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## **Will Missouri Adopt the Residual Exception to the Hearsay Rule?**

*State v. Bell*<sup>1</sup>

### I. INTRODUCTION

A criminal defendant has the constitutional right to a fair and impartial trial, and to confront witnesses who testify against him.<sup>2</sup> The purpose of the rules of evidence is to facilitate ascertainment of the truth, and to assist in fair adjudication of controversies<sup>3</sup> by admitting relevant evidence.<sup>4</sup> In a case of murder, the victim may still “speak” for herself through the testimony of others, but such evidence confronts a repeatedly insurmountable hurdle: the hearsay rule. The hearsay rule excludes out-of-court declarations because, as such, they cannot be subject to cross-examination.<sup>5</sup> Therefore, the rule often wipes out as inadmissible that which is left of the victims’ lives: their out-of-court stories. Although the out-of-court evidence is less credible than direct testimony, federal and state laws allow for numerous exceptions to the hearsay rule.<sup>6</sup> Such exceptions are supposed to account for situations where the out-of-court declarations may be no less trustworthy than direct testimony, and ought to be admitted in order to produce a fair result.<sup>7</sup> Nevertheless, even given these exemptions, it still is impossible to include all the types of hearsay evidence which may be inherently worthy of admission.

In order to deal with these situations, in both civil and criminal cases, numerous jurisdictions have enacted one more exception to the hearsay rule: the residual exception.<sup>8</sup> The exception, in criminal cases, often helps courts decide “domestic violence” issues when the murdered victim suffered prior abuse.<sup>9</sup> However, this exception is far from fully recognized in Missouri, despite the fact that the Missouri Court of Appeals has considered it on several occasions.<sup>10</sup>

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1. 950 S.W.2d 482 (Mo. 1997).

2. U.S. CONST. amend. VI; MO. CONST. art. I, § 18(a).

3. See generally 29 AM. JUR. 2D *Evidence* § 493 (1996).

4. FED. R. EVID. § 402.

5. 2 JOHN H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1364(9) (James H. Chadbourn, rev. ed. 1974).

6. FED. R. EVID. 803(1-23), 804(b)(1-4).

7. See WIGMORE, *supra* note 5, § 1422.

8. FED. R. EVID. §§ 803(24), 804(b)(5), (also called the “catch-all” or “omnibus” exceptions).

9. Donna Meredith Matthews, *Making The Crucial Connection: A Proposed Threat Hearsay Exception*, 27 GOLDEN GATE U. L. REV. 117, 118-19 (1997).

10. See *infra* note 91 and text accompanying notes 95-146.

*State v. Bell*<sup>11</sup> is the first case in which the Missouri Supreme Court voiced its position concerning the exception,<sup>12</sup> but it did so via the concurring opinion of Judge Limbaugh, who was joined by three other judges.<sup>13</sup> When four out of seven judges of the state's highest court speak about an unsettled issue of law, one wonders: how long will it take for such issue to become the law?

## II. FACTS AND HOLDING

On June 3, 1994, Fay Allen (Allen) called 911 and said that her husband, Winston Bell (Bell), had set her on fire.<sup>14</sup> She also indicated to the police and paramedics who came to her rescue that her husband had thrown gasoline on her and set her on fire.<sup>15</sup> As a consequence, Allen suffered second and third degree burns over ninety-one percent of her body, which resulted in her death two weeks later.<sup>16</sup> Bell was charged with first degree murder.<sup>17</sup>

At trial, Bell claimed that his wife had attacked him, and that, after a struggle, she spilled gasoline on both of them and ignited it.<sup>18</sup> He maintained that he managed to extinguish himself and that he tried to extinguish Allen by pouring water on her and putting her in the shower.<sup>19</sup> However, the State presented forensic evidence to challenge Bell's story and to show that there was no struggle over the gas can, and that Allen extinguished the fire herself by getting into the shower and removing her clothes.<sup>20</sup> The State also introduced testimony from several witnesses of numerous previous incidents of Bell's prior abuse of Allen, and referred to such incidents as evidence of Bell's intent to kill Allen at the time of the June 3 incident.<sup>21</sup> The trial court convicted Bell of first-degree murder and sentenced him to death.<sup>22</sup> Bell appealed.<sup>23</sup>

The Missouri Supreme Court reversed the trial court's decision and remanded for a new trial.<sup>24</sup> The court held that the testimony pertaining to Bell's prior abuse of Allen constituted hearsay, which the trial court erroneously admitted under the state-of-mind exception.<sup>25</sup> The testimony could not fit under

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11. *State v. Bell*, 950 S.W.2d 482, 485-87 (Mo. 1997).

12. *Id.* at 485.

13. *Id.*

14. *Id.* at 482.

15. *Id.*

16. *Bell*, 950 S.W.2d at 482-83.

17. *Id.* at 482.

18. *Id.* at 483.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 485.

25. *Id.* at 482.

the state-of-mind exception because it did not refer to “a contemporaneous statement of fear, emotion, or any other mental condition.”<sup>26</sup> It was not a declaration of Allen’s state of mind, but a narration of past acts between her and Bell as reported by others.<sup>27</sup> The court concluded that the testimony greatly increased the severity of the reported abuse by raising the number of times Bell was alleged to have beaten her, and, consequently, prejudiced Bell’s defense.<sup>28</sup> Judge Limbaugh concurred in a separate opinion, in which Judges Price, Robertson, and Holstein joined.<sup>29</sup> The opinion argued for application of the residual exception to the hearsay rule under appropriate findings by the trial court.<sup>30</sup> Because, prior to *Bell*, the issue of the residual exception to the hearsay rule was not addressed by the Missouri Supreme Court, and because the authorities in other jurisdictions are split on this issue, this concurring opinion offers significant guidance for future cases attempting to apply the exception in Missouri.

### III. LEGAL BACKGROUND

To fully appreciate the concurring opinion in *Bell*, one must consider the meaning and the use of the residual exception to the hearsay rule in Missouri<sup>31</sup> and in other jurisdictions.<sup>32</sup> It is also important to appreciate the rationale behind the residual exception given by various courts,<sup>33</sup> and to acknowledge the difference in application of the exception in criminal as opposed to civil cases.<sup>34</sup> In criminal situations, some of the issues concerning the applicability of the exception may raise concerns of possible violation of the Confrontation Clause of the federal Constitution.<sup>35</sup>

#### *A. The Residual Hearsay Exception: Federal Rules of Evidence 803(24) and 804(b)(5)*

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,”<sup>36</sup> and specifically enumerate

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26. *Bell*, 950 S.W.2d at 484.

27. *Id.*

28. *Id.* at 484-85.

29. *Id.*

30. *Id.*

31. See *infra* Part III.B..

32. See *infra* Part III.A..

33. See *infra* notes 167-70 and accompanying text.

34. See Matthews, *supra* note 9, for a discussion of the importance of the residual exception in criminal cases.

35. See *infra* text accompanying notes 227-51.

36. FED. R. EVID. 801(c).

the instances in which such evidence may be admitted.<sup>37</sup> Disregarding the “nonhearsay” exceptions,<sup>38</sup> hearsay evidence is inadmissible unless it falls within one of the specifically enumerated exceptions in Rules 803 or 804.<sup>39</sup> Rule 803 lists twenty-three specific exceptions,<sup>40</sup> followed by the residual exception.<sup>41</sup> Rule 804 lists four exceptions and then concludes with the residual exception.<sup>42</sup> The key difference between the two rules is that Rule 804 requires the declarant to be unavailable to testify, and Rule 803(24) does not.<sup>43</sup> Otherwise, the language and purpose of both the residual exceptions are identical.<sup>44</sup>

The presence of the residual exceptions means that, even if hearsay is not admissible under one of the enumerated exceptions, it may be admissible under the residual exceptions, if certain conditions are met.<sup>45</sup> Both of the residual exceptions were designed for the peculiar cases in which clearly trustworthy hearsay evidence ought to be admitted, even though it does not fit within the already recognized exceptions.<sup>46</sup> These two exceptions overlap in the sense that both require the statement to: (1) be relevant; (2) have circumstantial guarantees of trustworthiness equivalent to the trustworthiness of the enumerated exceptions in Rules 803 and 804(b); (3) be more probative than any other evidence the proponent can offer through reasonable efforts; (4) serve the interest of justice; and (5) be preceded by a pre-trial notice to the opposing party.<sup>47</sup>

From the language and the legislative history of Rule 803(24), it appears that Congress intended hearsay evidence to be admitted under that rule only if the reliability of such evidence would equal or exceed the reliability of evidence admitted under the other exceptions.<sup>48</sup> Therefore, the residual exceptions clearly were designed to equip the courts with the flexibility to address unusual fact situations.<sup>49</sup>

As stated above, courts consider five requirements in order to establish the residual exception: trustworthiness, materiality, probativeness, satisfaction of the

37. FED. R. EVID. 803(1-23), 804(b)(1-4).

38. FED. R. EVID. 801(d)(1-2).

39. FED. R. EVID. 802.

40. FED. R. EVID. 803(3).

41. FED. R. EVID. 8(24).

42. FED. R. EVID. 804(b)(5).

43. See 11 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 803 (2d ed. 1982).

44. *Id.*

45. See FED. R. EVID. 803(24), 804(b)(5).

46. FED. R. EVID. 803(1-23), 804(b)(1-4).

47. FED. R. EVID. 803(24), 804(b)(5).

48. One of Congress' intents in adopting the residual exception was to avoid the distortion of the enumerated exceptions beyond the rational circumstances for which they were designed. See Sen. Comm. on the Judiciary, S.Rep. No. 1277, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 7051, 7065-66; MOORE, *supra* note 43.

49. 31A C.J.S. *Evidence* § 264 (1996).

interests of justice, and notice.<sup>50</sup> The first requirement frequently results in three distinct approaches to examining trustworthiness: (1) only from circumstances which surround the testimony; (2) through both surrounding circumstances and extrinsic corroboration; and (3) only through extrinsic corroboration.<sup>51</sup> The first approach considers exclusively the circumstances which surround the statement.<sup>52</sup> For example in *Karme v. Commissioner*,<sup>53</sup> the Ninth Circuit Court of Appeals admitted *Karme*'s bank records because, in the court's opinion, they satisfied the "circumstantial guarantees of trustworthiness" simply because they were bank records taken from a remotely located bank.<sup>54</sup> No corroboration was necessary to support their veracity.<sup>55</sup>

The second approach looks at both the circumstances which surround the testimony and the extrinsic factors.<sup>56</sup> For example, in *United States v. Van Lufkins*,<sup>57</sup> Van Lufkins was convicted of assault and claimed that the court erroneously admitted, as lacking "circumstantial guarantees of trustworthiness," hearsay statements which the victim made to an FBI agent and to the victim's sister.<sup>58</sup> The Eighth Circuit Court of Appeals found the statements trustworthy because they had been made directly after the incident and were corroborated by other FBI evidence.<sup>59</sup>

The third approach concentrates exclusively on the analysis of outside factors and ignores the circumstances surrounding the testimony.<sup>60</sup> For example, in *United States v. Barnes*,<sup>61</sup> Barnes was convicted of conspiracy to import and possess cocaine with intent to distribute.<sup>62</sup> The prosecution introduced the confession of Barnes' codefendant, which incriminated Barnes.<sup>63</sup> Barnes argued that the court erred when it did not give instructions to the jury that would limit such evidence only for impeachment.<sup>64</sup> The Fifth Circuit Court of Appeals found the evidence admissible and held that it satisfied the requirements of the

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50. See FED. R. EVID. 803(24), 804(b)(5); MOORE, *supra* note 43. All five factors were intended to be restraints on the power of judges to admit hearsay which would not fit into the enumerated exceptions. *Id.*

51. James E. Beaver, *The Residual Hearsay Exception Reconsidered*, 20 FLA. ST. U.L. REV. 787 (1993).

52. *Id.* at 796.

53. 673 F.2d 1062 (9th Cir. 1982).

54. *Id.* at 1065.

55. *Id.*

56. Beaver, *supra* note 51, at 796.

57. 676 F.2d 1189 (8th Cir. 1982).

58. *Id.* at 1191.

59. *Id.*

60. Beaver, *supra* note 51, at 796.

61. 586 F.2d 1052 (5th Cir. 1978).

62. *Id.* at 1054.

63. *Id.*

64. *Id.*

“circumstantial guarantees of trustworthiness,” because the declarant not only was available, but in fact testified at trial.<sup>65</sup>

The second and third requirements to establish the residual exception pertain to the statement’s materiality and probativeness.<sup>66</sup> These requirements usually are met when the facts to which the hearsay statement refers otherwise would be lost, or when evidence of the same value cannot be obtained from another source.<sup>67</sup> The fourth requirement pertains to the interest of justice and can be satisfied relatively easily.<sup>68</sup>

The fifth requirement is one of advance notice. According to the Federal Rules, notice needs to be made “sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare.”<sup>69</sup> However, the courts have not been consistent in finding sufficient notice.<sup>70</sup> Some have adhered to the requirement literally, expecting notice before trial,<sup>71</sup> while others accept notice after the trial has begun.<sup>72</sup>

Despite the detailed consideration given by some courts to the above mentioned elements, the courts’ usual analysis of the residual exception concentrates on two basic elements: (1) the trustworthiness of hearsay; and (2) its necessity.<sup>73</sup> The inquiry pertaining to the trustworthiness prong focuses on the numerous factors supporting reliability of the testimony. For example, such factors may be: (a) the probable motivation of the declarant in making the statement; (b) the surrounding circumstances under which the statement was made; and (c) the knowledge and qualifications of the declarant.<sup>74</sup> The

65. *Id.* at 1055.

66. Beaver, *supra* note 51, at 796.

67. Noble v. Alabama Dep’t of Env’tl. Management, 872 F.2d 361, 366 (11th Cir. 1989). See also 2 MCCORMICK ON EVIDENCE, § 324, at 365-66 (4th ed. 1992); 31A C.J.S. Evidence § 264 (1996).

68. United States v. Woolbright, 831 F.2d 1390, 1396-97 (8th Cir. 1987). See also Cook v. Hoppin, 783 F.2d 684, 690-91 (7th Cir. 1986).

69. FED. R. EVID. 803(24).

70. Beaver, *supra* note 51, at 798.

71. Beaver, *supra* note 51, at 798 (citing Wilander v. McDermott Int’l, Inc., 887 F.2d 88, 92 (5th Cir. 1989); United States v. Wilkus, 875 F.2d 649, 655 (7th Cir. 1989); United States v. Cowley, 720 F.2d 1037, 1045 (9th Cir. 1983); Johnson v. William C. Ellis & Sons Iron Works, Inc., 609 F.2d 820, 823 (5th Cir. 1980); United States v. Ruffin, 575 F.2d 346, 358 (2d Cir. 1978); United States v. Oates, 560 F.2d 45, 72 n.30 (2d Cir. 1977)).

72. Beaver, *supra* note 51, at 798 (citing United States v. Panzardi-Lespier, 918 F.2d 313, 317 (1st Cir. 1990); United States v. Calkins, 906 F.2d 1240, 1245 (8th Cir. 1990); Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1553 (9th Cir. 1989); United States v. Chapman, 866 F.2d 1326, 1332 (11th Cir. 1989); United States v. Doe, 860 F.2d 488, 492 (1st Cir. 1988); United States v. Bailey, 581 F.2d 341, 348 (3d Cir. 1978); United States v. Iaconetti, 540 F.2d 574 (2d Cir. 1976)).

73. See *supra* note 50 and accompanying text.

74. Jay M. Zitter, Annotation, *Residual Hearsay Exception Where Declarant*

trustworthiness prong usually is satisfied when the courts find that the testimony was made with "circumstantial guarantees of trustworthiness."<sup>75</sup> For example, in *United States v. Iaconetti*,<sup>76</sup> Iaconetti was found guilty of soliciting and accepting a bribe and of attempting to extort money from a government supplier.<sup>77</sup> His testimony and the supplier's testimony were contradictory regarding who offered and who requested a bribe.<sup>78</sup> Iaconetti challenged the testimony of witnesses who stated that the supplier had told them about the bribe request immediately after Iaconetti had made it.<sup>79</sup> The court concluded that such hearsay testimony was both reliable and necessary because it was made with circumstantial guarantees of trustworthiness. The statement was made immediately after the event, to the appropriate persons, and by a declarant who was available for cross-examination.<sup>80</sup> The evidence was relevant, non-prejudicial and admissible under the residual exception.<sup>81</sup>

In *State v. Sharpe*,<sup>82</sup> Sharpe was convicted of attempted murder and assault.<sup>83</sup> On the morning of the crime, a victim's neighbor saw two men in a car near the victim's house.<sup>84</sup> Since it was strange for the car to be parked there at about 6:30 a.m., the neighbor wrote down its license number. When he later learned about the crime, the neighbor reported the number and the description of the car to the police.<sup>85</sup> Sharpe objected, claiming that such hearsay evidence did not fall under any of the hearsay exceptions.<sup>86</sup> The Connecticut Court of Appeals agreed that the evidence indeed did not satisfy any of the traditional exceptions, but it admitted the evidence under a residual exception similar to the exceptions found in the Federal Rules of Evidence.<sup>87</sup> The court decided that the necessity requirement was satisfied, because the same evidence could not have been obtained from other sources.<sup>88</sup>

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*Unavailable: Uniform Evidence Rule 804(b)(5), 75 A.L.R.4th 199, 200-02 (1990).*

75. Zitter, *supra* note 74, at 200-02.

76. 406 F. Supp. 554, 559 (E.D.N.Y. 1976). See also MCCORMICK, *supra* note 67, at 362-65; 29 AM. JUR. 2D, *Evidence* § 685 (1994); *F.T.C. v. Figgie Int'l, Inc.*, 994 F.2d 595, 608 (9th Cir. 1993).

77. *Iaconetti*, 540 F.2d at 559.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. 491 A.2d 345 (Conn. 1985).

83. *Id.*

84. *Id.* at 353-54.

85. *Id.*

86. *Id.*

87. *Sharpe*, 491 A.2d at 355.

88. *Id.*



*B. The Residual Hearsay Exception:  
Missouri Evidence Law*

The Missouri evidentiary rules have developed through caselaw and various statutes.<sup>89</sup> Missouri has not expressly adopted a residual exception analogous to the exceptions found in Federal Rules 803(24) and 804(b)(5).<sup>90</sup> However, some permutations of the Rule 803(24) exception have been addressed in a few cases.<sup>91</sup> The residual exception comparable to Rule 804(b)(5) has not been recognized in Missouri at all.<sup>92</sup> Consequently, interpretations of the residual exception are very scarce and they come almost exclusively from child abuse cases.<sup>93</sup> Also, until *Bell* there were no pronouncements regarding the residual exception by the Missouri Supreme Court.

### 1. Missouri Case Law

There are five Missouri non-child abuse cases decided by the Missouri Court of Appeals dealing with some permutation of the residual exception.<sup>94</sup> In *Liberty Financial Management Co., v. Beneficial Data Processing Co.*,<sup>95</sup> the issue concerned hearsay information generated by a survey of company employees pertaining to their time spent on computers.<sup>96</sup> The court of appeals concluded that the fact that the evidence was hearsay did not “automatically mandat[e its] exclusion from the consideration of the trier of fact.”<sup>97</sup> The court stated:

89. See *State v. Luster*, 750 S.W.2d 474 (Mo. Ct. App. 1988); *State v. Boliek*, 706 S.W.2d 847 (Mo. 1986).

90. FED. R. EVID. 803(24); 804(b)(5).

91. These cases may be divided into child abuse and non-child abuse cases. The former are: *Moore v. Director of Revenue*, 811 S.W.2d 848 (Mo. Ct. App. 1991); *State v. Parker*, 817 S.W.2d 920 (Mo. Ct. App. 1991); *Nickels v. Nickels*, 817 S.W.2d 632 (Mo. Ct. App. 1991); *Albers v. Hemphill Contracting Co.*, 740 S.W.2d 660 (Mo. Ct. App. 1987); *Liberty Fin. Management Corp., v. Beneficial Data Processing Corp.*, 670 S.W.2d 40 (Mo. Ct. App. 1984).

The latter are: *K.J.B. v C.A.B.*, 883 S.W.2d 117 (Mo. Ct. App. 1994); *State v. Daugherty*, 823 S.W.2d 33 (Mo. Ct. App. 1991); *D.L.H. v. H.T.H.*, 780 S.W.2d 104 (Mo. Ct. App. 1989); *Hord v. Morgan*, 769 S.W.2d 443 (Mo. Ct. App. 1989); *In re W.J.D.*, 756 S.W.2d 191 (Mo. Ct. App. 1988); *In re S.M. v. M.W.S.M.*, 750 S.W.2d 650 (Mo. Ct. App. 1988); *In re Marriage of P.K.A. v. J.E.A.*, 725 S.W.2d 78 (Mo. Ct. App. 1987).

92. See *infra* notes 115-16, 169.

93. FED. R. EVID. 803(24); 804(b)(5).

94. FED. R. EVID. 803(24); 804(b)(5).

95. 670 S.W.2d 40 (Mo. Ct. App. 1984).

96. *Id.* at 53-54.

97. *Id.* at 53.

[W]e address the question whether the trial court erred in admitting into evidence the results of the survey and the expert opinion drawn from those results. The parties have cited us to no conclusive Missouri authority on the point, and our own research has yielded none. We are persuaded, however, by *common sense and reason* that it is proper to allow into evidence surveys which meet fundamental requirements of necessity and trustworthiness for the purpose of providing the foundation for an expert opinion such as that elicited here.<sup>98</sup>

Similarly, in *Albers v. Hemphill Contracting Co.*,<sup>99</sup> the court of appeals regarded an audit summary concerning the company's business records as "trustworthy, necessary and properly accepted" to be the basis for the expert testimony.<sup>100</sup>

In two other cases, *Moore v. Director of Revenue*,<sup>101</sup> and *State v. Parker*,<sup>102</sup> the courts dealt with the issue of admissibility of blood test results. In *Moore*, the defendant's driving privileges were suspended after he had been arrested for driving while intoxicated.<sup>103</sup> He objected to the results of the blood test, claiming that the test was improperly administered and rendered incompetent evidence.<sup>104</sup> He argued that the phlebotomist who used a prepackaged, unopened needle and vacuum tube, which were labeled as "sterile," did not otherwise prove that they were in fact sterile.<sup>105</sup> The court held that the facts as presented by the hospital and by the phlebotomist, were sufficient to establish a "circumstantial probability of trustworthiness," and the evidence was competent.<sup>106</sup> The court relied heavily on the evidence concerning statements on the label and packaging, as to the content and condition of the needle and the tube,<sup>107</sup> but in considering trustworthiness of the packaged and labeled equipment, the court also took into account the consequences of questioning such evidence. It stated that if it held otherwise:

[A]n array of witnesses would be required to establish qualitative analyses of substances as well as production control and packaging in order for the items to be admissible in evidence. At best, but for admitting labels as evidence of the identity and condition of items, gross inconvenience would occur. At worst, items requiring such testimony would, in all practicality, not be

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98. *Id.* at 54 (emphasis added).

99. 740 S.W.2d 660 (Mo. Ct. App. 1987).

100. *Id.* at 663.

101. 811 S.W.2d 848 (Mo. Ct. App. 1991).

102. 817 S.W.2d 920 (Mo. Ct. App. 1991).

103. *Moore*, 811 S.W.2d at 848.

104. *Id.*

105. *Id.* at 850.

106. *Id.*

107. *Id.* at 851-52. At one point, the court even referred to such evidence as "non-people" evidence. *Id.*

admissible because of the difficulty or impossibility of securing the presence of witnesses.<sup>108</sup>

The court concluded that the facts supported the admission of such evidence as “sufficiently reliable and trustworthy on their face to be considered an exception to the hearsay rule.”<sup>109</sup>

In contrast, in *State v. Parker*,<sup>110</sup> the results of a blood test were deemed inadmissible because the evidence, as to whether the needle and vessel used to draw the blood were sterile and unused, came entirely from the testimony of a police officer and a blood specialist.<sup>111</sup> The court of appeals failed to find “circumstantial probability of trustworthiness” concerning such evidence.<sup>112</sup>

In the fifth Missouri non-child abuse case addressing the residual exception issue, *Nickels v. Nickels*,<sup>113</sup> the subject matter concerned tax returns. The court of appeals found the defendant’s hearsay evidence to be inadmissible.<sup>114</sup> It held that although the evidence might, arguably, fall under the “omnibus” (residual) exception, the court had to reject it because, as the court stated, “[T]his state has adopted no similar rule as contained in the Federal Rules of Evidence. . . . We find no Missouri case which specifically discusses the ‘omnibus exception.’”<sup>115</sup> Also, the court found “no language in Liberty which leads us to conclude that Missouri has adopted the ‘omnibus exception’ to the hearsay rule. Rather, we view Liberty as standing for the proposition that an expert witness may rely on hearsay evidence . . . in forming a basis for his opinion.”<sup>116</sup>

In addition to the above cases in the courts of appeals, the Missouri Supreme Court spoke on the general issue of hearsay exceptions in *Bynote v. National Super Markets, Inc.*<sup>117</sup> It stated that, in general, hearsay statements are excluded by the Missouri courts because they are not subject to cross-examination, presented under oath, or “subject to the fact finder’s ability to judge demeanor at the time the statement is made.”<sup>118</sup> However, the exceptions to the hearsay rule may apply when the “circumstances conspire to assure the trustworthiness of the declarant’s statement.”<sup>119</sup>

Since the mid-1980s, a trend has developed in Missouri statutory and case law toward increased flexibility in admission of statements made by a child to

108. *Id.*

109. *Id.*

110. 817 S.W.2d 920 (Mo. Ct. App. 1991).

111. *Id.* at 921.

112. *Id.*

113. 817 S.W.2d 632 (Mo. Ct. App. 1991).

114. *Id.* at 639-40.

115. *Id.* (emphasis added).

116. *Id.*

117. 891 S.W.2d 117 (Mo. 1995).

118. *Id.* at 120.

119. *Id.*

others, especially in child abuse cases.<sup>120</sup> The rationale for admitting such statements, even though they would be hearsay, was well explained in *In re Marriage of P.K.A. v. J.E.A.*<sup>121</sup> There, a father argued that his child's statements made to the child's mother and the child's psychologist, which indicated that the father had sexually abused the child, were inadmissible hearsay.<sup>122</sup> The court of appeals created a special hearsay exception designed to admit such statements in a case of necessity.<sup>123</sup> It stated:

Where the best interest of the child is the primary concern, we believe that the courts should consider those statements for their truth . . . This type of abuse would not often occur in the presence of persons competent to testify. Where there is a substantial basis to believe that the statements of the child are true, courts are justified in hearing and considering them to prevent further or potential abuse to a child. . . . Flexibility is needed in these cases, even where the child might be qualified to testify, because of the emotional trauma that such an experience may cause. It is desirable to avoid the necessity of forcing a young child to testify as to abuse, particularly when the abuser is the victim's parent. This exception should support efforts to prevent child abuse. It is to be used only where abuse may have occurred, or has been threatened, and the child might not be competent or reasonably expected to testify to it.<sup>124</sup>

In another case involving the special exception, *In re S.M. v. M.W.S.M.*,<sup>125</sup> a father challenged as inadmissible his son's statements made to several witnesses, that the father sexually abused him.<sup>126</sup> The court of appeals took into consideration both the *P.K.A.* exception,<sup>127</sup> and the public policy of the state pertaining to sexual abuse, as clearly reflected in the Missouri statutes,<sup>128</sup> and held that the statements were properly admitted.<sup>129</sup> The same result was reached in *In re W.J.D. & H.R.D.*,<sup>130</sup> where the court of appeals was persuaded to admit the statements made by two sexually abused girls because their father not only failed to object to the girls' testimony, but himself injected the girls' statements by putting their psychologist on the stand.<sup>131</sup>

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120. *See supra* note 93.

121. 725 S.W.2d 78 (Mo. Ct. App. 1987).

122. *Id.* at 80.

123. *Id.*

124. *Id.* at 81.

125. 750 S.W.2d 650 (Mo. Ct. App. 1988).

126. *Id.* at 653-55.

127. *Id.* at 653.

128. *Id.*

129. *Id.* at 655.

130. 756 S.W.2d 191 (Mo. Ct. App. 1988).

131. *Id.* at 196.

The *P.K.A.* exception<sup>132</sup> was expanded in *Hord v. Morgan*.<sup>133</sup> There, a father challenged the admissibility of testimony concerning his son's statements made to the mother's friend, that the father physically and emotionally abused him.<sup>134</sup> The court of appeals followed the holding in *P.K.A.*<sup>135</sup> and reasoned that the *P.K.A.* exception to the hearsay rule in sexual abuse, civil, non-jury cases also should apply to situations of physical and emotional abuse. The court stated that "[t]he goal of the exception is to prevent child abuse and to attempt to alleviate the consequent trauma that a child may experience through testifying."<sup>136</sup>

In another case considering the *P.K.A.* exception, *D.L.H. v. H.T.H.*,<sup>137</sup> a mother challenged the trial court's decision declining to admit testimony of a therapist who examined her son after the mother had found him engaging in a sexually inappropriate activity.<sup>138</sup> Although the court of appeals agreed with the mother and found the trial court decision erroneous, it held that the refusal to admit the testimony was not prejudicial.<sup>139</sup>

Finally, in *State v. Daugherty*,<sup>140</sup> the court of appeals also acknowledged the *P.K.A.*<sup>141</sup> exception, but because the child testified, it did not find necessity for its application.<sup>142</sup>

One of the most recent non-jury child abuse cases concerning a hearsay exception was *K.J.B. v. C.A.B.*<sup>143</sup> There, the trial court allowed hearsay testimony from both parents concerning their son's relationships with other family members,<sup>144</sup> and gave the defendant, the father, an opportunity to extensively cross-examine witnesses who testified about the son's statements.<sup>145</sup> The court of appeals did not find improper reliance on the hearsay evidence by the trial court and sustained its judgment.<sup>146</sup>

132. *See supra* text accompanying notes 121-24.

133. 769 S.W.2d 443 (Mo. Ct. App. 1989).

134. *Id.* at 447.

135. *Id.*

136. *Id.*

137. 780 S.W.2d 104 (Mo. Ct. App. 1989).

138. *Id.* at 104.

139. *Id.* at 106.

140. 823 S.W.2d 33 (Mo. Ct. App. 1991).

141. *Id.* at 36.

142. *Id.*

143. 883 S.W.2d 117 (Mo. Ct. App. 1994).

144. *Id.* at 120.

145. *Id.*

146. *Id.*

## 2. Missouri Statutes

The Missouri General Assembly has codified the law of admission of the following out-of-court statements of a child victim: (1) statements pertaining to the occurrence of particular crimes; (2) statements concerning other sexual abuse; and (3) statements indicating physical or emotional abuse. First, Section 491.075<sup>147</sup> controls admissibility of statements made by a child under twelve years of age relating to offenses falling under Chapters 565,<sup>148</sup> 566,<sup>149</sup> or 568,<sup>150</sup> which otherwise would be inadmissible either under statute or under court rule.<sup>151</sup> Such statements are deemed admissible "as substantive evidence to prove the truth of the matter asserted."<sup>152</sup> Such statements are admissible under Section 491.075, provided that the time, the content, and the circumstances of the statement meet "sufficient indicia of reliability," and the child either: (1) testifies at the proceeding; (2) is unavailable as a witness; or (3) is physically available but the court finds that "significant emotional or psychological trauma" would result from testifying in the presence of the defendant.<sup>153</sup>

Second, Section 492.304<sup>154</sup> controls admissibility of a visual or aural recording of the statement made by a child under twelve years of age and concerning crimes which fall under Chapters 565, 566, and 568,<sup>155</sup> regardless of whether the child is available to testify.<sup>156</sup>

Third, like Section 492.304,<sup>157</sup> Section 491.680<sup>158</sup> controls admission of visual evidence regarding children under the age of seventeen when the court finds that the child would suffer such significant trauma from testifying in the presence of the defendant, that the child is deemed unavailable as a witness.<sup>159</sup> Finally, under Section 491.075.1,<sup>160</sup> the court may admit a reliable out-of-court statement by a child under the age of twelve, who witnessed an offense

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147. MO. REV. STAT. § 491.075 (1994).

148. MO. REV. STAT. §§ 565.001-565.257 (1994 & Supp. 1997) (offenses against the person).

149. MO. REV. STAT. §§ 566.010-566.625 (1994 & Supp. 1997) (sexual offenses).

150. MO. REV. STAT. §§ 568.010-568.175 (1994 & Supp. 1997) (offenses against the family).

151. MO. REV. STAT. § 491.075 (1994).

152. MO. REV. STAT. § 491.075 (1994).

153. MO. REV. STAT. § 491.075 (1994). *See also* State v. Redman, 916 S.W.2d 787 (Mo. 1996); State v. Silvey, 894 S.W.2d 662 (Mo. 1995).

154. MO. REV. STAT. § 492.304 (1994).

155. *See supra* notes 148-51.

156. MO. REV. STAT. § 492.304 (1994). *See also* State v. Schaal, 806 S.W.2d 659 (Mo. 1991); State v. Crossland, 820 S.W.2d 72 (Mo. Ct. App. 1991).

157. MO. REV. STAT. § 492.304 (1994).

158. MO. REV. STAT. § 491.680 (1994).

159. MO. REV. STAT. § 491.680 (1994).

160. MO. REV. STAT. § 491.075.1 (1994).

chargeable under Chapters 565, 566, and 568.<sup>161</sup> Section 491.075.1 applies when the crime is “performed with or on a child by another” and: (1) the child testifies; (2) the child is unavailable; or (3) the court finds that a significant emotional or psychological trauma would result from testifying in the presence of the defendant.<sup>162</sup>

### 3. The State of the Residual Hearsay Exception Before *Bell*

In addition to the above statutory provisions and the *P.K.A.*-type exception designed for civil, non-jury proceedings involving issues of possible sexual child abuse,<sup>163</sup> Missouri case law allows for an additional exception to the rule that the evidence of “prior, unsworn, extrajudicial complaints . . . outside the *res gestae*” is ordinarily inadmissible hearsay,<sup>164</sup> in prosecutions involving cases of rape<sup>165</sup> and other sex crimes.<sup>166</sup>

The above discussion reveals that the residual hearsay exception has been imprecisely defined by the Missouri courts.<sup>167</sup> The most comprehensive explanation of the exception, and probably the most accurate determination of its uncertain status in Missouri was given by the court of appeals in *Nickels v. Nickels*.<sup>168</sup> The court clearly rejected the defendant’s arguments that the exception had been recognized in this state.<sup>169</sup> Some of the other courts felt uneasy about denominating the exceptions which they applied as residual, and referred to them as “special.” Such courts usually based their application of the exception on the notion of *necessity to receive the hearsay statements* “for their truth,”<sup>170</sup> or applied the exception when they found that the statements met the “circumstantial probability of trustworthiness.”

In addition, two secondary authorities on Missouri law of evidence offer interpretations of the residual exception. *Missouri Evidence Restated*<sup>171</sup> defines the exception as “[a] statement having circumstantial guarantees of trustworthiness, where, in the interest of justice, the court deems admission is a

161. *See supra* notes 148-51.

162. MO. REV. STAT. § 491.075.1 (1994). *See also* State v. Foote, 791 S.W.2d 879 (Mo. Ct. App. 1990).

163. *See supra* text accompanying notes 121-24 and 147-62.

164. *See* State v. Richardson, 163 S.W.2d 956 (1942).

165. *Id.* at 960.

166. *See* State v. Smith, 540 S.W.2d 189 (Mo. Ct. App. 1976).

167. *See supra* notes 90-93 and accompanying text.

168. 817 S.W.2d 632 (Mo. Ct. App. 1991).

169. *Id.* at 637-40.

170. These are the child abuse cases in which this language resembled the statutory language.

171. MISSOURI EVIDENCE RESTATED (2d ed. 1993).

necessity.”<sup>172</sup> *Missouri Evidence*<sup>173</sup> states more generally that “[a] declaration not specifically covered by any formally classified exception but which has equivalent circumstantial guarantees of trustworthiness is admissible if the interests of justice will be served by its admission, and if the statement is more probative than any other reasonably available evidence of the same matter.”<sup>174</sup>

It is uncertain whether the Missouri courts will remain satisfied with the two-prong, necessity-trustworthiness test; or embrace more comprehensive examination of the elements of the exemption.

#### IV. INSTANT DECISION

The *Bell*<sup>175</sup> court began its analysis by focusing on the arguments justifying the admission, under the state-of-mind exception to the hearsay rule, of evidence concerning Allen’s statements to third persons of prior abuse by Bell.<sup>176</sup> The state argued for admission of the testimony based on the present state-of-mind exception to the hearsay rule.<sup>177</sup> The court acknowledged that, in general, statements of the declarant’s present mental condition, made out of court, are excepted from the hearsay rule, and may be admissible, provided that their relevance is greater than their prejudicial impact.<sup>178</sup> By contrast, statements merely reciting past events are barred.<sup>179</sup> The court stated that such bar stems from the logic expressed by the U.S. Supreme Court in *Shepard v. United States*,<sup>180</sup> in which declarations of memory reciting past events were prohibited, but declarations of future intention were allowed.<sup>181</sup> The court acknowledged that such distinction is recognized by the Missouri courts as well.<sup>182</sup>

The court concluded that the testimony which referred to Allen’s statements neither reported her contemporaneous statements of emotion nor her current thoughts, feelings, or intentions.<sup>183</sup> The statements were, then, pure narration of

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172. MISSOURI EVIDENCE RESTATED, *supra* note 171, § 803(24).

173. I MISSOURI EVIDENCE (4th ed. 1993).

174. I MISSOURI EVIDENCE, *supra* note 173, § 8.29.

175. *State v. Bell*, 950 S.W.2d 482, 483 (Mo. 1997).

176. *Id.*

177. *Id.*

178. *Id.* See *State v. Boliek*, 706 S.W.2d 847, 850 (Mo. 1986); *State v. Ford*, 639 S.W.2d 573, 575 (Mo. 1982); *State v. Benson*, 142 S.W.2d 52, 54 (Mo. 1940); *State v. Pagano*, 882 S.W.2d 326, 336 (Mo. Ct. App. 1994); *State v. Singh*, 586 S.W.2d 410, 417 (Mo. Ct. App. 1979); *State v. Randolph*, 698 S.W.2d 535, 539 (Mo. Ct. App. 1985); *State v. Miller*, 664 S.W.2d 229, 231 (Mo. Ct. App. 1983); *Shepard v. United States*, 290 U.S. 96, 106 (1933).

179. *Bell*, 950 S.W.2d at 484.

180. 290 U.S. 96 (1933).

181. *Bell*, 950 S.W.2d at 484.

182. *Bell*, 950 S.W.2d at 484 n.8 (citing *State v. Benson*, 142 S.W.2d at 54 (Mo. 1940)).

183. *Id.* at 484.



past events.<sup>184</sup> Thus, the statements did not fit the exception and constituted inadmissible hearsay.<sup>185</sup> The court determined that the trial court abused its discretion by permitting such hearsay evidence to be presented to the jury.<sup>186</sup>

Next, the court turned to the issue of prejudice.<sup>187</sup> It indicated that according to Missouri law, when the trial court abused its discretion, reversal would follow only when such abuse had prejudiced the defendant.<sup>188</sup> The court noted that prejudice occurs when a reasonable probability exists that, but for the abuse, the verdict would have been different.<sup>189</sup> Then, the court analyzed the trial records and found a substantial imbalance between the scarcity of the state's evidence to prove Bell's intent to kill Allen, including his deliberation before setting her on fire, and the abundance of the state's evidence of his prior abuse.<sup>190</sup> Therefore, the court determined that frequent use by the state of the testimony revealing Bell's previous abuse<sup>191</sup> was supposed to overshadow its lack of evidence that Bell intended to kill Allen on June 3d.<sup>192</sup> Given such imbalance, there was a reasonable probability that the outcome of the trial would have been different if the hearsay evidence had been excluded.<sup>193</sup> Consequently, since there was a reasonable probability of prejudice at the trial,<sup>194</sup> the court reversed the trial court's decision and remanded for a new trial.<sup>195</sup>

### *A. Concurring Opinion*

Judge Limbaugh wrote a concurring opinion in which Judges Price, Robertson and Holstein joined.<sup>196</sup> Judge Limbaugh focused on the residual exception to the hearsay rule and argued for its adoption by the Missouri courts.<sup>197</sup> Judge Limbaugh began by expressing his dissatisfaction with the unjust result generated by the holding of the case.<sup>198</sup> First, he was troubled that otherwise probative and trustworthy evidence was inadmissible under the state-of-mind exception, and argued for adoption of the residual exception in the state.<sup>199</sup> Then, he recognized two elements of the residual exception: (1) the

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184. *Id.* at 484-85.

185. *Id.*

186. *Id.* at 484.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 484-85.

191. *Bell*, 950 S.W.2d at 485.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 485.

199. *Bell*, 950 S.W.2d at 485.

necessity of admitting otherwise inadmissible hearsay; and (2) the presence of factors which support trustworthiness of such hearsay.<sup>200</sup> He concluded that necessity would demand of the evidence that it concern a material fact, and be of such probative value that would otherwise be unattainable by the party seeking to introduce it.<sup>201</sup> Trustworthiness, in turn, would demand factors which bolster the reliability of the proposed hearsay,<sup>202</sup> including “the motivation for speaking truthfully, the timing of the statement, the basis of the declarant’s knowledge, the spontaneity of the statement, and the circumstances surrounding the statement.”<sup>203</sup>

Subsequently, Judge Limbaugh remarked upon the inherent limitations of the traditional hearsay exceptions.<sup>204</sup> He noted that the exceptions were designed to cover specific circumstances in which the evidence was anticipated to be trustworthy but they could not include all possible circumstances of such trustworthiness.<sup>205</sup> Therefore, the residual exception was introduced to compensate for that limitation and allow courts to consider hearsay evidence which would otherwise be inadmissible under the traditional exceptions.<sup>206</sup> Then, Judge Limbaugh explained the grounds upon which possible adoption of the residual hearsay exception by the Missouri courts might be based. First, he focused on the issue of trustworthiness<sup>207</sup> and pointed to *Bynote*<sup>208</sup> for direction regarding when the exceptions to the hearsay rule might apply in Missouri.<sup>209</sup> Next, he looked to the Missouri Court of Appeals’ occasional admission of hearsay for which none of the established exceptions applied,<sup>210</sup> and found that, especially in many child abuse cases,<sup>211</sup> such otherwise inadmissible hearsay was admitted because the courts were persuaded by the “circumstantial probability of trustworthiness,” or because the statements “spoke for their truth.”<sup>212</sup> Judge Limbaugh concluded that acceptance of the residual hearsay exception in Missouri on the grounds of trustworthiness would be “consistent with the underlying purpose of Missouri’s traditional and conventional hearsay

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200. *Id.* at 486.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* (citing FED. R. EVID. 803(24) (advisory committee’s note); 31A C.J.S. *Evidence* § 264 (1996); *Nowell v. Universal Elec. Co.*, 792 F.2d 1310, 1314 (5th Cir.), *cert. denied*, 479 U.S. 987 (1986)).

207. *Id.*

208. 891 S.W.2d 117, 120 (Mo. 1995).

209. *Bell*, 950 S.W.2d at 486.

210. *Id.* (citing *Moore v. Director of Revenue*, 811 S.W.2d 848, 852 (Mo. Ct. App. 1991); *State v. Parker*, 817 S.W.2d 920, 921 (Mo. Ct. App. 1991)).

211. *Id.*

212. The phrase commonly used in child abuse cases.

exceptions.”<sup>213</sup> He also indicated that such acceptance would constitute a reasonable solution to the dilemma courts face when they look for an exception to admit the trustworthy hearsay not covered by any other exception.<sup>214</sup>

Then, Judge Limbaugh argued how application of the exception arguably would necessitate reaching a different result in the instant case.<sup>215</sup> He referred to the issues of materiality and of probative value generated by the evidence concerning Bell’s prior abuse of Allen,<sup>216</sup> and stated that, by using that evidence, the state was able to convincingly weaken Bell’s defense of accident.<sup>217</sup> He further elaborated on the issue of reliability and trustworthiness of that evidence, concluding that it “met all the requirements of the residual hearsay exception, and had the trial court the benefit of the exception, the evidence would have properly been admitted.”<sup>218</sup> Nonetheless, Judge Limbaugh refrained from invoking the exception in the instant case because the trial court was a more appropriate place to determine issues of “materiality, probative value, reliability, and trustworthiness” of the evidence.<sup>219</sup> He concluded that it should be within the trial court’s discretion to admit or to refuse hearsay evidence under the residual exception.<sup>220</sup>

Finally, having exculpated the state for not arguing for application of the residual exception,<sup>221</sup> Judge Limbaugh agreed that it would, indeed, be erroneous to expand the state-of-mind exception to include the evidence which was clearly beyond its scope.<sup>222</sup>

## V. COMMENT

The residual exception to the hearsay rule was designed to admit various evidence. However, the residual exception is controversial.<sup>223</sup> The criticisms

213. *Bell*, 950 S.W.2d at 486.

214. *Id.* at 486-87.

215. *Id.* at 487.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Bell*, 950 S.W.2d at 486 (citing 29 AM. JUR. 2D *Evidence* § 702 (1994)).

221. *Id.*

222. *Id.*

223. For criticisms of the exception, see Beaver, *supra* note 51; Myrna S. Raeder, *The Effect Of The Catchalls On Criminal Defendants: Little Red Riding Hood Meets The Hearsay Wolf And Is Devoured*, 25 LOY. L.A. L. REV. 925 (1992). For a more sympathetic analysis of the exception, see Zitter, *supra* note 74; Matthews, *supra* note 9; Joseph W. Rand, Note, *The Residual Exceptions To The Federal Hearsay Rule: The Futile and Misguided Attempt To Restrain Judicial Discretion*, 80 GEO. L.J. 873 (1992); John Norman Scott, *Michigan Catches Up To The “Catch-Alls”: How Much Hearsay Will They Catch?*, 14 T.M. COOLEY L. REV. 1 (1997).

concerning it are of general and specific nature.<sup>224</sup> The general criticisms refer to the threats the exception represents to federal and state constitutional provisions, namely the defendant's right to confront witnesses under the Sixth Amendment.<sup>225</sup> The specific criticisms refer to possible abuses of the various elements of the exception by the courts during the process of their application.<sup>226</sup>

The most likely constitutional controversy that may be triggered by application of the residual exception can best be illustrated by the Congressional debate concerning the exception.<sup>227</sup> The debate focused on the issues pertaining to the Fifth and Sixth Amendments.<sup>228</sup> Representative Holtzman, who opposed adoption of the residual exception<sup>229</sup> stated that the exception:

basically abolishes the rules against hearsay and leaves it to the discretion of every judge to let in any kind of hearsay that he wants. This is true for criminal as well as civil cases. One of the basic assumptions in our system of jurisprudence is that the defendant in criminal trials has the right to confront his accuser. To abolish all prohibitions against hearsay really abridges our concept of a fair trial, aside from creating some Sixth Amendment problems.<sup>230</sup>

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>231</sup> As interpreted, the clause does not forbid the admission of hearsay statements against a criminal defendant.<sup>232</sup> In 1970, the United States Supreme Court distinguished between the prohibition of hearsay statements based on the Confrontation Clause and prohibition of such statements based on the hearsay rules.<sup>233</sup> A decade later, in *Ohio v. Roberts*,<sup>234</sup> the United States Supreme Court did not accept the view that the Confrontation Clause would bar use of any out-of-court statement when the declarant was unavailable.<sup>235</sup> The Court held that the Sixth Amendment established a rule of necessity, which demanded that the prosecutor either produce the declarant whose testimony is to be used against the defendant or demonstrate that such

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224. See generally Beaver, *supra* note 51.

225. See generally Beaver, *supra* note 51, at 806-11.

226. See generally Beaver, *supra* note 51, at 806-11.

227. See Raeder, *supra* note 223, at 925 (discussing the debates).

228. *Id.*

229. *Id.* (referring to FED. R. EVID. 804(b)(5)).

230. See Raeder, *supra* note 223, at 925 (discussing the debates).

231. U.S. CONST. amend.VI.

232. *Mattox v. United States*, 156 U.S. 237, 243 (1895). See also *Pointer v. Texas*, 380 U.S. 400, 407 (1965).

233. *California v. Green*, 399 U.S. 149, 155-56 (1970).

234. 448 U.S. 56 (1980).

235. *Id.* at 64.

declarant is unavailable.<sup>236</sup> Once unavailability of the declarant is demonstrated, the declarant's statement would be available only if "it bears adequate indicia of reliability."<sup>237</sup> While the reliability can be accepted without additional requirements in cases in which the evidence falls within firmly established hearsay exceptions, such reliability in other cases requires "a showing of particularized guarantees of trustworthiness."<sup>238</sup>

Similarly, in *Lee v. Illinois*,<sup>239</sup> the United States Supreme Court held, "[E]ven if certain hearsay evidence does not fall within 'a firmly rooted hearsay exception' and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness.'"<sup>240</sup>

In 1990, the United States Supreme Court faced the residual exception issue in *Idaho v. Wright*.<sup>241</sup> There, Wright and Giles were convicted in a state court of two counts of lewd conduct with Wright's two young daughters.<sup>242</sup> The issue was whether the incriminating statement that one of the children had made to a doctor satisfied the standard of "particularized guarantees of trustworthiness."<sup>243</sup> The doctor failed to videotape the interview, employed leading questions, and approached the interview with a preconceived notion of what the child was likely to say.<sup>244</sup> Since the Idaho residual hearsay exception under which the challenged statements were admitted, was not one of the firmly rooted hearsay exceptions, the evidence was presumptively unreliable and inadmissible for Confrontation Clause purposes.<sup>245</sup> The Court agreed with the prosecution that particularized guarantees of trustworthiness must be shown from the totality of the circumstances, but it limited the relevant circumstances to only those which "surround the making of the statement and that render the declarant particularly worthy of belief."<sup>246</sup> The Court also stated that the hearsay rule would not bar admission of the statement, if the declarant's truthfulness was so clear from the surrounding circumstances that subjecting him to cross-examination would be superfluous.<sup>247</sup> The *Wright* Court rejected the notion that the "evidence corroborating the truth of a hearsay statement may properly support a finding

236. *Id.* at 65.

237. *Id.* at 66.

238. *Id.*

239. 476 U.S. 530 (1986).

240. *Id.* at 543.

241. 497 U.S. 805 (1990).

242. *Id.* at 812.

243. *Id.* at 815.

244. *Id.* at 812-13.

245. *Id.*

246. *Id.* at 813.

247. *Id.* at 820.

that the statement bears ‘particularized guarantees of trustworthiness,’<sup>248</sup> and held that in order to be admitted under the Confrontation Clause, the hearsay evidence had to “possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.”<sup>249</sup> However, since the Confrontation Clause was the basis for the *Wright* decision, the Court’s holding governs only hearsay evidence submitted by the prosecution in criminal cases. *Wright* leaves open the question of whether corroboration may help establish the trustworthiness of the hearsay evidence presented either by a criminal defendant or by either of the parties to a civil trial. Such query concerning criminal defendants may be partially answered by *Chambers v. Mississippi*,<sup>250</sup> in which the failure to apply the hearsay exception to admit evidence that was corroborated by other evidence resulted in reversal because it deprived the defendant of a fair trial.<sup>251</sup>

Some commentators point to the possible abuses in the application of various elements of the residual hearsay exception.<sup>252</sup> They say that the exception has been used without the requirements of findings of fact, clear and convincing evidence of trustworthiness, and necessity.<sup>253</sup> They also claim that the requirement of materiality has been treated synonymously with relevance, or that the requirement that evidence serve the “interests of justice,” simply reaffirms a discretionary role of the judge.<sup>254</sup> According to them, the meaning of “circumstantial guarantees of trustworthiness” has always been imprecise, and the requirement of adequate notice treated very flexibly.<sup>255</sup> Moreover, the critics maintain that the exception allows the “near misses” to be used against the defendants in criminal cases, when by a “near miss” they mean a situation in which the evidence “just falls short of a recognized hearsay exception.”<sup>256</sup> Finally, they are bothered by the discretionary application of the residual exception, which results in unpredictability as to when and how it may be used.<sup>257</sup> The only meaningful threshold for admission of hearsay evidence under the residual exception is, according to the critics, that the evidence needs to be

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248. *Id.* at 822.

249. *Id.* (emphasis added).

250. 410 U.S. 284 (1973).

251. *Id.*

252. Raeder, *supra* note 223, at 935-39.

253. Raeder, *supra* note 223, at 936.

254. Raeder, *supra* note 223, at 936.

255. Raeder, *supra* note 223, at 936.

256. Raeder, *supra* note 223, at 936-37. Examples of such otherwise inadmissible hearsay which get admitted under the residual exceptions are: (1) the grand jury testimony of an unavailable witness; (2) child testimony which is not excited utterance; or (3) quasi-business records which do not meet Rule 803(6) requirements. Raeder, *supra* note 223, at 936-37.

257. Raeder, *supra* note 223, at 936-37.

more probative on the point for which it is offered than any other evidence that can be acquired through reasonable means.<sup>258</sup>

Given these condemnations of the exception, why was it embraced by the four judges of the Missouri Supreme Court in *Bell*? In *Bell*, the issue on appeal was whether the trial court abused its discretion to the extent of prejudicing Bell by admitting, under the state-of-mind exception, the evidence which concerned Allen's statements to third persons of prior abuse by him.<sup>259</sup> Considering the abundance of Missouri law pertaining to the state-of-mind exception, and the issue of prejudice against a criminal defendant, the only sensible result had to follow the precedent of *Bell*'s much earlier predecessor, *State v. Miller*.<sup>260</sup> There, Miller was tried for stabbing his wife.<sup>261</sup> He claimed that she initiated confrontation with him and that the stabbing was accidental.<sup>262</sup> The state introduced testimony of a witness who testified that several years earlier the victim had told the witness that Miller violently attacked her.<sup>263</sup> The state argued that the statements should be admissible under the state-of-mind exception.<sup>264</sup> The Missouri Supreme Court concluded that, since "the nature of the evidence [was such that the] defendant had no opportunity to confront the declarant or to cross-examine her,"<sup>265</sup> the witness' statements "redirected the entire. . . trial to the question of the defendant's culpability for a broken tooth, a broken arm. . . and away from the issue of guilt or innocence."<sup>266</sup> Admission of such evidence resulted in a highly prejudicial trial.<sup>267</sup>

But for the concurring opinion, the Missouri Supreme Court's holding in *Bell* would be indistinguishable from *Miller*. Departing from *Miller* in *Bell* would have undermined the soundness of evidentiary principles. Thus, the Missouri Supreme Court rightfully followed the *Miller* precedent. However, assuming that the purpose of the evidentiary regime is to "facilitate ascertainment of truth," the concurring opinion of Judge Limbaugh avoided degradation of the societal interest in justice by allowing for the possibility of reintroduction of the evidence concerning Bell's abusive behavior in the new trial.

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258. Raeder, *supra* note 223, at 936-37.

259. *State v. Bell*, 950 S.W.2d 482 (Mo. 1997).

260. 664 S.W.2d 229 (Mo. Ct. App. 1983).

261. *Id.*

262. *Id.*

263. *Id.* at 230.

264. *Id.*

265. *Id.* at 231.

266. *Id.*

267. *Id.*

## VI. CONCLUSION

The concurring opinion in *Bell* sets the stage for the Missouri courts to adopt the residual exception in criminal cases. Although it focuses on the requirements of necessity and trustworthiness, it would be premature to assume that other requirements considered at length by the courts of other jurisdictions, namely satisfaction of the interests of justice, advance notice, materiality, and probativeness, would not be used by the Missouri courts in establishing viable thresholds in their future decisions regarding the exception.

Because the issue of the residual exception to the hearsay rule was not addressed previously by the Missouri Supreme Court, and because the authorities in other jurisdictions are split on this issue, this concurring opinion offers significant guidance for Missouri courts attempting to apply the exception in the future. The *Bell* concurrence clearly invites the lower courts to entertain the issue. It seems almost certain that should an appropriate case knock at the door of the Missouri Supreme Court in the future, the court would give it more than residual attention.

JANUSZ Z. PUZNIAK



