I did. Q. What if anything happened after that? A. Well, they searched the men. Q. Did they search the two men that you pointed out? A. Yes. Q. Do you see any of them here now? A. I can't remember them. Q. You wouldn't remember what the men looked like now? A. No, it was so long ago. Q. What if anything did you do with the $10 notes you got from these men, after the police came? A. I was taken in the back with the money and the police and I signed those notes at that time. Q. Those were the two notes that were given to you in the bar by the two men? A. Yes. Q. What if anything did the police do with the two men that you pointed out in your presence? A. They put their hands on the walls . . . and they searched them for weapons, I guess and after that I don't know what happened to the two, I suppose they took them away.

The policeman had no doubt that the defendant was the person identified in the bar by the barmaid. The barmaid had no doubt that the man she pointed out who was arrested was the person who gave her one of the notes. It is not disputed that the person so identified was physically in police custody until after he was fingerprinted. No one suggests that the person fingerprinted is not the defendant who was tried in this case. The evidence was highly probative and reliable. No more satisfactory proof was available. The apparatus for testing the credibility of these two key witnesses was available — the oath, cross-examination and presence at the trial where the jury could observe demeanor.

Id. at 410.
In *Huff v. White Motor Corporation*, one of the principal issues on appeal was the exclusion from evidence of the decedent’s hospital-bed statements concerning the cause and nature of the truck fire which caused his injuries. Reversing the lower court, the court of appeals held that privity-based admissions should be tested for admissibility under the residual exception provided for in Rules 803(24) and 804(B)(5) rather than under the admissions provision of Rule 801(d)(2). The court found that the decedent’s statements met the 803(24) “equivalent circumstantial guarantees of trustworthiness” standard. Therefore, the guarantees governing application of the exception are those that existed when the statement was made.

The court noted that Huff’s statement was an unambiguous and explicit report of the events he had experienced two or three days earlier; it contained neither opinion nor speculation. He was not being interrogated, so there was no reason to give any explanation of how the accident happened unless he wanted to do so. There was

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64. 609 F.2d 286 (7th Cir. 1979). The Administratrix of an estate brought a wrongful death action against a truck manufacturer on the theory that the fuel system’s defective design caused the fire which took the driver’s life. Specifically, Huff, the deceased, was driving a truck-tractor when it jackknifed, sideswiped a guard rail, and collided with an overpass support. Aside from the structural damage to the tractor, the fuel tank ruptured and caught fire, engulfing the cab area. Huff’s severe burns caused his death nine days later. The trial court excluded defendant’s offered testimony of Melvin Myles. Out of the presence of the jury, Myles testified that, when he and a friend visited Huff in his hospital room two or three days after the accident, Huff gave the following description of how the accident occurred:

[H]e told us first more or less what happened and this U.S. 41 there has a bad curve there and he told us as he was approaching the curve or starting into it his pant leg was on fire and he was trying to put his pant leg out and lost control and hit the bridge abutment and then the truck was on fire.

Id. at 290.

65. The district court excluded this testimony as hearsay, rejecting defendant’s argument that Huff’s statement was an admission under Rule 801(d)(2), or admissible under the residual exception, Rule 803(24), and Rule 804(b)(5). Id.

66. The court declared that:

Although neither the rules themselves nor the Advisory Committee Notes refer to privity based [sic] admissions, and Congress added nothing on the subject in its consideration of the rules, the language of Rule 801(d)(2) and the general scheme of the hearsay article support our conclusion. Privity-based admissions are within the definition of hearsay, Rule 801(c), an extra-judicial statement offered “to prove the truth of the matter asserted,” and are not among the specifically defined kinds of admissions that despite Rule 801(c) are declared to be hearsay 801(d)(2).

Id.

67. Huff, 609 F.2d at 292. In contrast, the probative value of an admission of a party-opponent, classified as non-hearsay by Rule 801(d)(2), is based on its inconsistency with the position asserted in court. That probative value does not depend on whether the party knew when making it that it would be against his interest in a later lawsuit. See Strahorn, *A Reconsideration of the Hearsay Rule and Admission*, 85 U. Pa. L. Rev. 484, 564, 570, 573 (1937), quoted in Huff, 609 F.2d at 292.

68. Huff, 609 F.2d at 292.

69. Id.

70. Huff appears to have wanted to tell Myles and King how the accident happened, as follows
no reason for him to invent the story of the preexisting fire in the cab, since the story was contrary to his pecuniary interest, whether or not he was aware of a possible claim against the manufacturer of the vehicle.\textsuperscript{71} The plaintiff argued that it was unlikely that Huff made the statement because Mrs. Huff testified that he was not physically able to carry on a conversation.\textsuperscript{72} Thus, Mrs. Huff was questioning the reliability of the witness. The court stated that reliability of a witness' testimony that the hearsay statement was made is not a factor in determining admissibility.\textsuperscript{73} The circumstantial guarantees of trustworthiness necessary under the residual exception are to be equivalent to the guarantees that justify the specific exceptions, and those guarantees relate solely to the trustworthiness of the hearsay statement itself.\textsuperscript{74}

In contrast to \textit{Huff v. White}, the district court in \textit{Land v. American Mutual Insurance Company}\textsuperscript{75} did not allow into evidence a written unsworn statement which the decedent made to her claims adjuster shortly after an accident in which she lost four fingers. The court found that her statement did not provide the degree of trustworthiness required under Rule 803(24). To reach this determina-

\begin{itemize}
\item Q. And was there a conversation in which [sic] you had with him and same that he had with you? A. [by Myles] It was mostly us listening to Mr. Huff. Q. It was mostly what? A. We listened to what he had to say. \textit{Id.} at 292 n.8.
\item 71. \textit{Id.} A fire of unexplained cause burning Huff's clothing would tend to indicate driver error and to fix the responsibility for the accident, with attendant adverse pecuniary consequences, on him. \textit{Id.} The court also found the plaintiff's argument that Huff may have invented the story to explain to his employer how the accident happened unpersuasive. Moreover, he was speaking to a friend and relative by marriage who were paying a sympathy call, not to his employer. \textit{Id.} at 292 n.9.
\item 72. \textit{Id.} at 292. Mrs. Huff testified that she could only see him ten minutes out of every hour, that when she saw him "he just came and went, [s]ometimes he would answer, sometimes he wouldn't," didn't seem to know what was going on, couldn't speak over two or three words at a time, and that she [Mrs. Huff] was never able to carry on a coherent conversation with him. \textit{Id.} at 292, n.10.
\item 73. The court further declared that:
\begin{quote}
The specific exceptions to the hearsay rule are not justified by any circumstantial guarantee that the witness who reports the statement will do so accurately and truthfully. That witness can be cross-examined and his credibility tested in the same way as that of any other witness. It is the hearsay declarant, not the witness who reports the hearsay, who cannot be cross-examined.
\end{quote}
\textit{Id.} at 293. Thus, the reliability test of Myles' testimony is to be applied not by the court, but by the jury.
\item 74. \textit{Id.}
\item 75. 582 F. Supp. 1484 (E.D. Mich. 1984). The plaintiff alleged that his decedent was injured while operating a machine manufactured by defendant Harris Seybold Company, and that the injury was caused by the defective design and manufacture of the machine. Land died from causes unrelated to the hand injury. Noting that Mrs. Land was never deposed, that there were no other witnesses to her accident, and that plaintiff would be unable to produce any testimony or other evidence relating to the circumstances of Land's injury, the defendant moved for a summary judgment. In response, the plaintiff produced a written unsworn statement which Land made shortly after her accident, in which she described how she was injured. The court ruled Mrs. Land's statement inadmissible, and summary judgment was granted. \textit{Id.} at 1485.
\end{itemize}
tion on admissibility, the court considered the character of the declarant's statement, the relationship of the parties, the probable motivation of the declarant in making the statement, and the circumstances under which it was made. Land, the decedent, gave her statement to the claims adjuster for her employer's worker's compensation insurer during an interview to determine whether Land was entitled to disability benefits.

The court in Land found that the circumstances and character of Land's statement did not provide the degree of trustworthiness required under the rule. The court noted that both the adjuster and Land had interests which were adverse to the defendant, an unremarkable observation in itself, since virtually all plaintiffs have interests adverse to defendants. However, it was significant here because Land and the adjuster were the only parties present when Land gave her statement. The defendant did not have an opportunity to observe or question Land when she made these statements. Additionally, the adjuster was the insurer's employee. The insurer would benefit from any evidence that the machine was defective, since any recovery Land received would first reimburse the insurer for benefits paid or payable.

The court in Land further noted that Land's statement was highly self-serving: she did not merely describe her actions at the time of her injury, but also explained that her injury was caused solely by the machine's malfunction.

Land's statements contrasted

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76. Id.
77. Land's statement read in part:

About 8:30 on 12-12-78 I started working on the guillotine. To operate the machine, I first have to push down a lever with my right hand to bring the blade down and cut the material. I have only used my left hand to operate the left handle. After I would push the right handle the blade would come down, cut the material and then go back up and click into place locking into place. When I heard the blade click in its up position, I reached into the machine to take the material out of the machine. I put both of my hands under the blade to remove the foam material. As I had both of my hands under the blade to remove the material, the blade started coming down slower than it usually did in a normal cycle. As I saw the blade coming down, I tried to get my hands out but I could not get my left hand out and the blade cut off the first two joints of my little finger and the total other three fingers. In order for me to push both levers down, I had to reach under the table of the machine. It would be impossible to accidentally bump the handles with a hip or knee because they are up under the table of the machine. I know for sure that I did not bump the handles. When I let go of the left handle, the only way the blade would come down again would be if the safety catch didn't go into place. There is no way to see if the safety catches or not because it is hidden from view because of the machine.

Id. at 1486.
78. Id.
79. Id. at 1487. Land stated that she knew "for sure" that she did not bump the handles which would have caused the blade to descend, because it would have been "impossible" for her to do so. She stated that the "only way" that the blade could have descended as it did was that the machine's safety catch had failed to operate properly. The court found that these were statements so clearly in her own interest that their trustworthiness was subject to serious

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sharply with the statements admitted in *Dallas County v. Commercial Union Assurance Co.*,\(^8^0\) upon which the plaintiff relied. Unlike *Dallas*, in which the newspaper report had no motive to lie, both the adjuster and Land had reason to place all responsibility for Land’s injury upon the machine’s manufacturer.\(^8^1\)

The plaintiff also relied upon *Huff v. White* to bolster its argument for admissibility of Land’s statement. Land’s statement did not, however, comport with the trustworthiness standard articulated in *Huff* because her statement contained both opinion and speculation, was given in response to questions from one who had an interest in the outcome of the litigation, and was not against the speaker’s interests.\(^8^2\)

Other cases have also imposed the equivalent standard of trustworthiness clause of the residual hearsay exception. For example, in *United States v. American Telephone & Telegraph*,\(^8^3\) the district court held that “third-party” documents,\(^8^4\) that is, statements which the government adopted from companies upon whose active assistance it relied in presenting its case, were admissible under the residual hearsay exception of 803(24),\(^8^5\) provided the statements met

\(^8^0\). 286 F.2d 388 (5th Cir. 1961).

\(^8^1\). *Land*, 582 F. Supp. at 1487. Moreover, unlike *Dallas County*, in which the court recognized that a false report would have subjected the newspaper and the reporter to embarrassment within the community, 286 F.2d at 397, Land’s distortion of the truth would not carry such possibilities.

\(^8^2\). *Dallas County*, 286 F.2d at 397. See also *Page v. Barko Hydraulics*, 673 F.2d 134 (5th Cir. 1982), a strict liability and negligence action against a limb loader manufacturer. Plaintiff’s son died when he was engulfed in flames while operating the limb loader. Over plaintiff’s strenuous objection, the court admitted, under Rule 803(24), plaintiff’s deposition testimony, which recalled a conversation that occurred several days after the accident while her son was in the hospital.

\(^8^3\). 516 F. Supp. 1237 (D.C. 1981). In this antitrust suit brought by the government, the defendant raised the issue of admissibility of certain so-called “third-party” documents, that is, documents which either were authorized by employees or agents of companies in competition with the defendant, or purported to recount statements made by such employees or agents. The district court held that the documents could properly be received under the residual exceptions to the hearsay rule, subject to defendant’s compliance with procedures designed to ensure that their admission would not unfairly disadvantage the government. However, the documents consisting of consultants’ reports supplied to third parties failed to meet the trustworthiness requirement and were thus inadmissible.

\(^8^4\). *Id.* at 1238. At the court’s request, defendants submitted a sampling of these third-party documents for consideration under Rule 803(24). The documents were organized into seven broad categories: (1) contemporaneous memoranda reflecting discussions in meetings or telephone conversations with or by adverse third parties (AT&T competitors); (2) internal memoranda of adverse third parties; (3) diaries and calendars of adverse third parties; (4) correspondence (letters from adverse third parties); (5) public statements by adverse third parties; (6) deposition testimony in other cases; and (7) consultants’ reports supplied to adverse third parties. *Id.* at 1239.

\(^8^5\). AT&T had also proposed admitting the “third-party” documents under *FED. R. EVID. 801(d)(2)* which states:

(d) Statements which are not hearsay. A statement is not hearsay if:

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a represen-
the equivalent standard of trustworthiness requirement. In determining the trustworthiness of the statements to be admitted, the court proposed a two-pronged test. First, did the memoranda reliably represent what was said at the meeting or conversation? Second, were the substantive statements made in the course of the meeting or conversation themselves trustworthy? 86

To answer the first question, the court examined Rule 803(1) 87 and the Notes of the Advisory Committee on the Proposed Rules. The Committee Notes stated that the "substantial contemporaneity of event and statement negates the likelihood of deliberate or conscious misrepresentation." 88 Thus, the court concluded that the meetings or conversations which the memoranda represented appeared to be a guarantee of reliability of similar magnitude for the purposes of Rule 803(24). 89

To test the trustworthiness of substantive statements made in the course of the meeting or conversation, the court examined Rule
tative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

AT&T had argued that, since the government adopted and purported to believe in the statements made by the competitor companies, these statements should be admitted as "adop-
tive admission" by the government under Rule 801(d)(2)(B). Am. Tel., 516 F. Supp. at 1238. However, the court declared that:

[While] it is no doubt true that the government shares many common interests with the competitors of AT&T in this suit, [t]his circumstance alone does not, however, entail the automatic adoption by the government of every relevant doc-
ument originating in the files of these competitors. As stated by the Court of Appeals of this Circuit:

'The Government has the same entitlement as any other party to assist-
tance from those sharing common interests, whatever their motives. This is clearly true in antitrust cases, where Congress has established a policy of private enforcement to supplement governmental action against offend-
ers. This policy should not be thwarted by allowing an alleged anti-trust offender to acquire the trial preparations of his private adversaries when they cooperate with Government lawyers in a related suit by the Justice Department.' United States v. American Telephone and Telegraph Com-
pany, 642 F.2d 1285, at 1300 (D.C. Cir. 1980).

This congressional policy would similarly be thwarted were the Court to allow the alleged antitrust offender to introduce statements by private parties as admissions against the government merely because these parties have cooperated with the government lawyers in the suit.


86. Id. at 1240.

87. Fed. R. Evid. 803 provides that "[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness: (1) Present sense impression. A state-
ment describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."


89. Am Tel., 516 F. Supp. at 1241.
804(b)(3) and found that although the substantive statements recorded in the contemporaneous memoranda which AT&T attempted to introduce into evidence would probably not fall into the letter of this exception, the theory underlying the exception was nevertheless instructive. That theory provides that the "circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true."

*In Re A.H. Robins Co. Inc.*, presented a novel Rule 803(24) trustworthiness problem. In evidentiary rulings regarding depositions on problems with intrauterine devices (IUD), several hearsay objections were premised on the hearsay-within-hearsay prohibition of Rule 805. Doctors whose patients had problems with the Dalkon Shield, or the patients themselves, had contacted and made statements to Robins' employees, who had then repeated or introduced those statements into the corporate decision-making process. The court held that the statements of the "outsiders" had a circumstantial guarantee of trustworthiness since they were received and assessed by Robins' employees as valuable input about the performance of the Dalkon Shield and its component parts, and were

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90. Federal Rule 804(b)(3) provides that statements against interest are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) Statement against interest. A statement which was, at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

91. *Am. Tel.*, 516 F. Supp. at 1240. The court found the substance of the statements contained in the three types of documents within the memoranda category (4) all circumspectly reliable under the "declaration against interest theory of the Advisory Committee." *Id.* at 1241. *See supra* note 83 which delineates the seven categories of third-party documents at issue.


93. *Am. Tel.*, 516 F. Supp. at 1241. The court further found that the theory underlying the memoranda's admissibility under Rule 803(24) would also apply to internal memoranda of adverse third parties, diaries and calendars of adverse third parties, correspondence (to the extent that the letters were authored by an employee or agent of an adverse party), and public statements made by adverse third parties. *Id.*

94. 575 F. Supp. 718 (D. Kan. 1983). In consolidated discovery proceedings relating to actions against Robins, the manufacturer of an intrauterine device (IUD), the court made several evidentiary rulings. One ruling concerned the admission into evidence of doctors' and IUD users' statements to Robins' employees who treated the information as valuable input concerning the performance of the IUD and its component parts.

95. *Fed. R. Evid.* 805 provides that "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

96. 575 F. Supp. at 724.

97. *Id.*
produced directly from Robins' corporate files. 98

The court found no reason to doubt the trustworthiness of the doctors' and the patients' statements. Neither doctors nor patients would be motivated to fabricate a problem or concern and then contact Robins. Doctors treating patients who exhibited the same or similar problems related to IUD use would be best able to inform the manufacturer of these problems. Moreover, although the court failed to recognize this, the doctors were merely communicating the information to Robins for the purpose of medical diagnosis and treatment, a hearsay exception under Rule 803(4). 99

B. Comparing 803(24) to Other Hearsay Exceptions

As illustrated by American Telephone and Telegraph Company, courts often examine whether the hearsay comes under any exception other than Rule 803(24). If it does not, courts will examine whether the statement, while inadmissible under any of the other hearsay exceptions, is admissible under Rule 803(24) because it has the “equivalent circumstantial guarantees of trustworthiness” of the other hearsay exception(s). In Clark v. City of Los Angeles, 100 the court refused to admit into evidence a diary kept by one of the vendors for purposes of the litigation. The diary was not admissible as a business record exception 101 to the hearsay rule, since it was not prepared in the regular course of a business activity, nor was it used in the routine operation of a business or agency. 102 Additionally, the diary itself was replete with instances of hearsay, multiple hearsay, and non-expert opinion which was not independently admissible. 103

98. Id. Similar circumstantial guarantees of trustworthiness for admissibility under the residual exceptions to the hearsay rule were present in all those categories of documents in Am. Tel., and the documents were subsequently received into evidence. Am. Tel., 516 F. Supp. at 1241. The sixth category, deposition testimony by employees of adverse third parties taken in conjunction with other litigation, contains additional circumstantial guarantees of trustworthiness in that it was taken under oath subject to penalties for perjury, and such depositions will be also admitted. Am. Tel. 516 F. Supp. at 1241-42.

99. Fed. R. Evid. 803(4). This hearsay exception provides that statements for purposes of medical diagnosis or treatment are not excluded even though the declarant is available as a witness: “(4) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” Id.

100. 650 F.2d 1033 (9th Cir. 1981). Here, two open-air vendors challenged the alleged discriminatory enforcement of permit and zoning requirements. At trial, plaintiffs asserted that the City and its police department selectively enforced the law, denied due process, and conspired to deny them their Civil Rights in violation of 42 USC §§ 1983 and 1985(3). From a judgment of $60,000, the defendants appealed. The Court of Appeals found the diary inadmissible either as a business record, since it was not used in the business of selling new and used merchandise, or under the hearsay exception for statements which have equivalent circumstantial guarantees of trustworthiness.


102. Clark, 650 F.2d at 1037.

103. Id.
The diary was also inadmissible under 803(24) because it did not have circumstantial guarantees of trustworthiness equivalent to the enumerated exceptions. Moreover, the diary was a heavily "emotive" document which did not simply relate factual occurrences, but was written in a style designed to arouse sympathy and create enmity for the defendants.

_U.S. v. Hitsman_ illustrates an interesting application of Rule 803(24). There, the court utilized the traditional equivalent circumstantial guarantees of trustworthiness standard for an untraditional reason. In _Hitsman_, the government introduced one defendant's college transcript to show that an individual who had taken those courses could manufacture methamphetamine. The court admitted the transcript under Rule 803(24) and found it to be a self-authenticating document under Rules 901 and 902.

Although the issue of trustworthiness was not specifically addressed in _Hitsman_, the college transcript did meet the equivalent circumstantial guarantees of trustworthiness standard. There was no reason to assume the transcript was in error about the courses taken, nor was there motivation to falsify the transcript. In fact, falsification would have served no one's purpose, since the transcript was

104. _Id._ at 1038.

105. _Id._ "The diary went far beyond the other evidence properly brought forth in this case, in that it contained much hearsay and opinion statements, and was written in a highly emotional and sympathetic manner." _Id._

106. 604 F.2d 443 (5th Cir. 1979). Defendants were convicted under 18 USC § 2 and 21 USC §§ 812, 841(a)(1) and 846, of conspiracy to manufacture and distribute methamphetamine, and distribution and manufacture of methamphetamine. _Id._ at 444. On appeal, one defendant challenged the government's admission of his college transcript under 803(24) for the purposes of showing that an individual who had taken the course shown on the transcript could manufacture methamphetamine. _Id._ at 446.

107. _Hitsman_, 604 F.2d at 446. An expert witness for the government, who had examined invoices for the various chemicals and equipment, and testified that they were used to manufacture methamphetamine, reviewed the college transcript.

108. _Id._

109. _Id._ at 447. The court judicially noticed the college's existence, finding that colleges normally make such records in the course of operations and that the exhibit had the indicia of being an authentic copy since it bore a seal above the registrar's signature. _Id._

110. Fed. R. Evid. 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

111. Fed. R. Evid. 902. Rule 902 provides:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal.
(2) Domestic public documents not under seal.
(3) Foreign public documents.
(4) Certified copies of public records.
(5) Official publications.
(6) Newspapers and periodicals.
(7) Trade inscriptions and the like.
(8) Acknowledged documents.
(9) Commercial paper and related documents.
(10) Presumptions under Acts of Congress.
prepared as the student matriculated through school. Moreover, a
student normally sees his transcript at the time he is matriculating
and has an opportunity to note any errors, thus satisfying the old
concept of publicity. The transcript, admitted under 803(24) seemed
to have the equivalent circumstantial guarantees of trustworthiness
found in Rules 803(6) and 803(8).

In J.D. Moffett v. McCauley,112 a prison inmate unsuccessfully
brought a civil rights action alleging that a strip-search method was
unconstitutional. The court held that it was error to refuse to admit
a prison report detailing the search.113 Since the report was prepared
on behalf of the defendants, the court found it reasonable to infer
that the investigators preparing the report relied on prison officials
with first-hand knowledge of the incident for information.114 Addi-
tionally, the prison official responsible for the report had both a busi-
ness duty and a public obligation to be accurate.115 The court also
noted that the warden’s willingness to sign an affidavit attached to
the report saying that its contents were true to the best of his knowl-
edge attests to the warden’s confidence in the mode of preparation.116

The decision to admit this report is troublesome for several rea-
sons. First, while the court examined the report, it did not examine
its contents. The report relied on prison officials who had “first-hand
knowledge” of the incident. How trustworthy can these statements
be or, more correctly, how objective can those involved in the inci-
dent be? Second, courts routinely refuse to admit reports made in
preparation for litigation, holding that they lack sufficient guarantees
of trustworthiness because they are not made in the regular course of
business.117 The Moffett court rationalized the report’s admission be-
cause the evidence was offered against the party for whom it was
prepared.118 But this reasoning fails to support a finding that the

112. 724 F.2d 518 (7th Cir. 1984). The strip search in question took place in the confer-
cence room of the main administration building at the correctional facility. Moffett was ordered
to take off all of his clothes and to bend over and spread his buttocks. Plaintiff complained
about offensive language made by the guards. As the defendant’s brief described the unlikely
and unfortunate set of circumstances, after the strip search but before Moffett was fully
clothed, “two nuns of all things” appeared at the door. Moffett asserted that the nuns saw him
completely nude, and that one of the guards laughed degradingly.

After Moffett filed a complaint regarding the strip search, prison officials conducted an
investigation. Moffett sought to have the report admitted into evidence because it conflicted
with the [guard’s] trial testimony. Id. at 583.

113. Id. at 582.
114. Id. at 584.
115. Id.
116. Id.
117. Id. See, e.g., Palmer v. Hoffman, 318 U.S. 109 (1943) (deceased railroad engi-
eer’s signed statement giving his version of grade-crossing accident involving locomotive he
was operating, made two days after the accident during interview with company official and
state commission representative held inadmissible because not made “in the regular course” of
business within meaning of the Business Records Act).
118. Moffett, 724 F.2d at 584, n.1. See also Leon v. Penn Central Co., 428 F.2d 528,
report met the trustworthiness standard set forth in 803(24). It is not inconceivable that the “facts” given by representatives of the party involved were colored by their subjective viewpoint.

C. Failure to Meet the 803(24) Trustworthiness Standard

A number of cases illustrate evidence which does not rise to the level of trustworthiness required for admission. For example, in United States v. Castaneda-Reyes, an air piracy case, the court excluded a document from the Cuban Ministry of Public Health which purportedly showed the defendant’s stay as a patient in a psychiatric hospital because the document had apparently been altered. In addition to excluding altered documents, courts frequently exclude self-serving statements as untrustworthy, even when such statements actually go against the declarant’s interests. In United States v. Hinkson, in which Hinkson was convicted of homicide in a motorcycle gang murder, a third-party witness testified that another gang member committed the murder for which Hinkson had been convicted. But the evidence against Hinkson was so overwhelming that the alleged admission to a third-party witness was probably sheer bravado. The appeals court held that there was an insufficient basis to demonstrate equivalent circumstantial guarantees of trustworthiness, even though the gang member’s third-party statements were self-inculpatory.

As previously mentioned, Rule 803(24) calls for a guarantee of trustworthiness equivalent to that of the other twenty-three hearsay

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119. 703 F.2d 522 (11th Cir. 1983). Appellant Rafael Castaneda-Reyes was convicted of attempted air piracy under 49 USC § 1472(i)(1). On October 25, 1980, appellant was on a commercial flight leaving Miami en route to San Antonio. Shortly after take-off, Castaneda-Reyes attempted to hijack the plane to Cuba, but was quickly subdued. Once restrained, he began hitting his head against the bulkhead several times, stating he was crazy. Castaneda-Reyes asserted a defense of not guilty by reason of insanity.

120. Id. at 524.

121. 632 F.2d 382 (4th Cir. 1980). Hinkson, a member of the “Norseman” motorcycle gang, was convicted of killing a guard at Fort Bragg, North Carolina. At trial, the defense interrogated Minott, another gang member, who left the state on the day of the murder, and eventually turned up in New Hampshire, living with Jack and Teresa Neal, friends of his girlfriend. While Minott admitted that he carried with him clippings of several shootings, including that of the guard’s murder, he denied that he had spoken of unfinished business in North Carolina. In response to Minott’s denials, the defense attempted to call Teresa Neal. Outside the jury’s presence, Neal testified that Minott had said he shot the guard with the aid of someone called “Wolf,” and that he (Minott) was wanted for murder. According to Neal, Minott showed her clippings of North Carolina shootings on one occasion. Id. at 384.

122. The only guarantee of trustworthiness was the fact that Minott’s alleged statement was self-inculpatory. Hinkson, 632 F.2d at 386. However, Neal testified that Minott gloried in parading his motorcycle gang member image before his girlfriend’s acquaintances. A claim that he killed the guard, made to a relatively casual acquaintance hundreds of miles from the scene of the killing, would seem to be braggadocio. Id.

123. See supra note 121.
exceptions. In *United States v. Perlmutter*, the Ninth Circuit Court of Appeals held that a document purportedly listing the defendant’s four convictions in Israel was inadmissible under either Rule 803(8) or Rule 803(24). The court disallowed the document under 803(8) because there was no evidence of any duty on the part of the person signing the report—or anyone else—to record the information. The court also refused to admit the document under 803(24), holding that there was nothing indicating that the exhibit, when compared with other hearsay exceptions, had the equivalent circumstantial guarantees of trustworthiness. In the court’s view, 803(24) could not be used to circumvent either the “duty to record” requirements of 803(6) or 803(8), or the requirements of 803(22).

D. Misinterpreting the 803(24) Trustworthiness Standard

Some courts have attempted to employ 803(24) to transcend traditional trustworthiness analysis, based on circumstances existing at the time the statement is made, by measuring trustworthiness on the basis of whether independent extrinsic corroboration of the out-

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124. 693 F.2d 1290 (9th Cir. 1982). Yitchak Perlmutter was convicted of misstating orally and on his Application to File Petition for Naturalization that he had not been convicted of any offense other than traffic violations. *Id.* at 1292. At his trial, a document purporting to list Perlmutter’s four convictions in Israel was entered as an exhibit. The court of appeals held that the document was not properly authenticated, and should have been excluded from evidence as hearsay not falling within any recognized exceptions.

125. See *Fed. R. Evid.* 803(8).

126. *Perlmutter*, 693 F.2d at 1293. The court also declared that:

[Since] there is no indication that Herstig, the person who signed the conviction report and the identification form, had first hand knowledge of the convictions and because of the probability of multiple levels of hearsay in this situation, [the evidence] does not fit within Rule 803(8). It is apparent that Herstig, who signed the conviction report, did not act on the basis of first hand knowledge since the alleged convictions had occurred from 17 to 26 years earlier in a variety of different courts.

*Id.* at 1293-94. This interpretation of Rule 803(8) is erroneous. An individual need not have first-hand knowledge of the incidents or facts contained in the records he controls or supervises. Such a requirement would be an impossible and impractical one. Rule 803(8) attempts to avoid this hardship, and focuses on necessity and convenience. See Grant, *The Trustworthiness Standard For The Public Records and Reports Hearsay Exception*, 12 *Western State U. L. Rev.* (Fall 1984).

127. *Fed. R. Evid.* 803(22) provides that, even if the declarant is available as a witness, the hearsay rule will not exclude:

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon plea of guilty (but not upon a plea of nolo contend(ere)), adjudging a person guilty of a crime punishable by death or improvement in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachments, judgment against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

Rule 803(22) was intended to be a vehicle for proving underlying facts when a judgment of conviction is presented. *Perlmutter*, 693 F.2d at 1294. In *Perlmutter*, the district court attempted to stretch the rule to allow the fact of conviction to be proved by lesser evidence. A judgment of conviction, not the conviction itself, is a prerequisite to the use of this rule. *Id.*
of-court statement existed. This independent extrinsic corroboration may include the availability at trial of the out-of-court declarant or corroboration of the hearsay at trial by other admissible evidence.

In United States v. Thevis, a RICO case in which the out-of-court declarant was murdered before trial but after giving his grand jury testimony, the court admitted the testimony at trial. The court established a two part analysis in determining whether a state-

128. Compare Fed. R. Evid. 804(a) which defines unavailability as follows:

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant —

1. is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
2. persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
3. testifies to a lack of memory of the subject matter of his statement; or
4. is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
5. is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or, in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrong doing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

129. 84 F.R.D. 57 (N.D. Ga. 1979), aff'd on other grounds, 665 F.2d 616 (5th Cir. 1982), cert. denied, 408 U.S. 1008 (1982). Thevis was charged and convicted of violating the Racketeer Influenced and Corrupt Organizations Act (RICO). The court admitted statements and grand jury testimony of Underhill, a witness who was murdered, by the defendant, prior to trial. The court relied on Fed. R. Evid. 804(b)(5) to admit the testimony: "Death had been the most obvious and irreversible form of unavailability." Thevis, 84 F.R.D. at 64 n.3, quoting Weinstein supra note 35 at 804-39 (1978). Since both Fed. R. Evid. 803(24) and Fed. R. Evid. 804(b)(5) have the same equivalent circumstantial guarantees of trustworthiness standard and since this case involves the issue of corroboration, its use is pertinent in the discussion.

130. Prior to offering the statement under Rule 804(b)(5), the court recessed the trial for hearings outside the presence of the jury. During these hearings, the defense presented evidence as to Underhill's credibility, motive, interest, and bias, as well as evidence directed towards controverting the corroborating evidence upon which the government relied to reach the "circumstantial guarantees of trustworthiness" required by Rule 804(b)(5). Rule 804(b)(5) provides that, notwithstanding the declarant's unavailability, the hearsay rule will not exclude:

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 purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it including the name and address of the declarant.

ment has circumstantial guarantees of trustworthiness.\textsuperscript{131} The first step takes the more traditional view, analyzing the declarant and the circumstances surrounding his statement. This portion of the analysis inquires into the declarant's relationship with the party against whom the statement is offered, the declarant's motive to speak truthfully about the facts observed, the nature in which the declarant gave the statement, and the declarant's opportunity to observe the episode set forth in the statement.\textsuperscript{132}

The second, and more novel part of the court's analysis, is to determine whether there is independent evidence to corroborate the statement.\textsuperscript{133} In effect, this part of the analysis looks outside the statement to determine circumstantial guarantees of trustworthiness, while the first inquiry seeks to satisfy the same benchmark from within the statement.\textsuperscript{134}

*United States v. West*\textsuperscript{135} adopts the same position on corroboration. There, the trial court admitted into evidence the grand jury testimony of a witness who was slain before trial. The defendants appealed the trial court's application of 804(b)(5), contending that the deceased witness' prior criminal record contradicted Rule 804(b)(5)'s legislative history. Defendants argued that 804(b)(5) applied only when "exceptional circumstances" lent a degree of trustworthiness equivalent to that of evidence admissible under other

\textsuperscript{131} Thevis, 84 F.R.D. at 63.

\textsuperscript{132} Id. The court found that Underhill had a strong motive to testify truthfully, since only untruthful testimony would have subjected him to criminal liability. Additionally, at the time of the grand jury testimony and the F.B.I. interview, he had a civil RICO suit pending against defendant Thevis. The pending civil litigation gave Underhill further motive to testify truthfully, since prior inconsistent statements could be used to impeach his credibility and harm his civil RICO testimony.

The fact that the statements were recorded and accurately transcribed supports their credibility. Additionally, the statements bespeak their own authenticity as each is replete with detail to which only a participant and confidant would have access. Furthermore, the court noted that no agreement had been made by the government to shield Underhill from civil liability for his past actions. Consequently, many of the statements contained admissions against Underhill's pecuniary interest. *Id.* at 65.

\textsuperscript{133} Id. at 64.

\textsuperscript{134} Id. For the second part of the test, the court reviewed each proffer individually to determine whether the corroborating evidence enhanced the circumstantial guarantees of trustworthiness. *Id.* at 66. The additional evidence did support the government's case and the testimony given by Underhill. However, this raises the basic question of whether there was a need for corroboration to admit Underhill's statements. The government might have had additional supportive or corroborative evidence or testimony with which to bolster its case. No trial attorney wishes to rely on one witness for the entire case, particularly if the witness is deceased. But each piece of evidence, while it may be supportive of other pieces of evidence, should not be used to bolster the admission of other exhibits and testimony.

\textsuperscript{135} 574 F.2d 1131 (4th Cir. 1978). The defendants were tried and convicted of distribution of and possession with intent to distribute, heroin. The issue on appeal was whether the admission of the grand jury testimony of Michael Victor Brown, who was slain before trial, was proper under Rule 804(b)(5) and the Confrontation Clause of the Sixth Amendment. Thus, the issues in this case closely parallel those found in *Thevis*. The convictions were the result of an extensive Drug Enforcement Agency investigation in which Brown, while serving time on drug and parole violations, volunteered his assistance to the DEA. *Id.* at 1131.
804(b) exceptions to the extra-judicial statement.138

The court in *West* noted that the government took elaborate steps which not only met, but probably "exceeded by far," the substantial guarantees of trustworthiness of some of the other 804(b) hearsay exceptions.139 For example, the agents made certain that Brown, the deceased witness, possessed neither drugs nor money other than that supplied by the agents to make the purchases138 necessary for the arrest. The court also found that other precautions, including the use of electronic surveillance devices, assured the reliability of the actual out-of-court statement.139 For the court, "the most impressive assurance of trustworthiness,"140 came from the corroboration provided by the agents' observations, from pictures they took, and recordings of the conversations.141

It is not troubling that Brown's statements were corroborated, but rather that the corroboration was used as a basis for satisfying the equivalent guarantees of trustworthiness as a requisite to admissibility. The court in *West* found that the guarantees here were greater than necessary. This may be correct. Nevertheless, the court confuses not only what standards should be applied to meet the "equivalency" test for trustworthiness, that is, whether corroboration should be a factor in determining trustworthiness, but also, in utilizing the *Thevis* court's two-level approach, what standards come under which category. For example, the court categorizes as "corroboration" Brown's interest in gaining favors in order to avoid further imprisonment, which in turn gave him strong incentive to be extremely accurate in reporting.142 This is not corroborative evidence; it is Wigmore's trustworthiness standard for determining when hear-

136. Id. at 1134-35.
137. Id. at 1135.
138. Each time the DEA agents received notice that Brown was about to make a purchase, they arranged for extensive surveillance. Id. at 1133. Before each purchase, DEA agents strip-searched Brown to determine whether he had drugs or money other than the money supplied by the agents to effect the purchase. Id. at 1133, 1135. The agents also searched his vehicle to be sure that it did not contain any drugs. Id. at 1133.
139. Except when he entered a building, thus becoming concealed from view, Brown was under constant surveillance, photographs were taken when he was with one of the defendants. Id. at 1135. After each purchase, Brown and an agent reviewed what he had done, said, and observed, and then prepared a correct statement. Id.
140. Id. at 1135.
141. Id. The court declared that:

Although Brown's grand jury testimony was not subject to immediate cross-examination, to a large extent what Brown said was corroborated by the observations of the agents. The agents did appear as witnesses and were subject to cross-examinations about what they observed, including the possibility of mistake or prevarication by Brown, and their own roles in preparing Brown's statement.

Id.

142. Id. Brown knew what the agents were doing to corroborate and verify his reports, and any attempted deception would only have aroused their suspicion.
say may be admitted into evidence. In *United States v. Bailey,* one defendant gave a signed statement to the F.B.I., but then refused to testify at trial. The court of appeals reversed the conviction, finding that the trustworthiness of a statement should be analyzed by evaluating not only the facts corroborating the statement's veracity, but also the circumstances in which the declarant made the statement and his incentive to speak truthfully or falsely. The court also declared that factors bearing on the reliability of the report of the hearsay should be considered.

The tests applied in Bailey were incorrect for several reasons. First, the in-court witness reporting the out-of-court statement does not have a bearing on whether the out-of-court statement is trustworthy. The trustworthiness of the hearsay is distinct from the trustworthiness of the witness on the stand. The fact-finder is capable of deciding whether the witness is credible through his demeanor, through impeachment, or through the testimony itself. In *Huff v. White,* the court rejected Bailey, noting that the specific exceptions to the hearsay rule are not justified by any circumstantial guarantee that the witness who reports the statement will do so accurately and truthfully. It is the hearsay declarant, not the witness who reports the hearsay, who cannot be cross-examined.

Second, the court in Bailey misapprehended the equivalent circumstantial guarantees for trustworthiness, because it emphasized corroboration, a misunderstanding also apparent in West, Thevis, and Brown. As in these cases, in which the courts employed corroboration in determining whether a hearsay statement met the equivalent circumstantial guarantees of trustworthiness, the court in

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143. See also United States v. McCall, 740 F.2d 1131 (4th Cir. 1984), in which the court held that the trial court erred in admitting the affidavit of an unavailable witness. While the court supported the "corroborative testimony" view-point of trustworthiness discussed in United States v. Garner, 574 F.2d 1141 (4th Cir.), cert. denied, 439 U.S. 936 (1978) and West, 574 F.2d 1131 (4th Cir. 1978), the court found that an affidavit did not rise to the "indicia of reliability" required for admission, as compared to the admissions of grand jury testimony in other cases.

144. 581 F.2d 341 (3rd Cir. 1978). Bailey's robbery accomplice, Stewart, agreed to plead guilty under terms requiring Stewart to furnish a statement and to testify at any future proceedings concerning the robbery. Prior to sentencing, Stewart gave the F.B.I. two oral statements, one of which was transcribed by an F.B.I. agent. Stewart signed that statement, acknowledging its truth. Both statements outlined Stewart's involvement in the robbery and named Bailey as the second bank robber. During Bailey's trial, Stewart refused to testify concerning his earlier statements. The court ruled that Stewart's written statements were admissible pursuant to Rule 804(b)(5), since the F.B.I. agent who was present when Stewart made his statement testified about its contents and the manner in which the statement was taken. *Id.* at 343-45.

145. *Id.* at 349.

146. 609 F.2d 286 (7th Cir. 1979).

147. 609 F.2d at 293. As the court recognizes, the witness [repeating the hearsay statement] can be cross-examined and his credibility tested in the same way as that of any other witness. *Id.*
Bailey similarly confused admission of corroborative evidence to support a position taken at trial, with corroborative evidence to support the admission at trial of hearsay evidence.

IV. Conclusion

Some courts have utilized the equivalent circumstantial guarantee of trustworthiness standard properly by applying Wigmore's approach to determine trustworthiness. Other courts, in attempting to adapt this rule for novel purposes have used the wrong standard, and have either improperly applied the rule or applied it for the wrong reason. A few courts have completely confused the concept of equivalent circumstantial guarantees of trustworthiness by misapplying or misunderstanding the policy of admitting hearsay evidence if and when it is trustworthy.

These problems can be remedied only if courts articulate when hearsay is trustworthy and admissible under the standards provided by Wigmore and Weinstein, and as illustrated in Dallas County. Inserting the word "independent" before the word "equivalent" in Rule 803(24) to signify that the statement to be admitted should be considered "trustworthy" independently from "corroborative" evidence would further clarify the Rule's proper application. Federal Rule of Evidence 803(24) will reach its full potential as a purveyor of truth only when it is used as Congress intended.

148. See supra notes 21-34 and accompanying text.