# SUICIDE IN THE EVIDENTIARY SPOTLIGHT: AN ANALYSIS OF THE TRUSTWORTHINESS OF SUICIDE NOTES UNDER THE FEDERAL RESIDUAL EXCEPTION

**Abstract:** Suicide is a leading cause of death in the twenty-first century. Individuals who take their own lives occasionally leave behind suicide notes. Although rare, these suicide notes are sometimes offered into evidence under the federal residual exception, an exception to the evidentiary rule against hearsay. A court must then decide whether a suicide note is admissible under this exception. In 2019, changes to the federal residual exception went into effect. To be admissible under the new standard, a hearsay statement must be trustworthy and possess probative value. Additionally, the offering party must give notice to the opposing party of its intention to offer the statement into evidence before or during a trial hearing. There is currently no case law analyzing the admissibility of a suicide note under this exception since the 2019 amendment. Precedent indicates that most courts conduct only a cursory analysis before deeming a suicide note to be inadmissible for lacking sufficient guarantees of trustworthiness, the first requirement of the residual exception. The judges in these courts, however, fail to consider psychological research and additional case law, wherein courts in detail review the trustworthiness of suicide notes under the dying declaration exception. These both offer beneficial insight about suicide notes and their trustworthiness. The precedent of cursory analysis is problematic because suicide notes have the potential to influence the outcome of criminal cases, exculpating or inculpating defendants. This Note argues for meaningful admissibility analyses via a three-part balancing test that incorporates psychological research and case law to assess more accurately the trustworthiness of a suicide note under the residual exception.

## INTRODUCTION

Imagine you are cleaning your older sister's apartment.[1] She took her life last week after battling depression and substance abuse for many years. You suddenly stumble upon a two-page suicide note addressed to you and hidden in

[1] This is a hypothetical situation, but there are documented accounts of similar stories. *See generally* Michael Gold, *Stephanie Parze: Ex-Boyfriend Confessed to Her Killing in Suicide Note*, N.Y. TIMES (Jan. 27, 2020), https://www.nytimes.com/2020/01/27/nyregion/stephanie-parze-body-found.html [https://perma.cc/6XSH-3SYM] (explaining that the victim's ex-boyfriend, who previously used violence against her, admitted to her murder in his suicide note); Alex Johnson, *Brother's Suicide Note Confession Frees Man After 15 Years in Prison for Murder*, NBC NEWS (Dec. 9, 2015), https://www.nbcnews.com/news/us-news/brothers-suicide-note-confession-frees-man-after-15-years-prison-n477301 [https://perma.cc/9S5Y-432T] (explaining that a man's suicide note, which confessed to raping and killing a girl, ultimately freed his brother who was in prison for those crimes).

a secret compartment of her desk drawer. In the note, your sister tells you how much she loves you and that she is sorry for killing herself. As you continue reading, she confesses to killing her boyfriend, even though his best friend is currently on trial for the murder. You are astonished. You know that your sister and her ex-boyfriend always fought and that she occasionally used violence against him, but you never expected that she would kill him. Then you realize that if what the note says is true, an innocent man could go to jail for a crime that he did not commit. *So, how do you know that your sister's suicide note is trustworthy*? This is the most troublesome question that courts face when litigants seek to admit suicide notes into evidence under the federal residual exception.[2]

In 2019, in *United States v. Hammers*, the United States Court of Appeals for the Tenth Circuit attempted to answer that question.[3] The defendant, Buck Leon Hammers, was the "Superintendent of the Grand-Goodland Public School District in Grant, Oklahoma."[4] The government charged Hammers with conspiracy to commit fraud and embezzle school finances.[5] The government also charged Hammers's secretary, Pamela Keeling, as a co-conspirator.[6] Shortly after the government brought charges, Keeling committed suicide.[7]

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[2] *E.g.*, United States v. Hammers, 942 F.3d 1001, 1010–12 (10th Cir. 2019) (explaining that the defendant argued the suicide note was admissible under the Federal Rule of Evidence 807 (Rule 807), also known as the residual exception, but noting "the note did not offer guarantees of trustworthiness," and thus the note was inadmissible); *see* FED. R. EVID. 807(a)(1) (noting that the first requirement of the amended residual exception is that "the statement is supported by sufficient guarantees of trustworthiness").

[3] *Hammers*, 942 F.3d at 1011 (examining whether the suicide note was admissible under the federal residual exception).

[4] *Id.* at 1007. Hammers became the Superintendent in 2001 of the "Grant Schools." *Id.* In 2009, the "Grant Schools" merged with the "Goodland School District, creating the Grant-Goodland Public School District." *Id.*

[5] *Id.* at 1014 (explaining that the government charged Hammers and Pamela Keeling, his secretary, with conspiring "to commit bank fraud and embezzle federal program funds"); *see* 18 U.S.C. § 371 (noting that when at least two individuals conspire to defraud the United States or one of its agencies, each individual shall be fined, imprisoned, or both); *id.* § 1349 (stating that an individual who conspires to commit an offense "shall be subject to the same penalties as those prescribed for the offense"). The school district's auditing firm first noticed deficiencies in several audits in 2011, and consequently suspected fraud. *Hammers*, 942 F.3d at 1008. The firm also noticed deficiencies in 2012, 2013, and 2014. *Id.* By 2014, the auditors noticed purchases totaling $386,211, but there were no actual invoices. *Id.* The auditors reviewed checks issued to vendors and determined that a school official endorsed the checks and cashed them at the same bank shortly afterwards. *Id.* The auditing firm reported its findings to the U.S. Department of Education Office of Inspector General Investigation Services. *Id.* In 2016, the U.S. Department of Education Office of Inspector General Investigation Services executed a search warrant for the Grand-Goodland Public School District and seized multiple documents. *Id.* at 1007–08. The school board then suspended both Hammers and Keeling because of their suspected involvement in the fraud scheme. *Id.* at 1008.

[6] *Hammers*, 942 F.3d at 1007.

[7] *Id.* at 1008.

Keeling, however, left behind a suicide note.[8] In her note addressed to the school district, she revealed her intention to take full responsibility for the fraud scheme and to deny Hammers's involvement.[9]

In 2018, prior to Hammers's trial, the government moved to exclude the suicide note, arguing that it was inadmissible hearsay.[10] The United States District Court for the Eastern District of Oklahoma granted the government's motion.[11] The case proceeded to trial, and a jury convicted Hammers.[12] In 2019, Hammers appealed to the United States Court of Appeals for the Tenth Circuit, arguing that the district court erred in excluding the suicide note because it was admissible under the federal residual exception.[13] The Tenth Circuit disagreed with Hammers and upheld the district court's ruling.[14] According to the Tenth Circuit, the suicide note was inadmissible under the residual exception because it was not sufficiently trustworthy, and therefore failed the first requirement of the exception.[15] The Tenth Circuit reasoned that Hammers had a close relationship with Keeling, which likely motivated her to clear his name, and that Keel-

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[8] *Id.*

[9] *Id.* Keeling left other suicide notes addressed to her family, but the suicide note addressed to the school district was the only one at issue in the case. *Id.*

[10] *Id.* In response to the government's motion, Hammers argued that the note was admissible either as a statement against interest or under the federal residual exception. *Id.*; *see* FED. R. EVID. 804(b)(3) (explaining that for a hearsay statement to be admissible, the declarant must be unavailable, the statement must be contrary to the declarant's interest, and the statement must be supported by assurances of trustworthiness if offered in a criminal case against the declarant); FED. R. EVID. 807 (2011) (amended 2019) (indicating that for a hearsay statement to be admissible it must be trustworthy, evidence of a material fact, more probative than any other evidence, serve the interests of justice, and the offering party must give notice to the opposing party). The U.S. District Court for the Eastern District of Oklahoma found that the suicide note was not against Keeling's interest or supported by circumstances assuring its trustworthiness, so it was inadmissible under either hearsay exception. *Hammers*, 942 F.3d at 1008–09. The district court reconsidered the issue at trial, but it confirmed the exclusion of the suicide note. *Id.* at 1008.

[11] *Hammers*, 942 F.3d at 1007.

[12] Plaintiff/Appellee's Supplemental Index at 20, 23–26, 39, *id.* (No. 18-7051).

[13] Appellant's Opening Brief at 26, *Hammers*, 942 F.3d 1001 (No. 18-7051). Hammers argued that the district court erred in excluding the suicide note as a statement against interest before arguing it was admissible under the residual exception. *Id.* at 21. This scenario is common in other cases, but this Note's focus is on the admissibility of statements under the federal residual exception. *See infra* notes 14–231 and accompanying text.

[14] *Hammers*, 942 F.3d at 1012.

[15] *Id.* at 1011 (citing FED. R. EVID. 807 (2011) (amended 2019)). In 2019, the U.S. Court of Appeals for the Tenth Circuit applied the equivalence standard, which is no longer the trustworthiness standard under the amended residual exception. *See id.* (describing the residual exception's requirements prior to its 2019 amendment); *see also* FED. R. EVID. 807(a)(1) (stipulating that the first requirement of the residual exception is that "the statement is supported by sufficient guarantees of trustworthiness"); *infra* notes 58–75 and accompanying text (describing the requirements of the current federal residual exception, one of which is trustworthiness). To meet the equivalence standard, a statement must "carry 'equivalent' circumstantial guarantees of trustworthiness" as to any one of the other hearsay exceptions. FED. R. EVID. 807 advisory committee's note to 2019 amendment (explaining the equivalence standard but then noting its problems).

ing's participation in a fraud scheme cast doubt on her ability to tell the truth.[16] The court ultimately affirmed Hammers's conviction, despite the presence of a key piece of exculpatory evidence.[17]

*Hammers* illustrates the most common misapplication of the residual exception to suicide notes.[18] In exercising this flawed interpretation, many other courts have similarly reasoned that suicide notes are not sufficiently trustworthy and therefore fall outside of the scope of the residual exception.[19] These

[16] *Hammers*, 942 F.3d at 1011–12. Hammers argued that a suicide note written willingly and close to the time of one's death is trustworthy because the nearness of death removes any motivation to lie. *Id.* at 1012. The Tenth Circuit held that the district court's findings were supported by the record and the law. *Id.* The Tenth Circuit also held that the suicide note was inadmissible as a statement against interest. *Id.* at 1011 (citing FED. R. EVID. 804(b)(3)). Reviewing the requirements of a statement against interest, the Tenth Circuit first reasoned that Keeling was unavailable because she committed suicide. *Id.* at 1010. Second, the Tenth Circuit determined that her suicide note was not against her interest because she committed suicide, which indicated that she never intended to be alive long enough to face criminal liability. *Id.* at 1010–11. Finally, the court explained that her suicide note was not corroborated by guarantees of trustworthiness because committing suicide implied a tainted state of mind, defrauding the school districted portrayed her as untrustworthy, and having a close relationship with Hammers encouraged her to clear his name. *Id.* at 1011.

[17] *See id.* at 1008, 1019 (affirming Hammers's conviction even though Keeling took all the credit for defrauding the school district in her suicide note and she specifically wrote that Hammers was not involved); *see also* A.A. Leenaars, *Suicide Notes in the Courtroom*, 6 J. CLINICAL FORENSIC MED. 39, 41 (1999) (describing two cases involving suicide notes that were invaluable pieces of evidence).

[18] *See Hammers*, 942 F.3d at 1011–12 (explaining in two paragraphs out of nineteen pages—while referring to no research and only one case discussing suicide notes—that the defendant's secretary's suicide note was inadmissible under the residual exception because the note lacked trustworthiness but recognizing the "persuasive" argument that suicide might remove a motivation to lie).

[19] *See* United States v. Esmurria, No. 02-1556-cr, 2006 U.S. App. LEXIS 13513, at *2, *5–6 (2d Cir. May 26, 2006) (reasoning that the statements in the suicide note were not equivalently trustworthy to be admissible on appeal for a "drug-related offense[]" because the writer of the suicide note was a co-defendant, "did not fear the negative consequences . . . of . . . making a false statement, . . . [and] had an incentive to lie" because he was the defendant's "brother-in-law and . . . was responsible for bringing [the defendant] into the conspiracy"); United States v. Angleton, 269 F. Supp. 2d 878, 881–82, 891 (S.D. Tex. 2003) (reasoning that the statements in the five suicide notes, confessing to the murder at question, were not sufficiently trustworthy because the writer of the note was the defendant's brother, wrote the "jail notes" in his cell, and committed suicide during his defendant-brother's trial); Commonwealth v. Pope, 491 N.E.2d 240, 241, 244 (Mass. 1986) (reasoning that the statements in the suicide note, confessing to a killing for which the defendant "was tried and convicted . . . as an accessory . . . to the murder . . . and for unlawfully carrying a firearm" were not equivalently trustworthy to be admissible because "the Commonwealth adduced no evidence concerning the time and circumstances in which the note was written"); State v. Brown, 752 P.2d 204, 205–06, 207 (Mont. 1988) (reasoning that the statements in the suicide note, apologizing for involving the defendant who helped smuggle a pistol into the writer's state prison, were not sufficiently trustworthy under Montana's residual exception because the note "contained no direct statement implicating [the defendant]," "d[id] not mention the pistol, plan, or the delivery," and only "infer[red] some possible role in the conspiracy"). Although in 1988, in *State v. Brown*, the Supreme Court of Montana applied the residual exception found in Montana's Rules of Evidence, Montana's rule is like the trustworthiness requirement of the pre-amended federal residual exceptions. 752 P.2d at 205–06, 207. *Compare* FED. R. EVID. 803(24) (1975) (transferred 1997) ("A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness . . . ."), *and id.* R. 804(b)(5) (transferred 1997) (same), *with* MONT. R. EVID. 803(24) (1977) (exempting from the hear-

courts generally provide minimal explanation regarding why the suicide notes are, in fact, untrustworthy.[20] Importantly, nearly all courts fail to consider psychological research and other case law analyzing suicide notes.[21] Justice and fairness are values enshrined in the Federal Rules of Evidence.[22] Justice and fairness mandate that courts engage in thoughtful analyses of the trustworthiness of suicide notes, including thorough reviews of relevant research and precedent.[23]

This Note embarks on the task of evaluating the trustworthiness requirement under the federal residual exception in the context of suicide notes.[24] Part I discusses the residual exception and its 2019 amendment, psychological research analyzing suicide notes, and case law involving the admissibility of suicide notes under the residual exception.[25] Part II reviews arguments regarding the trustworthiness of a suicide note under the dying declaration exception, where courts have been more willing to review the trustworthiness element, and through additional psychological research.[26] Part III posits a three-part balancing standard for judges to use when deciding whether a suicide note achieves the trustworthiness requirement of the residual exception.[27]

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say exclusion rule statements made by declarants who are available as witnesses, even if the statements are "not specifically covered by any of the [stated] exceptions" if there are "comparable circumstantial guarantees of trustworthiness"), *and id.* R. 804(b)(5) (same).

[20] *See, e.g.*, *Hammers*, 942 F.3d at 1011–12 (explaining that Keeling's suicide note was not trustworthy in two paragraphs); *Angleton*, 269 F. Supp. 2d at 891 (noting that the circumstances under which the suicide notes were written were not trustworthy in one paragraph, but failing to list those circumstances); *Pope*, 491 N.E.2d at 244 (explaining that the suicide note was not trustworthy in two sentences because the Commonwealth did not provide evidence indicating "the time and circumstances in which th[e] note was written").

[21] *See, e.g.*, *Hammers*, 942 F.3d at 1011–12 (citing to no research examining suicide notes and referring to only one case that discussed the admissibility of a suicide note under the residual exception); *Angleton*, 269 F. Supp. 2d at 891 (citing to no studies reviewing suicide notes or prior precedent discussing their admissibility); *Pope*, 491 N.E.2d at 244 (same).

[22] *See* FED. R. EVID. 102 (explaining that two goals of the Federal Rules of Evidence are "to administer every proceeding fairly" and secure a "just determination").

[23] *See infra* notes 198–231 and accompanying text.

[24] *See infra* notes 28–231 accompanying text. For a court to admit a suicide note under the residual exception, the note must fulfill all the requirements of the residual exception: trustworthiness, more probative than other evidence that could be admissible on that same point, and notice to the nonoffering party. FED. R. EVID. 807. This Note's focus, however, is on the trustworthiness requirement. *See infra* notes 28–231 and accompanying text.

[25] *See infra* notes 28–139 accompanying text.

[26] *See infra* notes 140–197 accompanying text.

[27] *See infra* notes 198–231 accompanying text.

## I. THE ADMISSIBILITY OF SUICIDE NOTES UNDER THE FEDERAL RESIDUAL EXCEPTION

Research suggests that suicide rates in the United States have continuously increased over the past twenty years.[28] Some studies suggest that technology contributes to this rise, specifically in adolescents, but even with additional forums to communicate with others, only a modest percentage of those committing suicide leave behind notes.[29] When offered to prove the truth of the statements contained within them, suicide notes are considered hearsay, which is typically inadmissible.[30] Nevertheless, these notes are occasionally admitted into evidence under Federal Rule of Evidence 807 (Rule 807), also known as the residual exception.[31] This Part provides an overview of the federal residual exception, suicide notes, and case law representing the intersection of the two.[32] Section A summarizes the rule against hearsay, its exceptions, and historical forms and applications of the exception.[33] Section B then examines the act of suicide and suicide notes and discusses psychological research analyzing the authenticity of suicide notes.[34] Section C discusses case law involving the admissibility of suicide notes under the federal residual exception.[35]

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[28] Holly Hedegaard et al., *Suicide Mortality in the United States, 1999–2017*, 330 NCHS DATA BRIEF, Nov. 2018, at 1 (finding that the "age-adjusted suicide rate increased 33% from 10.5 per 100,000 standard population to 14.0" from 1999 to 2017).

[29] *See* Julie Cerel et al., *Who Leaves Suicide Notes? A Six-Year Population-Based Study*, 45 SUICIDE & LIFE-THREATENING BEHAV. 326, 328 (2015) (finding that approximately 18% of individuals who committed suicide in Kentucky left behind a suicide note); Markham Heid, *Depression and Suicide Rates Are Rising Sharply in Young Americans, New Report Says. This May Be One Reason Why*, TIME (Mar. 14, 2019), https://time.com/5550803/depression-suicide-rates-youth/ [https://perma.cc/J939-A7QD] (relying on one study that found "among young people, rates of suicidal thoughts, plans and attempts all increased significantly, and in some cases more than doubled, between 2008 and 2017" and explaining this is likely due to "heavy technology use," such as using smartphones, poorly affecting mental health). Additionally, suicide notes may take the form of written notes, e-mails, texts, voicemails, videos, or something else. Cerel et al., *supra*, at 326.

[30] *See* FED. R. EVID. 801(c) (explaining hearsay is an out-of-court statement that "the declarant [(speaker)] does not make while testifying at the current trial or hearing," which the "party offers to prove the truth of the matter asserted in the statement").

[31] *See, e.g.*, United States v. Hammers, 942 F.3d 1001, 1011 (10th Cir. 2019) (explaining that the defendant argued that the suicide note was admissible under the federal residual exception). *See generally* FED. R. EVID. 807 ("Residual Exception").

[32] *See infra* notes 36–139 accompanying text.

[33] *See infra* notes 37–85 and accompanying text.

[34] *See infra* notes 86–117 and accompanying text.

[35] *See infra* notes 118–139 and accompanying text.

### *A. Rule Against Hearsay and Its Exceptions*

Hearsay is one of the most complicated concepts in the Federal Rules of Evidence.[36] Subsection 1 of this Section describes the rules explaining hearsay and its admissibility.[37] Subsection 2 presents an overview of the federal residual exception, beginning with its enactment and through its current amendment.[38] Subsection 3 then describes the changes to the residual exception, amended in 2019, and one case analyzing the admissibility of hearsay evidence under the amended residual exception.[39]

#### 1. Hearsay Evidence and the Exceptions That Can Make It Admissible

Hearsay is defined as an out-of-court statement offered for the truth of the matter asserted.[40] A statement includes an assertion that is oral or written, in addition to nonverbal conduct if the declarant intended it to be an assertion.[41] The declarant is the person who conveys the out-of-court-statement.[42] Although under Federal Rule of Evidence 802 (Rule 802) hearsay is ordinarily inadmissible, statements that fall within one or more enumerated exceptions

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[36] *See* Matthew Barakat, *AP Explains: What's Wrong with Hearsay Evidence in Congress?*, AP NEWS (Nov. 15, 2019), https://apnews.com/article/1c7e4526345148d292fef46e7da9e701 [https://web.archive.org/web/20201107020429/https://apnews.com/article/1c7e4526345148d292fef46e7da9e701] (explaining hearsay is generally "inadmissible at a trial,' but then "[t]here are more than [twenty] exceptions to the general rule barring hearsay" wherein the court permits the admission of hearsay).

[37] *See infra* notes 40–48 and accompanying text.

[38] *See infra* notes 49–57 accompanying text.

[39] *See infra* notes 58–85 accompanying text.

[40] FED. R. EVID. 801(c) (defining hearsay). *United States v. Brown* is an example of a case involving inadmissible hearsay. 548 F.2d 1194, 1197 (5th Cir. 1977). The defendant appealed from his tax fraud conviction and claimed that the U.S. District Court for the District of Florida wrongfully admitted hearsay evidence. *Id.* During trial, the government introduced an Internal Revenue Service (IRS) agent's testimony who stated "that between 90% and 95% of about 160 returns prepared by defendant contained overstated itemized deductions." *Id.* at 1199. The jury likely heavily relied on the agent's testimony when making its finding. *Id.* at 1200. On appeal, the U.S. Court of Appeals for the Fifth Circuit reasoned that the agent's testimony was inadmissible hearsay because she based it directly on out-of-court statements from each taxpayer that she interviewed. *Id.* at 1205. The Fifth Circuit reasoned that the defendant possessed no opportunity to cross-examine the taxpayers, so the jury could not adequately examine the trustworthiness of the agent's statements. *Id.* The Fifth Circuit held that "a clearer case of hearsay testimony would be difficult to imagine," so it reversed and remanded the case. *Id.* at 1205–06.

[41] FED. R. EVID. 801(a) (defining hearsay statement). The following categories of statements are not hearsay: a witness-declarant's prior statement if the statement meets one of the three subcategories, or a statement of a party-opponent offered against the party who made the statement if it meets one of the five subcategories. *Id.* R. 801(d). Statements that are admissible under these categories are not hearsay. *See id.* R. 801(d)(1) (explaining that the declarant who testifies "is subject to cross-examination about a prior statement"); *id.* R. 801(d)(2) advisory committee's note to 1972 proposed rules (indicating that a statement of a party-opponent is based on adversarial fairness).

[42] *Id.* R. 801(b) (defining declarant).

may be admitted substantively.[43] There are three different classifications of hearsay exceptions.[44] First, Federal Rule of Evidence 803 (Rule 803) contains twenty-three exceptions, each of which is independent of the declarant's availability to testify in court.[45] Second, Federal Rule of Evidence 804 (Rule 804) contains five exceptions, each of which may apply only when the declarant is unavailable to testify.[46] Finally, the residual exception, Rule 807, is independent of the declarant's availability to testify in court.[47] The Advisory Committee for the Federal Rules of Evidence noted that a party offering hearsay evidence should first try to offer it under Rule 803 or Rule 804 before proceeding to offer it under the residual exception.[48]

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[43] *See id.* R. 802 (excluding hearsay evidence unless it is admissible through a federal statute, the Federal Rules of Evidence, or a rule prescribed by the U.S. Supreme Court); *id.* R. 803 (describing twenty-three exceptions to the rule against admitting hearsay); *id.* R. 804 (describing five exceptions to the rule against admitting hearsay if the declarant is unavailable); *id.* R. 807 (describing one exception to the rule against admitting hearsay that is to be used "even if the statement is not admissible" under Federal Rule of Evidence 803 (Rule 803) or Federal Rule of Evidence (Rule 804)). Federal Rule of Evidence 802's (Rule 802) ban on admitting hearsay evidence suggests a preference for first-hand knowledge unless it meets one of the hearsay exceptions. G. Michael Fenner, *The Residual Exception to the Hearsay Rule: The Complete Treatment*, 33 CREIGHTON L. REV. 265, 265 (2000). If a declarant's hearsay statement is admitted under one of the enumerated exceptions, that "declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness" such as an "inconsistent statement." FED. R. EVID. 806.

[44] *See* FED. R. EVID. 803 (noting that there are twenty-three different exceptions to the prohibition against hearsay); *id.* R. 804 (noting that there are five exceptions when the declarant is unavailable to the prohibition against hearsay); *id.* R. 807 (describing one exception to the rule against admitting hearsay that is to be used "even if the statement is not admissible" under Rule 803 or Rule 804).

[45] *See id.* R. 803 (describing twenty-three types of admissible hearsay statements that are exceptions to the rule against admitting hearsay); *id.* R. 803 advisory committee's note to 1972 proposed rules (noting that the application of Rule 803 does not depend on the availability of the declarant). The Advisory Committee justified the admissibility of these statements based upon their trustworthiness. *See id.* (explaining why evidence is admissible under Rule 803 exceptions); *see also* Liesa L. Richter, *Goldilocks and the Rule 803 Hearsay Exceptions*, 59 WM. & MARY L. REV. 897, 904 (2018) (explaining that Rule 803 hearsay exceptions "enjoy inherent reliability").

[46] *See* FED. R. EVID. 804 (describing first that a declarant is considered unavailable if a privilege applies, the declarant refuses to appear, the declarant has no memory, the declarant is dead or ill, or the proponent cannot procure the declarant's attendance, and then noting five hearsay exceptions if the declarant is unavailable). The Advisory Committee justified the admissibility of these statements based on necessity, given that the declarant is unavailable, and because of the statement's trustworthiness. *See id.* R. 804 advisory committee's note to 1972 proposed rules (suggesting a preference for hearsay of a specified quality over no evidence at all); Richter, *supra* note 45, at 904–05 (explaining that Rule 804 exceptions rest on both reliability and necessity because the declarant is unavailable to testify).

[47] *See* FED. R. EVID. 807 (specifying no requirement that the declarant be unavailable). A hearsay statement is unlikely to be excluded by the court if it fulfills all elements of the residual exception). *See id.*

[48] *Id.* R. 807 advisory committee's note to 2019 amendment (noting that a party should proceed to use the residual exception when offering a hearsay statement "if it is apparent that the hearsay could [not] be admitted under another exception").

## 2. The History of the Residual Exception

Congress enacted the residual exception with the intention of allowing hearsay when a court decides that the evidence is trustworthy, material, probative, and necessary.[49] Since the exception's enactment, hearsay evidence is now admitted in ad hoc situations. For example, a court admitted investigator notes about customer conversations with salespeople to prove a lack of product confusion,[50] and a different court admitted a suicide note to prove a conspiracy to commit murder.[51] Without the residual exception's ability to admit hearsay statements in obscure situations, the enumerated exceptions in Rules 803 and 804 would become overly flexible and thus less precise in admitting such reliable, relevant, and necessary hearsay statements.[52]

When Congress enacted the Federal Rules of Evidence in 1975, both Rule 803 and Rule 804 contained identical residual exceptions.[53] Congress intended

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[49] *See* United States v. Tome, 61 F.3d 1446, 1452 (10th Cir. 1995) (explaining that courts must use careful discretion when admitting evidence under the residual exception or else risk destruction of the hearsay rule); United States v. Vigoa, 656 F. Supp. 1499, 1504 (D.N.J. 1987), *aff'd*, 857 F.2d 1467 (3d Cir. 1988) (indicating that the purpose of the residual exception is "to admit otherwise excludable hearsay arising under such exceptional circumstances that it has not been anticipated by any of the four enumerated 804(b) exceptions"); *see also* Victor Gold, *The Three Commandments of Amending the Federal Rules of Evidence*, 85 FORDHAM L. REV. 1615, 1616–17 (2017) (noting that both the House Committee on the Judiciary and the Senate Judiciary Committee intended the residual hearsay exception to be used in rare instances).

[50] Deere & Co. v. FIMCO Inc., 260 F. Supp. 3d 830, 837, 839, 844 (W.D. Ky. 2017) (concluding that the investigator's notes of the salespersons' out-of-court statements describing their customers' lack of confusion presented an "exceptional circumstance" in which the residual exception's requirements were met and its use was appropriate).

[51] People v. Miller (*Miller I*), No. 233018, 2003 WL 21465338, at *1–2 (Mich. Ct. App. June 24, 2003) (per curiam) (concluding that the suicide note, offered to prove a conspiracy between the defendant and the suicide victim to murder the defendant's husband, was admissible under the residual exception), *habeas corpus granted conditionally sub nom.*, Miller v. Stovall, 573 F. Supp. 2d 964 (E.D. Mich. 2008), *habeas corpus denied*, No. 05–73447, 2012 WL 3151541 (E.D. Mich. 2012), *aff'd*, 742 F.3d 642 (6th Cir. 2014). The out-of-court statements described in these situations satisfied the residual exception's requirements, but it does not mean that these types of statements always will. *See* Fenner, *supra* note 43, at 302 (concluding that a court admits a hearsay statement only when it determines that each element of the residual exception is met).

[52] Fenner, *supra* note 43, at 265–66 (suggesting that the residual exception is an expression of plasticity). Although a statement may not fit within a hearsay exception, the residual exception allows the admittance of out-of-court statements that meet its requirements, thus keeping both the hearsay definition and its exceptions intact. *Id.*

[53] *See* FED. R. EVID. 803(24) (1975) (transferred 1997); *id.* R. 804(b)(5) (transferred 1997). The text of both Rule 803(24) and 804(b)(5) in 1975 were as follows:

> Other Exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this excep-

this redundancy to demonstrate that the residual exception was complementary to the other exceptions under Rule 803 and Rule 804.[54] Both rules provided that a hearsay statement may be admitted when it has circumstantial indicators of trustworthiness equivalent to those of another hearsay exception.[55]

In 1997, Congress combined the Rule 803 and Rule 804 residual exceptions into one rule—Rule 807—but did not change the substance of the general exception.[56] Since 1997, the Advisory Committee proposed two amendments to the residual exception, which became effective in 2011 and 2019.[57]

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> tion 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.

*Id.* R. 803(24) (1975) (transferred 1997); *id.* R. 804(b)(5) (transferred 1997). In 1975 and until 1997, the only difference between the residual exceptions was that Rule 804(b)(5)'s residual exception was solely applicable when the declarant, as a witness, met one of the five categories of unavailability. *See id.* R. 804 (noting that these hearsay exceptions only apply when the declarant is unavailable). For example, in 1995, in *United States v. Tome*, the defendant appealed a conviction of aggravated sexual abuse alleging that his child's statements to a caseworker about his sexual abuse failed to meet the requirements of Rule 803(24). 61 F.3d at 1446, 1451–52. The U.S. Court of Appeals for the Tenth Circuit first reasoned that the child's statements to her caseworker were trustworthy because the caseworker was "trained and experienced" in dealing with child abuse victims, the interview consisted of "non-leading questions," and the child described the abuse in detail. *Id.* at 1453. On the other hand, the court also found that the child's statements were significantly untrustworthy because the conversation was not spontaneous, the interview did not occur close in time to the abuse, and the child could have lied because she wanted to live with her mother. *Id.* Therefore, the court concluded that, given the totality of the circumstances, the statements failed the trustworthiness requirement of Rule 803(24), and were deemed inadmissible hearsay. *Id.* at 1453. Additionally, in 1987, in *United States v. Vigoa*, the government filed a motion to admit grand jury testimony of an unavailable witness. 656 F. Supp. at 1499. The U.S. District for the District of New Jersey held that the grand jury testimony fit squarely within a specific hearsay exception, so it could not qualify under Rule 804(b)(5). *Id.* at 1504. Despite this, the court performed a residual exception analysis on the hearsay statement examining its trustworthiness. *Id.* at 1506. The court reasoned that the witness gave only yes or no answers to leading questions, his motivation to lie remained unclear, the official Federal Bureau of Investigation (FBI) reports merely restated the witness's story, there was only one corroborating witness who recanted part of his statement, and only one possible FBI observation readily tied the defendant to the crime. *Id.* at 1506–07, 1509. Therefore, the court concluded that the grand jury testimony failed the trustworthiness requirement of Rule 804(b)(5), and was inadmissible hearsay. *Id.* at 1509. Accordingly, both *Tome* and *Vigoa* demonstrate that in analyzing a hearsay statement under either residual exception of Rule 803(24) or Rule 804(b)(5), the trustworthiness analysis is the same. *See Tome*, 61 F.3d at 1451–52 (considering a hearsay statement under the residual exception when the declarant was available); *Vigoa*, 656 F. Supp. at 1509 (analyzing a hearsay statement under the residual exception when the declarant was unavailable).

[54] *See* Gold, *supra* note 49, at 1616–17 (explaining that debates among the Advisory Committee, the House Committee on the Judiciary, and the Senate Judiciary Committee informed the placement and language of the residual exception in both Rule 803 and Rule 804).

[55] FED. R. EVID. 803(24) (1975) (transferred 1997); *id.* R. 804(b)(5) (transferred 1997).

[56] *See* FED. R. EVID. 807 advisory committee's note to 1997 rule ("The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807."); Gold, *supra* note 49, at 1617 (noting that although the residual exception became its own rule, its connection to Rule 803 and Rule 804 remained in place with the continued use of the equivalent standard of trustworthiness). *See*

### 3. The Amended Residual Exception

The Advisory Committee's 2019 changes to the residual exception notably altered its requirements.[58] To begin, the Advisory Committee clarified that part (a) of the residual exception applies to hearsay statements that are generally inadmissible under a Rule 803 or Rule 804 exception.[59] The Advisory Committee noted that a party offering a hearsay statement may argue that because the statement is a "near-miss" of one of the other hearsay exceptions, it should still be admitted under the residual exception.[60] A statement nearly misses an exception under Rule 803 or Rule 804 by satisfying most but not all requirements of either exception.[61]

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*generally* FED. R. EVID. 807 (2011) (amended 2019) (stating that a hearsay statement must have "equivalent circumstantial guarantees of trustworthiness").

[57] FED. R. EVID. 807 advisory committee's note to 2011 amendment ("These changes are intended to be stylistic only."); *id.* R. 807 advisory committee's note to 2019 amendment ("Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.").

[58] *See id.* R. 807 advisory committee's note to 2019 amendment (noting that the residual exception's amendment includes changes to the trustworthiness requirement, the notice requirement, and the deletion of the requirements that the statement is evidence of a material fact and serves the interests of justice).

[59] *Compare id.* R. 807(a) ("[A] hearsay statement is not excluded by the rule against hearsay even if the statement is *not admissible* under a hearsay exception . . . ." (emphasis added)), *with* FED. R. EVID. 807(a) (2011) (amended 2019) ("[A] hearsay statement is not excluded by the rule against hearsay even if the statement is not *specifically covered* by a hearsay exception . . . ." (emphasis added)). As of December 1, 2019, the amended residual exception provides:

> ***(a)*** *In General.* Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:
>
> **(1)** the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
>
> **(2)** it is more probative on the point for which it is offered other than any other evidence that the proponent can obtain through reasonable efforts.
>
> ***(b)*** *Notice.* The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing of the court, for good cause, excuses a lack of earlier notice.

FED. R. EVID. 807.

[60] FED. R. EVID. 807 advisory committee's note to 2019 amendment (authorizing a court to engage in a "near-miss" analysis).

[61] *See* Gold, *supra* note 49, at 1623–24 (describing the near-miss problem). An example of the near-miss problem is when grand jury testimony is offered against the defendant in a subsequent criminal case. Fenner, *supra* note 43, at 271. All the requirements of the former testimony exception are met, except that the party against whom the statement is offered did not have the opportunity to cross-examine the declarant. *Id.*; *see* FED. R. EVID. 804(b)(1) (noting that the requirements of the former testimony exception are that the declarant is unavailable, the declarant gave testimony "as a witness at a trial, hearing, or lawful deposition," and the testimony is offered against a party who had "an opportunity and similar motive to develop it by direct, cross-, or redirect examination"). Additionally, the

The amended residual exception also demands that a hearsay statement fulfill three requirements to be admissible: it must be trustworthy, probative, and preceded by notice to opposing counsel.[62] Prior to the 2019 amendment, the residual exception required that a statement contain assurances of trustworthiness equivalent to those of another hearsay exception.[63] The amended rule, however, discarded this standard because of its difficult application and inconsistent results.[64] Part (a)(1) of the residual exception now states that a hearsay statement must be endorsed by assurances of trustworthiness.[65] The Advisory Committee noted that courts should apply this new standard by reviewing the circumstances encompassing the actual making of the statement and any inde-

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Advisory Committee suggested that courts faced with near-miss situations should analyze why the hearsay statement failed to meet the particular exception's requirements. FED. R. EVID. 807 advisory committee's note to 2019 amendment (noting a court should consider whether a statement is a near-miss when ruling on admissibility). By recognizing that the near-miss problem may be part of the analysis, the Advisory Committee might be suggesting first that the residual exception is flexible enough to deal with new situations that the other hearsay exceptions do not address. *See* Fenner, *supra* note 43, at 271–72 (discussing the majority approach to the near-miss problem). The Advisory Committee might also be suggesting that the lines between the other categorial hearsay exceptions are not perfect. *See id.* at 272 ("The residual exception and the other exceptions are not mutually exclusive.").

[62] *See* FED. R. EVID. 807(a)(1) (describing the trustworthiness requirement); *id.* R. 807(a)(2) (describing the probative value requirement); *id.* R. 807(b) (describing the notice requirement).

[63] FED. R. EVID. 807(a)(1) (2011) (amended 2019) (providing that "a hearsay statement is not excluded" if "the statement has equivalent circumstantial guarantees of trustworthiness"). The residual exception previously required courts to compare the offered hearsay statement's trustworthiness to another hearsay exception. Daniel J. Capra, *Expanding (or Just Fixing) the Residual Exception to the Hearsay Rule*, 85 FORDHAM L. REV. 1577, 1581–82 (2017). The trustworthiness of statements that are admissible under Rule 804 are less trustworthy than Rule 803 because the declarant is unavailable in the former. *Id.* Courts could choose to compare the trustworthiness of the offered hearsay to other Rule 803 and Rule 804 hearsay exceptions that have varying strengths of reliability depending on whether the court wanted to admit the evidence. *Id.* at 1582–83. Consequently, the equivalence standard led to inconsistent results. *Id.* at 1582.

[64] *See* FED. R. EVID. 807 advisory committee's note to 2019 amendment (noting that the equivalence standard failed to guide courts because the Rule 803 and Rule 804 hearsay exceptions offered "different types of guarantees of reliability, of varying strength" that a court could choose to use); Capra, *supra* note 63, at 1582–83 (explaining that applications of the residual exception prior to the 2019 amendment lacked consistency among courts).

[65] FED. R. EVID. 807(a)(1) (providing that a court can admit a hearsay statement if, in addition to satisfying other requirements, it "is supported by sufficient guarantees of trustworthiness").

pendent evidence that corroborates it.[66] A court's goal in this evaluation is to ascertain whether the declarant is likely telling the truth.[67]

Regarding the second requirement, the amended residual exception still requires an assessment of the hearsay statement's probative value under part (a)(2).[68] The Advisory Committee suggested that this is a necessary inquiry intended to prevent parties from using the residual exception as a tool to undermine Rule 803 and Rule 804.[69] In deciding whether the evidence fulfills the probative element, the court must ask whether the proffered hearsay statement is the best available evidence on that point.[70] If the court determines that there is other evidence that illuminates a certain objective in the same way or more efficiently, the proffered evidence fails the probative requirement and is not necessary to admit.[71]

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[66] *Id.* R. 807 advisory committee's note to 2019 amendment (explaining how a court should apply the trustworthiness requirement to a hearsay statement). In assessing the trustworthiness requirement, the Advisory Committee noted that a court may not exclude a hearsay statement based on the credibility of a witness describing the declarant's hearsay statement. *Id.* Instead, the focus should be on the circumstances surrounding the statement. *Id.* Additionally, the Advisory Committee determined that requiring courts to consider corroborating evidence, instead of giving courts the option to consider it, creates a uniform approach among the courts. *Id.* The Advisory Committee finally noted that the existence of corroborating evidence is not dispositive, but rather goes toward "the strength and quality of that evidence." *Id.*

[67] Capra, *supra* note 63, at 1584. Corroborating evidence assists the court in deciding whether the declarant is likely telling the truth. *Id.* In criminal cases, when a court determines that a hearsay statement fulfills the trustworthiness requirement, the court must still determine whether the hearsay statement satisfies the requirements of the Confrontation Clause of the Sixth Amendment. FED. R. EVID. 807 advisory committee's note to 2019 amendment; *see* U.S. CONST. amend. VI. Under the Confrontation Clause, criminal defendants possess a constitutional right "to be confronted with the witnesses against" them. U.S. CONST. amend. VI. The "testimonial" hearsay statement of a declarant who does not testify at trial is inadmissible unless the declarant is unavailable to testify and the defendant at least had an opportunity to cross-examine the declarant at some point. Ohio v. Clark, 135 S. Ct. 2173, 2179 (2015) (citing Crawford v. Washington, 541 U.S 36, 54 (2004)). A statement is testimonial if the declarant's purpose was to create "an out-of-court substitute for trial testimony." *Id.* at 2183 (quoting Michigan v. Bryant, 562 U.S. 344, 358 (2011)).

[68] *See* FED. R. EVID. 807(a)(2) (providing that "a hearsay statement is not excluded" if, in addition to satisfying other requirements, it is "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts"); *id.* R. 807 advisory committee's note to 2019 amendment (noting that the Advisory Committee stressed keeping the probative requirement).

[69] *Id.* R. 807 advisory committee's note to 2019 amendment (explaining that the probative requirement's goal is to prevent the erosion of other hearsay exceptions).

[70] Capra, *supra* note 63, at 1585 (explaining that a court compares the proffered evidence with other evidence that could prove the truth of the matter asserted).

[71] *See id.* at 1585–86 (citing Larez v. City of Los Angeles, 946 F.2d 630, 641–44 (9th Cir. 1991)) (explaining that in *Larez v. City of Los Angeles*, the U.S. Court of Appeals for the Ninth Circuit held that newspaper accounts, which were sufficiently trustworthy, were inadmissible under the residual exception because the reporters were available to testify). The probative requirement thus is a "best evidence requirement." *Id.* at 1586. It also gives a court discretionary authority "to *hypothesize* other sources of evidence that can be used to prove the point." *Id.* at 1589.

Finally, under part (b), the amended residual exception now states that before a trial or hearing, unless excused by good cause, the offering party must provide the other party with notice in writing of the substance of the statement and the name of the declarant.[72] This provides them with a fair chance to counter the statement.[73] The good cause exception is an additional safeguard to prevent against misuse of the exception because it is only available in limited scenarios.[74] Finally, the amended residual exception no longer requires that a hearsay statement concern a material fact or that its admission furthers the ends of justice.[75]

There is little case law analyzing the amended rule.[76] In 2019, however, the United States District Court for the District of Idaho applied the amended

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[72] *Compare* FED. R. EVID. 807(b) (indicating that the proponent of the hearsay evidence must give written notice to the opposing party "of the intent to offer the statement," which includes the substance of the statement and name of the declarant, to assure "the party has a fair opportunity to meet it," unless good cause excuses notice), *with* FED. R. EVID. 807(b) (2011) (amended 2019) ("The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.").

[73] FED. R. EVID. 807 advisory committee's note to 2019 amendment.

[74] *Id.* ("For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins, or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay."). Additionally, the requirement of written notice was also added with the intention of providing a reliable written record. *See id.* (illustrating that requiring notice in writing assures certainty and quells any arguments that may occur about whether a party received notice). Furthermore, the amended residual exception preserves the requirement under part (b) that a non-offering party receive notice so that the party has a fair chance to oppose the evidence. *Id.* Finally, the amended residual exception no longer requires that the offering party state the declarant's address, a senseless task according to the Advisory Committee. *Id.*

[75] *Compare id.* (noting that two requirements were deleted), *with* FED. R. EVID. 807(a) (2011) (amended 2019) (providing that if, in addition to satisfying other requirements, "the [hearsay] statement is offered as evidence of a material fact" and "admitting it will best serve the purposes of these rules and the interests of justice" can be admissible). Notably, the Advisory Committee indicated that these requirements were eliminated because they are present in other Federal Rules of Evidence. *See* FED. R. EVID. 807 advisory committee's note to 2019 amendment (noting that the deleted requirements are found in Federal Rules of Evidence 102 and 401); *see also id.* R. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."); *id.* R. 401 (explaining that evidence is relevant when it makes a material fact either more or less likely to be true than without the evidence). Prior to the December 2019 amendment, other scholars recognized that the relevance requirement is already mandated, and that the justice requirement adds nothing. *E.g.*, Fenner, *supra* note 43, at 270 (recognizing that prior to the 2019 amendment, the residual exception could be analyzed based on three requirements: trustworthiness, probative value, and notice).

[76] *See, e.g.*, Grunig v. Johnson & Johnson, No. 18-cv-00111, 2019 U.S. Dist. LEXIS 217487, at *14 (D. Idaho Dec. 16, 2019) (applying the federal residual exception's amended requirements to determine whether a hearsay statement was admissible); *see also* Gold, *supra* note 49, at 1621 (explaining that amending a broad concept like the trustworthiness requirement disrupts the effect of precedent based on the residual exception's previous trustworthiness standard).

residual exception in *Grunig v. Johnson & Johnson*.[77] One of the plaintiffs in *Grunig* endured a hernia repair surgery in which his doctor used surgical mesh, manufactured by the defendants, to repair his hernia.[78] A few years later, a different doctor diagnosed that plaintiff with a bowel obstruction caused by the surgical mesh adhering to bands of tissue.[79] The plaintiffs, the patient and his wife, then sued the defendants in federal district court.[80] The defendants asked the court to strike from the record an affidavit submitted by the plaintiffs in response to the defendants' motion for summary judgment as inadmissible hearsay.[81] In response, the plaintiffs argued that the affidavit met the requirements of the residual exception.[82]

The section of the affidavit at issue detailed a phone conversation between the plaintiffs' son and the doctor that performed the hernia repair that took place at a time after the surgery.[83] The court concluded that the doctor's statements were not supported by sufficient indicators of trustworthiness because neither direct nor circumstantial evidence corroborated the doctor's statements.[84] The court therefore held that the statements failed to meet the trustworthiness requirement of the amended federal residual exception and thus granted the defendants' motion to strike.[85]

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[77] *Grunig*, 2019 U.S. Dist. LEXIS 217487, at *14 (analyzing hearsay statements under the amended residual exception).

[78] *Id.* at *1–3. No problems occurred during this surgery. *Id.* at *3–4.

[79] *Id.* at *4–5. The doctor then removed the surgical mesh to fix the bowel obstruction. *Id.* at *5.

[80] Complaint & Demand for Jury Trial at 1, *id.* (No. 18-cv-00111). The plaintiffs alleged that the defendants were "jointly and severally liable" for the defective manufacturing of the surgical mesh as well as "vicariously liable" for the actions of the defendants' employees. *Id.* at *3.

[81] *Grunig*, 2019 U.S. Dist. LEXIS 217487, at *6.

[82] *Id.* at *11 (citing FED. R. EVID. 807). The plaintiff also argued that the affidavit was admissible under the present sense impression exception. *Id.* (citing FED. R. EVID. 803(1)) (indicating for a statement to be admissible under the present sense impression exception, it must be made almost contemporaneously after a declarant perceives an event). The admittance theory for the present sense impression exception is that a declarant who makes a statement while or close to when the event is happening negates "the likelihood of deliberate of conscious representation." FED. R. EVID. 803(1) advisory committee's note to 1972 proposed rules. Additionally, a party can examine as a witness the declarant or, if applicable, the non-declarant about the circumstances surrounding the statement. *Id.*

[83] *Grunig*, 2019 U.S. Dist. LEXIS 217487, at *9–10. The affidavit alleged that the doctor recounted the entanglement of the hernia mesh during the surgery, and that over time the mesh became "layered." *Id.*

[84] *Id.* at *16. The U.S. District Court for the District of Idaho emphasized that the statements were not trustworthy because the doctor did not recall the phone call, the record did not demonstrate when the phone call took place, the doctor testified he would have used different language when describing the circumstances of the hernia repair surgery, and it would have been impossible to have more than a single layer of mesh. *Id.* at *14–16. The court also recognized that the plaintiff's doctor testified at trial, but his testimony would not have fixed any hearsay problems because it did not support the plaintiff's statements. *Id.* at *16.

[85] *Id.* at *16. The court also determined that the conversation contained in the affidavit did not meet the present sense impression exception because no evidence demonstrated that the conversation was close enough in time to the completion of the plaintiff's surgery. *Id.* at *12–13.

### *B. Suicide Notes and What They Indicate About Their Authors*

Suicide is defined as an intentional self-injurious action that results in the end of one's life.[86] The unfortunate reality of suicide rates in the United States is that they have increased by nearly thirty-three percent since 1999.[87] A cause for greater concern is the fact that, in 2016, suicide became the second leading cause of death for Americans age ten to thirty-four, as well as the fourth leading cause of death for Americans age thirty-five to fifty-four.[88] Depression is the most prevalent underlying cause of suicide.[89] Scholars continue to study suicide with the goal of better understanding it and quelling its rise, but there are still significant gaps in the research.[90] Suicide notes, however, are a form of data that have allowed researchers to learn more about the complexities of suicide.[91]

A modest percentage of individuals who commit suicide leave behind suicide notes, although scholars dispute the precise percentage.[92] A suicide note is

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[86] Bart Desmet & Véronique Hoste, *Emotion Detection in Suicide Notes*, 40 EXPERT SYS. WITH APPLICATIONS 6351, 6351 (2013) (defining suicide). Suicide can be differentiated from attempted suicide, which is when an individual tries to commit suicide but that attempt does not result in an individual's death. ANTOON A. LEENAARS, SUICIDE NOTES: PREDICTIVE CLUES AND PATTERNS 27 (1988) (comparing suicide with attempted suicide). The act of attempted suicide is generally to change one's behavior, whereas the goal of suicide is to end one's life. *Id.*

[87] *See* Hedegaard et al., *supra* note 28, at 1 (finding that the "age-adjusted suicide rate increased 33% from 10.5 per 100,000 standard population to 14.0" from 1999 to 2017). According to a 2013 statistic, nearly every fourteen minutes, an individual in the United States commits suicide. *Analyzing the Language of Suicide Notes to Help Save Lives*, NPR: TALK OF THE NATION (May 15, 2013), https://www.npr.org/2013/05/15/184232472/analyzing-the-language-of-suicide-notes-to-help-save-lives [https://perma.cc/52VX-JK8D].

[88] Hedegaard et al., *supra* note 28, at 1 (describing the age brackets wherein suicide is a leading cause of death). Suicide is also a primary cause of death in local jails and state prisons. Venus Chui, Note, *Correcting Correctional Suicide: Qualified Immunity and the Hurdles to Comprehensive Inmate Suicide Prevention*, 59 B.C. L. REV. 1397, 1411 (2018). This is likely due to separation from loved ones, a lack of control, the trauma of being detained, and living in an authoritarian setting. *Id.*

[89] *See* Drew Coster & David Lester, *Last Words: Analysis of Suicide Notes from an RECBT Perspective: An Exploratory Study*, 31 J. RATIONAL-EMOTIVE COGNITIVE-BEHAV. THERAPY 136, 147 (2013) (analyzing genuine suicide notes and concluding that the most common emotional category present was depression); *Risk Factors & Warning Signs*, AM. FOUND. FOR SUICIDE PREVENTION, https://afsp.org/risk-factors-and-warning-signs [https://perma.cc/4RBP-J9CF] (suggesting that the most prevalent mental health condition associated with suicide is untreated or undiagnosed depression).

[90] *See* Leenaars, *supra* note 17, at 39 (explaining that there are few scientific studies on suicide notes).

[91] *See* LEENAARS, *supra* note 86, at 31 (explaining that analyzing suicide notes has been a helpful tool to learn more about suicide because it provides a snapshot of that suicidal person's life "so that some essential essences . . . can be reasonably inferred"). Other alternatives researchers have used to study suicide include, "statistics, third-party interviews," and attempted suicide. *Id.*

[92] *Compare* Cerel et al., *supra* note 29, at 328 (concluding that only 18% of individuals who committed suicide in Kentucky left behind suicide notes), *with* Toshiki Shioiri et al., *Incidence of Note-Leaving Remains Constant Despite Increasing Suicide Rates*, 59 PSYCHIATRY & CLINICAL

likely one of the last pieces of personal information left by the individual who committed suicide.[93] The notes often provide unique insight into what the individual was thinking at the time that person wrote the note.[94] Research regarding who might leave a suicide note is fairly inconclusive.[95] Some studies suggests that gender, the suicide method, living alone, and a history of suicide threats may help predict whether an individual is likely to write a suicide note.[96] Other research suggests that there are no meaningful differences in demographics or circumstances between individuals who write suicide notes and those who do not.[97]

There is also a significant amount research that has dissected the genuineness of these notes.[98]A genuine suicide note is a real note that is actually left behind by the individual who committed suicide.[99] This differs from a simulated note, which is a note written by an individual as if that person made plans to

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NEUROSCIENCES 226, 227 (2005) (indicating that after analyzing over 5,161 individuals who committed suicide in Japan, roughly 30% left suicide notes).

[93] *See* Coster & Lester, *supra* note 89, at 137 (noting that besides a suicide note, the other information an individual who commits suicide may leave behind include clinical records or notes from one's therapist).

[94] *See* Stephen T. Black, *Comparing Genuine and Simulated Suicide Notes: A New Perspective*, 61 J. CONSULTING & CLINICAL PSYCHOLOG. 699, 702 (1993) (explaining that because suicide notes represent the final way that a suicidal person communicates with the world and their loved ones, they are invaluable evidence to researchers studying persons who commit suicide); Leenaars, *supra* note 17, at 43 (suggesting that a suicide note is a "window into [the] mind" of the individual who committed suicide).

[95] *See infra* notes 96–97 and accompanying text (comparing data on individuals who commit suicide and the circumstances under which they do so); *see also* Timothy T. Lau, *Reliability of Dying Declaration Hearsay Evidence*, 55 AM. CRIM. L. REV. 373, 392 (2018) (suggesting that there is no consensus among scholars regarding how gender and education, along with other demographic indicators, contribute to the act of note-leaving).

[96] *See* Valerie J. Callanan & Mark S. Davis, *A Comparison of Suicide Note Writers with Suicides Who Did Not Leave Notes*, 39 SUICIDE & LIFE-THREATENING BEHAV. 558, 565–66 (2009) (noting that individuals who left suicide notes were less likely to have made prior suicide attempts or committed suicide by hanging, but it was likelier these individuals lived alone); Belinda Carpenter et al., *Who Leaves Suicide Notes? An Exploration of Victim Characteristics and Suicide Method of Completed Suicides in Queensland*, 20 ARCHIVES SUICIDE RSCH. 176, 186 (2016) (noting that those who used gas to commit suicide were more likely to leave suicide notes); N. Heim & D. Lester, *Do Suicides Who Write Notes Differ from Those Who Do Not? A Study of Suicides in West Berlin*, 82 ACTA PSYCHIATRICA SCANDINAVICA 372, 372 (1990) (explaining that women and those who killed themselves using poison were more likely to leave suicide notes).

[97] *See* Cerel et al., *supra* note 29, at 328 (concluding that there were no differences between the circumstances and demographics of those who left a suicide note and those who did not); Natalie J. Jones & Craig Bennell, *The Development and Validation of Statistical Prediction Rules for Discriminating Between Genuine and Simulated Suicide Notes*, 11 ARCHIVES SUICIDE RSCH. 219, 231 (2007) (same).

[98] *See infra* notes 99–117 and accompanying text (reviewing research that examines genuine suicide notes).

[99] *See* Maria Ioannou & Agata Debowska, *Genuine and Simulated Suicide Notes: An Analysis of Content*, 245 FORENSIC SCI. INT'L 151, 153 (2014) (defining genuine suicide notes).

commit suicide, but did not have that sincere intention.[100] Subsections 1 and 2 examine an outsider's—someone who did not write the suicide note—ability to distinguish a genuine suicide note from a simulated suicide note[101] and reviews the content often found in each type of note.[102]

### 1. Identifying a Genuine Note Versus a Simulated Note

Some research has analyzed whether individuals, including lay persons and trained professionals, can distinguish between genuine and simulated suicide notes.[103] These studies suggest that it is a difficult, but not impossible, task.[104] One study found that students who possessed a more compassionate outlook toward suicide were better able to distinguish between genuine and simulated suicide notes.[105] In another study examining genuine and simulated suicide notes, the study concluded that mental health professionals were only accurate fifty percent of the time when identifying a genuine note from a simulated one.[106]

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[100] *See id.* (defining simulated suicide notes). Generally, researchers that compare genuine versus simulated suicide notes obtain the genuine suicide notes from a coroner's office, and simulated suicides from participants who volunteered to write them. *Id.*; *see also* Black, *supra* note 94, at 699.

[101] *See infra* notes 103–106 and accompanying text.

[102] *See infra* notes 107–117 and accompanying text.

[103] *See* David Lester, *Correlates of Accuracy in Judging Genuine Versus Simulated Suicide Notes*, 79 PERCEPTUAL & MOTOR SKILLS 642, 642 (1994) (studying college students' ability to identify genuine and simulated suicide notes); *Analyzing the Language of Suicide Notes to Help Save Lives*, *supra* note 87 (describing mental health professionals' ability to identify genuine and simulated suicide notes).

[104] *See* Lester, *supra* note 103, at 642 (explaining that if an individual possessed a certain attitude about suicide, it increased the odds that the individual would correctly identify whether a suicide note was genuine or simulated); *Analyzing the Language of Suicide Notes to Help Save Lives*, *supra* note 87 (describing the accuracy of mental health professionals' ability to distinguish between genuine and simulated suicide notes).

[105] *See* Lester, *supra* note 103, at 642; *see also* David Lester, *Reliability of Naïve Judges of Genuine Suicide Notes*, 73 PERCEPTUAL & MOTOR SKILLS 942, 942 (1991) (analyzing a group of fifty-eight college students taking a social science class judging thirty-two genuine and simulated suicide notes, and determining that those students who could identify a genuine versus a simulated suicide note "were reliably better"). The study asked forty-three college students taking a thanatology course to differentiate between thirty-three pairs of genuine and simulated notes. Lester, *supra* note 103, at 642; *see also What Is Thanatology?*, BEST COUNSELING DEGREES (Sept. 25, 2020), https://www.bestcounselingdegrees.net/resources/thanatology/ [https://perma.cc/LN2U-YD9Z] (explaining that thanatology is the study of physical and psychological changes associated with death). The study determined that students who possessed a more sympathetic outlook toward suicide were more commonly correct in distinguishing genuine from simulated suicide notes. *See* Lester, *supra* note 103, at 642. The study determined the correct students shared certain views about suicide. *Id.* Those beliefs were that suicide starts from disagreements with a relative, suicide might be the only solution in certain situations, suicide is an individual's own business, suicide reflects a lack of religious beliefs, suicide does not necessarily mean that an individual wants to die, suicide is more acceptable if it is non-violent, and suicide generally ends in an individual dying. *Id.*

[106] *Analyzing the Language of Suicide Notes to Help Save Lives*, *supra* note 87. This study examined sixty-six suicide notes—thirty-three genuine and thirty-three simulated. *Id.* The researchers then

### 2. The Content of Genuine and Simulated Suicide Notes

Other scholars have compared the topics discussed by suicidal persons, overall themes present, and language in the notes, and have found significant differences between genuine and simulated ones.[107] In one study comparing a sample of thirty-three pairs of genuine and simulated suicide notes, for example, researchers specifically analyzed the differences in topics and themes.[108] They discovered that simulated notes referred to topics such as autonomy, injustice, planning, and reunion, but typically did not discuss the reasons for committing suicide.[109] Genuine suicide notes, by contrast, contained an overall emotional and interpersonal theme, referring to topics such as relationship failure, elaborate love, and partners.[110] Specifically, when analyzing certain topics in the suicide notes, the researchers discovered that genuine suicide notes typically contained instructions to loved ones about practical matters and constrictions, which is regarded as narrow-thinking focusing on one state or emotion.[111] In another study comparing suicide notes for content and structure, re-

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shuffled the suicide notes and asked mental health professionals to correctly identify the genuine suicide notes from the simulated ones; they were accurate 50% of the time. *Id.* In the same study, a computer was accurate 90% of the time. *Id.* The difference in accuracy was attributed to human bias, which the researchers claim does not plague computers. *Id.*

[107] *See* Ioannou & Debowska, *supra* note 99, at 153–157 (comparing the content of genuine and simulated suicide notes and concluding that there were different themes and topics present); Jones & Bennell, *supra* note 97, at 223, 225 (analyzing the content and structure of genuine and simulated suicide notes and finding that there were differences between the two kinds of notes). Researchers determine themes based on: (1) the similar topics present among the content of the suicide notes they analyze and (2) the type of suicide note—genuine or simulated. Then they lump the suicide notes of the same type that discuss similar topics into the same theme. *See* Ioannou & Debowska, *supra* note 99, at 153, 154.

[108] Ioannou & Debowska, *supra* note 99, at 153.

[109] *Id.* at 154. The researchers divided the simulated notes into three specific themes: escape, positive affection and self-blame, and purposeless life. *Id.* at 156–57. The first theme—escape—embraced negative stereotypes and saw one's self as weak. *Id.* at 156. Positive affection notes included positive views of others but not one's self, while blaming one's self for failed relationships. *Id.* at 157. Lastly, notes that focused on a purposeless life referenced interpersonal problems, displeasure with loved ones, and cynicism. *Id.*

[110] *Id.* at 154. The researchers separated genuine suicide notes into four themes: planned escape, negative affection and self-mitigation, positive affection and failed relationship, and lack of self-acceptance. *Id.* at 155–56. The first theme—planned escape—discussed medical problems and the fact that one's suicide was intentional. *Id.* at 155. The second theme—negative affection and self-mitigation—expressed anger toward others and martyrdom. *Id.* Positive affection and failed relationship notes discussed one's relationship failure but in a positive and memorable tone. *Id.* at 155–56. The final theme in genuine notes—self-acceptance—focused on negative attitudes toward one's self. *Id.* at 156.

[111] *Id.* at 151, 155–57 (noting that in 35% of simulated notes, suicide note writers mentioned the following items: regrets, unstated reasons for committing suicide, positive and loving views of one's partner, and general declarations of love, whereas in more than 45% of all genuine suicide note writers mentioned: regrets, directives, general declarations of live, narrow thinking, and positive views of one's partner). Individuals who commit suicide and express constriction in their suicide notes generally believe that suicide is the only solution to the problems they face. *Id.* at 152.

searchers found that, compared to the simulated notes, the genuine notes were longer, had shorter sentences, and involved more instructions and positive affection toward loved ones.[112]

Scholars who focus on analyzing genuine suicide notes generally agree that the most common topics discussed are sadness, hopelessness, love, and instructions to loved ones.[113] Interestingly, the presence of blame is less conclusive.[114] One study suggested that although expressions of blame were present in most of the analyzed suicide notes, self-blame was far more common than blame of others.[115] Another study, however, found that both writers of suicide notes referenced both blame toward others and self-blame less than a combined total of thirty-percent of the time.[116] In sum, even with some conflicting conclusions, the research discussing genuine versus simulated suicide

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[112] Jones & Bennell, *supra* note 97, at 223, 225, 228 (suggesting that the organization and language of a suicide note demonstrates that individuals who commit suicide are focused on conveying relevant information in a concise manner to survivors).

[113] *See* Coster & Lester, *supra* note 89, at 142 tbl.2 (indicating that the most common emotional category present in eighty-six suicide notes for both males and females was depression); Desmet & Hoste, *supra* note 86, at 6355 fig.3 (noting that results indicated that love, thankfulness, hopelessness, and instructions were the most common topics contained in the analyzed suicide notes); John P. Pestian et al., *What's in a Note: Construction of a Suicide Note Corpus*, BIOMEDICAL INFORMATICS INSIGHTS, Nov. 5, 2012, at 1, 2, 5 tbl.3 (demonstrating that instructions, hopelessness, and love were the most common topics in the 1,319 suicide notes analyzed); Sandra Sanger & Patricia McCarthy Veach, *The Interpersonal Nature of Suicide: A Qualitative Investigation of Suicide Notes*, 12 ARCHIVES SUICIDE RSCH. 352, 358 tbl.1 (2008) (finding that out 186 suicide notes, instructions (e.g., "financial affairs") and positive relationships (e.g., "[s]ays 'I love you'") were the most common topics).

[114] *Compare* Pestian et al., *supra* note 113, at 1, 2, 5 tbl.3 (noting that blame was only present in 18% of the notes analyzed, and often showed self-blame), *and* Sanger & Veach, *supra* note 113, at 358 tbl.1 (stating that blame for others was only present in 8% of 186 suicide notes analzyed, whereas self-blame was present in 17% of 186 suicide note analyzed), *with* L. McClelland et al., *A Last Defence: The Negotiation of Blame Within Suicide Notes*, 10 J. CMTY & APPLIED SOC. PSYCH. 225, 225 (2000) (concluding that the topic of blame was present in 87% of 172 suicide notes analyzed).

[115] *See* McClelland et al., *supra* note 114, at 231, 233 (stating that 79% of 172 suicide notes contained references to self-blame, and 20% allocated blame to others). Research further suggests that there are many other emotional topics that may appear in suicide notes but are far less common. *See* Coster & Lester, *supra* note 89, at 142 tbl.2 (indicating that guilt, shame, hurt, and anger were less prevalent topics discussed in the analyzed suicide notes); Pestian et al., *supra* note 113, at 5 tbl.3 (indicating that guilt, sorrow, blame, hopefulness, thankfulness, anger, fear, happiness/peacefulness, pride, forgiveness, and abuse were less prevalent topics discussed in the analyzed suicide notes); Sanger & Veach, *supra* note 113, at 358 tbl.1 (indicating that explanations for committing suicide, relationship reconciliation and maintenance, concern for others, negative relationships, and acknowledgments of relationships ending were less prevalent topics discussed in the suicide notes analyzed).

[116] Sanger & Veach, *supra* note 113, at 358 tbl.1 (stating that blame was only present in 8% out of 186 suicide notes reviewed, and self-blame was present in 17% of the same notes). The most common topic discussed by writers in this study was "instructions" to loved ones, found in 70% of suicide notes, and the least discussed topic was blame toward others, which was found in only 8% of notes. *Id.*

notes offers advantageous information that a court should use when analyzing the trustworthiness of a suicide note under the residual exception.[117]

### *C. The Admissibility of Suicide Notes Under the Residual Exception Prior to Its 2019 Amendment*

In general, when litigants seek to admit suicide notes, they often argue for their admissibility under Rule 803, Rule 804, or the residual exception.[118] The cases involving such arguments are usually criminal in nature, including prosecutions for drug-related offenses, fraud schemes, and charges related to murder, among others.[119]

For two principal reasons, many courts have been reluctant to admit suicide notes into evidence under the residual exception.[120] First, courts have typically found that the offering party, who bears the burden of demonstrating admissibility, has failed to meet one of the requirements of the residual exception.[121] The most commonly cited failure is that the offering party did not demonstrate that the hearsay statements contained in the suicide note bore satisfactory indicators of trustworthiness.[122] Second, courts have concluded that

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[117] *See supra* notes 103–116 and accompanying text (describing studies analyzing genuine suicide notes).

[118] *See* United States v. Hammers, 942 F.3d 1001, 1010 (10th Cir. 2019) (noting that the defendant argued that the suicide note was admissible as a statement against interest first, and admissible under the federal residual exception in the alternative); United States v. Angleton, 269 F. Supp. 2d 878, 881 (S.D. Tex. 2003) (explaining that the defendant argued that the suicide notes were admissible as a dying declaration, statement against interest, excited utterance, and also admissible under the residual exception if those theories failed); Commonwealth v. Pope, 491 N.E.2d 240, 243–44 (Mass. 1986) (describing that the plaintiff argued that the suicide note was admissible as a statement against interest, under the state of mind exception, and alternatively, under the residual exception); State v. Brown, 752 P.2d 204, 206–07 (Mont. 1988) (observing the plaintiff argued that the suicide note was admissible under the residual exception and as a statement against interest). *But see* United States v. Esmurria, No. 02-1556-cr, 2006 U.S. App. LEXIS 13513, at *5 (2d Cir. May 26, 2006) (explicating that the defendant argued that the suicide note was admissible only under the residual exception).

[119] *See, e.g.*, *Hammers*, 942 F.3d at 1007 (illustrating a case involving a fraud scheme); *Esmurria*, 2006 U.S. App. LEXIS 13513, at *1 (providing an example of a case related to drug offenses); *Angleton*, 269 F. Supp. 2d at 878 (depicting a murder-for-hire case); *Pope*, 491 N.E.2d at 241 (explaining an instance of bringing charges for accessory to murder-suicide); *Brown*, 752 P.2d at 204 (involving a conspiracy to deliver a pistol to a prison inmate).

[120] *See, e.g.*, *Pope*, 491 N.E.2d at 244 (concluding that the suicide note was inadmissible because the Commonwealth did not satisfy two requirements of the residual exception and admitting it would broaden the residual exception too much); *Brown*, 752 P.2d at 207 (holding that the suicide note was inadmissible because the State failed to satisfy a foundational element of the residual exception and further noting that the residual exception should be used sparingly).

[121] *See, e.g.*, *Esmurria*, 2006 U.S. App. LEXIS 13513, at *6 ("The burden of proof of admissibility is on the proponent of the evidence." (citing Bourjaily v. United States, 483 U.S 171, 175 (1987))); *Pope*, 491 N.E.2d at 244 (reasoning that the Commonwealth failed to satisfy the trustworthiness and notice requirements of the residual exception).

[122] *See Hammers*, 942 F.3d at 1011–12 (reasoning that the suicide "note did not offer guarantees of trustworthiness" because the individual who committed suicide and the defendant were close

the admission of a suicide note would expand the residual exception beyond Congress's intention to only admit hearsay in exceptionally rare situations.[123] Accordingly, these decisions do not suggest that a suicide note will *never* be admitted under the residual exception; rather, they illustrate the extremely high and discretionary bar that the offering party must overcome when arguing that a suicide note is trustworthy under the residual exception.[124]

At least one state court, however, has approved the admission of a suicide note under the residual exception.[125] In 2003, in *People v. Miller* (*Miller I*), the Michigan Court of Appeals concluded that the defendant's ex-lover's suicide note, which detailed a conspiracy to murder the defendant's husband, was admissible under Michigan's residual exception.[126] At the time, Michigan's residual exception mirrored the federal standard.[127] The court reasoned that the

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friends, arguably motivating the individual to exculpate the defendant); *Esmurria*, 2006 U.S. App. LEXIS 13513, at *5–6 (reasoning that the codefendant's suicide note failed to meet the trustworthiness requirement of the residual exception because it was written by an individual who was indifferent to the repercussions of his actions and possessed a motive to lie because the defendant was his brother-in-law); *Angleton*, 269 F. Supp. 2d at 881–82, 891 (reasoning that the circumstances under which the suicide notes were written, wherein the defendant's brother wrote them in his jail cell, were not sufficiently trustworthy); *Pope*, 491 N.E.2d at 244 (concluding that the suicide note was not trustworthy because the Commonwealth failed to establish the time and circumstances of the writing and failed to give notice); *Brown*, 752 P.2d at 207 (reasoning that the statements in the suicide note were not sufficiently trustworthy, so the suicide note only gave rise to speculation of the defendant's role in the conspiracy). The courts in these cases applied the equivalence standard, which is no longer the trustworthiness standard under the amended residual exception. *See* FED. R. EVID. 807(a)(1) (providing that "a hearsay statement is not excluded" if "the statement is supported by sufficient guarantees of trustworthiness").

[123] *See Hammers*, 942 F.3d at 1011 ("Courts must use caution in applying the residual exception because 'an expansive interpretation of the residual exception would threaten to swallow the entirety of the hearsay rule.'" (quoting United States v. Tome, 61 F.3d 1446, 1452 (10th Cir. 1995)); *Pope*, 491 N.E.2d at 244 (concluding that admitting the suicide notes would adopt a broad formulation of the residual exception that was inappropriate in that case); *Brown*, 752 P.2d at 207 (holding that because suicide notes were contemplated before the passage of the rules of evidence, they did not present any unexpected situations warranting the development of hearsay law).

[124] *See Hammers*, 942 F.3d at 1011 ("The residual exception should only be used 'in extraordinary circumstances where the court is satisfied that the evidence offers guarantees of trustworthiness and is material, probative and necessary in the interest of justice.'" (quoting United States v. Dalton, 918 F.3d 1117, 1133 (10th Cir. 2019))); *Pope*, 491 N.E.2d at 244 (noting that an offered hearsay statement must possess trustworthiness as a first step in applying the residual exception properly).

[125] *See, e.g.*, People v. Miller (*Miller I*), No. 233018, 2003 WL 21465338, at *2 (Mich. Ct. App. June 24, 2003) (per curiam) (concluding that a suicide note was admissible under Michigan's residual exception), *habeas corpus granted conditionally sub nom.*, Miller v. Stovall, 573 F. Supp. 2d 964 (E.D. Mich. 2008), *habeas corpus denied*, No. 05–73447, 2012 WL 3151541 (E.D. Mich. 2012), *aff'd*, 742 F.3d 642 (6th Cir. 2014).

[126] *Id.* at *1–2 (noting that the individual who committed suicide left a note to his parents detailing how he and the defendant murdered the defendant's husband, and holding that it was admissible under Michigan's residual exception).

[127] *Compare* MICH. R. EVID. 803(24) (indicating that the requirements of the residual exception are trustworthiness, relevancy, probative value, service of justice, and notice), *with supra* note 53 and accompanying text (listing the text of the former federal residual exception under Rule 803(24)).

hearsay statements in the suicide note contained indicia of trustworthiness sufficient to satisfy both the residual exception and the criminal defendant's constitutional right to confront adverse witnesses.[128] These indicia included the suicide note's consistency, spontaneity, voluntariness, basis in personal knowledge, close temporal proximity to the writer's death, addressal to family members, and reason for being written— suicide.[129] The court also reasoned that the admission of the note was relevant, probative, and served the interests of justice.[130] After concluding that the suicide note met all of the residual exception's requirements, the Michigan court held that it was properly admitted.[131]

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[128] *Miller I*, 2003 WL 21465338, at *2 (listing multiple factors relevant to a statement's trustworthiness (citing People v. Lee, 622 N.W.2d 71, 80 (Mich. Ct. App. 2000))). In a criminal trial, the defendant has the right to confront the opposing witness. U.S. CONST. amend. VI. In *Ohio v. Roberts*, the U.S. Supreme Court concluded that when offering hearsay statements into evidence where the declarant is unavailable, a criminal defendant's constitutional right to confront witnesses is satisfied if the statement either falls within a hearsay exception or is trustworthy. 448 U.S. 56, 66 (1980), *overruled by* Crawford v. Washington, 541 U.S. 36 (2004). In *Miller I*, the plaintiffs, People of the State of Michigan, offered a suicide note under the residual exception against the defendant, Sharee Miller, who "conspired with her recently-acquired lover to kill her new husband." 2003 WL 21465338, at *1. The defendant's lover helped her commit the murder, but then later killed himself and left behind a suicide note explaining the lovers' conspiracy. *Id.* Because the residual exception is not a firmly rooted hearsay exception, in a criminal proceeding, hearsay statements offered against a defendant under the residual exception "must be analyzed for particularized guarantees of trustworthiness." *Lee*, 622 N.W.2d at 77 (quoting United States v. Barrett, 8 F.3d 1296, 1300 (8th Cir. 1993)). In deciding whether to admit the suicide note, the Michigan Court of Appeals in *Miller I* equated the trustworthiness requirement of the residual exception with the trustworthiness requirement of the Confrontation Clause. *See* 2003 WL 21465338, at *2 (explaining that to satisfy the trustworthiness requirements of the residual exception and the Confrontation Clause, the hearsay statement must "possess[] adequate indicia of reliability"); *see also supra* note 67 and accompanying text (explaining the Confrontation Clause).

[129] *Miller I*, 2003 WL 21465338, at *2 (citing *Lee*, 622 N.W.2d at 80). The *Miller I* court spent most of its analysis considering the trustworthiness of the suicide note. *See id.* (explaining that the suicide note was trustworthy in two paragraphs and discussing the rest of the residual exception's requirements in a short paragraph).

[130] *Id.* The court reasoned that the suicide note was relevant to proving the defendant's conspiracy to commit murder because it contained detailed plans to kill her husband. *Id.* The court also explained it was probative because the writer of the note was dead. *Id.* Finally, the court concluded it served the interests of justice. *Id.*

[131] *Id.* The court affirmed the defendant's conviction of "conspiracy to commit first-degree murder and second-degree murder." *Id.* at *1. Importantly, like in *Miller I*, other courts have assessed the residual exception's trustworthiness requirement simultaneously with the trustworthiness requirement of the Confrontation Clause. *Id.*; *see, e.g.*, United States v. Tome, 61 F.3d 1446, 1452–53 (10th Cir. 1995) (citing Idaho v. Wright, 497 U.S. 805, 821–22 (1990)) (using the Confrontation Clause factors from *Idaho v. Wright* to analyze the trustworthiness of a hearsay statement under the residual exception). These courts explain that there is no distinction between the two requirements. *See, e.g.*, *Tome*, 61 F.3d at 1452 n.5 (explaining that it used Confrontation Clause factors because the "[U.S. Supreme] Court saw no meaningful distinction between Rule 803(24)'s requirement that a statement have 'circumstantial guarantees of trustworthiness' and the Confrontation Clause requirement that it 'bear adequate indicia of reliability'" (quoting FED. R. EVID. 803(24) (1975) (amended 1987, 2000, 2011, 2013, & 2014))).

The *Miller I* case went on to live a long and complex appellate life.[132] The petitioner-defendant from *Miller I* sought a writ of habeas corpus after his conviction was affirmed in state court.[133] The United States District Court for the Eastern District of Michigan granted the petition conditionally, and the United States Court of Appeals for the Sixth Circuit affirmed.[134] The government appealed to the United States Supreme Court, which granted certiorari, but then vacated and remanded the case.[135] The district court denied habeas relief, and the petitioner-defendant ultimately appealed to the Sixth Circuit.[136] In *Miller v. Stovall* (*Miller II*), the Sixth Circuit approved the reasoning of the Michigan trial and appellate courts, concluding that it was reasonable to hold that the statements in the suicide note were admissible hearsay.[137] Thus, *Miller II* exemplifies that admission of a suicide note under the residual exception is possible, and that a factor-based analysis of the trustworthiness requirement is workable.[138] It also shows that analysis of a suicide note proffered under the residual exception properly focuses on intricately reviewing the question of trustworthiness.[139]

## II. Reviewing the Trustworthiness of Suicide Notes

The case law analyzing suicide notes under the residual exception suggests that courts pay close attention to the trustworthiness requirement.[140] Giv-

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[132] *See* Miller v. Stovall (*Miller II*), 742 F.3d 642, 642 (6th Cir. 2014) (describing the appellate history of the case).

[133] *Id.* The Supreme Court of Michigan denied reconsideration of the petitioner-defendant's conviction. People v. Miller, 679 N.W.2d 66, 66 (Mich. 2004).

[134] *Miller II*, 742 F.3d at 642.

[135] *Id.*

[136] *Id.*

[137] *Id.* at 648, 651 (examining the factors that the Michigan Court of Appeals used in *Miller I* to decipher whether the suicide note was trustworthy). In *Miller II*, the U.S. Court of Appeals for the Sixth Circuit noted that the suicide victim lacked a motive to lie in his suicide note because he was not a codefendant, he addressed the suicide note to his parents, and he knew his death was imminent. *Id.* The Sixth Circuit held that the rest of the factors that the *Miller I* court used "were not strong indicators of reliability," but that their absence would have undermined the suicide note's trustworthiness. *Id.* at 649. First, the Sixth Circuit concluded that the suicide note's consistency was not a significant assurance of trustworthiness. *Id.* Next, the Sixth Circuit concluded that although the spontaneity demonstrated some reliability, it was insufficient to guarantee the note's trustworthiness. *Id.* Furthermore, the Sixth Circuit reasoned that the fact that the statements in the suicide note were based on personal knowledge similarly did not assure trustworthiness. *Id.* at 650. The Sixth Circuit also concluded that the proximity of note-writing to the suicide itself indicated trustworthiness because the nearness of committing suicide removed any motive to lie. *Id.* Finally, the Sixth Circuit noted that the suicide note's remorseful tone and self-incriminating statements indicated trustworthiness. *Id.* at 648.

[138] *See id.* at 648–51 (applying a multifactorial approach, holding that the admission of the suicide note was reasonable).

[139] *See id.* (spending four pages to determine that the suicide note was trustworthy).

[140] *See, e.g.*, *id.* (concluding that the suicide note was admissible because it was sufficiently trustworthy, and reasoning that the writer wrote it voluntarily and near death, addressed it to family members, and contained a remorseful tone and "self-incriminating content"); Commonwealth v. Pope, 491 N.E.2d 240, 241 242, 244 (Mass. 1986) (concluding that the statements in the suicide note, con-

en that a majority of courts conclude that suicide notes are not sufficiently trustworthy, but do not always analyze this requirement in much detail, this Note undertakes that task.[141] Section A of this Part discusses decisions that have analyzed the trustworthiness of suicide notes in the context of another hearsay exception—dying declarations.[142] Section A demonstrates that courts providing these decisions have more closely analyzed the trustworthiness of suicide notes compared to courts that have analyzed suicide notes under the residual exception.[143] Section B reviews research assessing whether suicide notes are trustworthy pieces of evidence and offers solutions to concerns raised by scholars about their trustworthiness.[144]

### *A. The Trustworthiness of Suicide Notes in the Context of the Dying Declaration Exception*

The case law examining the trustworthiness of a suicide note under the residual exception is undeniably sparse.[145] Far more often, courts have examined the trustworthiness of suicide notes under Federal Rule of Evidence 804(b)(2), the dying declaration exception.[146] To meet the dying declaration

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fessing to a killing that the defendant "was tried and convicted . . . as an accessory . . . to the murder . . . and for unlawfully carrying a firearm" were not equivalently trustworthy to be admissible because the proponents produced "no evidence concerning the time and circumstances in which the note was written"); State v. Brown, 752 P.2d 204, 205–06, 207 (Mont. 1988) (concluding that the statements in the suicide note—apologizing for getting the defendant involved in smuggling a pistol into a state prison—were not sufficiently trustworthy under Montana's residual exception because the note "contained no direct statement implicating [the defendant]," "d[id] not mention the pistol, plan, or the delivery," and only "infer[red] some possible role in the conspiracy").

[141] *See, e.g.*, United States v. Hammers, 942 F.3d 1001, 1011–12 (10th Cir. 2019) (analyzing in just two paragraphs the trustworthiness of a suicide note under the residual exception); *Pope*, 491 N.E.2d at 244 (analyzing in merely two sentences the trustworthiness of a suicide note under the residual exception); *Brown*, 752 P.2d at 207 (using only one paragraph to discuss the trustworthiness of a suicide note under the residual exception).

[142] *See infra* notes 145–174 accompanying text.

[143] *See infra* notes 145–174 accompanying text.

[144] *See infra* notes 175–197 accompanying text.

[145] *See supra* notes 118–139 and accompanying text (examining case law that has analyzed the trustworthiness of suicide notes in the context of the residual exception).

[146] *See, e.g.*, Pittman v. Cnty. of Madison, No. 08-cv-890, 2015 U.S. Dist. LEXIS 15883, at *6–9 (S.D. Ill. Feb. 10, 2015) (citing State v. Satterfield, 457 S.E.2d 440, 447 (W. Va. 1995)) (noting that the suicide note was admissible under the dying declaration exception and finding it was trustworthy because the note was written only a few hours before the suicide); Kincaid v. Kincaid, 127 Cal. Rptr. 3d 863, 874–75 (Ct. App. 2011) (citing Garza v. Delta Tau Delta Fraternity Nat'l, 948 So. 2d 84, 95 (La. 2006)) (concluding that the suicide note was inadmissible under the dying declaration exception for lack of trustworthiness because the declarant possessed a motive to pin blame on her father, who she accused of sexual abuse, causing her depression, drinking and drug abuse, and other illegal activities); *Garza*, 948 So. 2d at 95, 97–98 (concluding that the suicide note was inadmissible under the dying declaration exception and noting that an individual who chooses to commit suicide may have a motive to lie when writing a suicide note and can write whatever they want in that note, thus defeating the presumption of trustworthiness); *Satterfield*, 457 S.E.2d at 447, 450 (holding that the suicide note

exception, the proffering party must demonstrate that the declarant is unavailable to testify as a witness, the statement was made under the honest belief that death was near, the statement related to the causes and circumstances of the declarant's death, and the case is either a civil or criminal matter involving a homicide.[147] An underlying basis for the admissibility of evidence under the dying declaration exception is that a declarant's statement has significant assurances of trustworthiness.[148] Similar to the trustworthiness analysis under the residual exception, a court tasked with ruling on the applicability of the dying declaration exception considers the totality of the circumstances and the manner in which the statement was made to determine trustworthiness.[149]

One of the rationales for admitting hearsay statements under the dying declaration exception is that individuals who are near death have no motive to lie.[150] To courts, this attaches an inherent trustworthiness to the statements.[151] In 1995, in *State v. Satterfield*, the Supreme Court of Appeals of West Virginia indicated that the state's rules of evidence were broad enough to extend this exception and its rationale to suicide notes.[152] The *Satterfield* court concluded that the declarant's suicide note proclaiming his innocence was admissible under the dying declaration exception.[153] In doing so, the court reasoned that the declarant believed that death was near and wrote the suicide note in close proximity to the suicide, thus rendering the note trustworthy and fulfilling the first requirement of the dying declaration exception.[154] Second, the *Satterfield* court

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was admissible under the dying declaration exception and noting that because the individual who committed suicide wrote the note close in time to the suicide, the note was sufficiently trustworthy).

[147] *See* FED. R. EVID. 804(b)(2) (explaining that a court may admit an out of court statement in a criminal homicide or civil case if the declarant made it when he or she believed death was near, discussed the "causes or circumstances" of death, and is also unavailable).

[148] *See Kincaid*, 127 Cal. Rptr. 3d at 873 (explaining that an underlying notion is that statements offered must have considerable assurances of trustworthiness); Richter, *supra* note 45, at 904–05 (explaining that Rule 804 exceptions rest on both trustworthiness and necessity because the declarant is unavailable to testify); *see also* FED. R. EVID. 807(a)(1) (indicating that a hearsay statement must be sufficiently trustworthy).

[149] *Compare* FED. R. EVID. 807(a)(1) (indicating that a hearsay statement must be "supported by sufficient guarantees of trustworthiness" after assessing "the totality of circumstances" under which the statement was elicited), *with Satterfield*, 457 S.E.2d at 448 (indicating a statement is trustworthy under the dying declaration exception after assessing "the totality of circumstances" under which the statement was elicited and determining there was no motivation to lie (quoting Syl. Pt. 3, State v. Young, 273 S.E.2d 592, 595 (W. Va. 1980), *modified on other grounds*, State v. Julius, 408 S.E.2d 1 (1991))).

[150] *Satterfield*, 457 S.E.2d at 447.

[151] *Id.*

[152] *Id.* at 448.

[153] *See id.* at 447, 450 (explaining that the suicide note did not blame anyone; rather the declarant explained that he was not guilty of the murders of which he was accused).

[154] *Id.* at 450. The declarant testified in a criminal murder trial. *Id.* at 445. At trial, the defendant's attorney conducted an intense cross-examination, even going so far as to imply the defendant was responsible for the murder. *Id.* at 446. The declarant committed suicide the next day before he could

explained that the note described the reasons why the declarant killed himself, and therefore also fulfilled the second requirement of the exception—that the writer of the note explained his reasons for committing suicide.[155]

Applying similar reasoning in a more recent case, the United States District Court for the Southern District of Illinois held in *Pittman v. County of Madison* that a non-accusatory suicide note was admissible under the dying declaration exception.[156] First, the *Pittman* court reasoned that the suicide note met the imminence requirement because the declarant wrote it only a few hours prior to taking his life, thus rendering the note trustworthy.[157] The court also explained that the suicide note detailed the reasons why the declarant wanted to die.[158] Again, both of the hearsay exception requirements were met, and the note was admissible.[159]

Some courts, however, have reached the opposite conclusion.[160] In 2006, in *Garza v. Delta Tau Delta Fraternity National*, the Supreme Court of Louisiana held that the declarant's suicide note was inadmissible under the dying declaration exception.[161] The *Garza* court first emphasized that death by suicide is planned, a fact that gives a person the opportunity to tailor a suicide note to an individual's liking.[162] The court further explained that this reality defeats the presumption of trustworthiness that accompanies a statement made when death is out of the declarant's control.[163] The court distinguished the suicide note in *Garza* from the one in *Satterfield*.[164] As previously described, the

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be recalled. *Id.* at 447. Therefore, the declarant must have written the suicide note close in time to his death. *See id.* at 450.

[155] *Id.* at 450. The suicide note consisted of the declarant explaining that he could not handle the pressure of going through the trial and telling his girlfriend goodbye. *Id.* at 447. In 1995, in *State v. Satterfield*, the Supreme Court of Appeals of West Virginia applied the West Virginia Rules of Evidence, but the requirements of the West Virginia dying declaration exception parallel those of the Federal Rules of Evidence. *See id.* at 448 (applying West Virginia's law on the dying declaration exception). *Compare* FED. R. EVID. 804(b)(2) ("In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances."), *with* W. VA. R. EVID. 804(b)(2) (same).

[156] *See* Pittman v. Cnty. of Madison, No. 08-cv-890, 2015 U.S. Dist. LEXIS 15883, at *6–9 (S.D. Ill. Feb. 10, 2015) (concluding that a suicide note that did not blame anyone was admissible under the dying declaration exception). The suicide note was written to the defendant's family members. *Id.* at *5. The declarant blamed himself for wanting to die because he could not bear living any longer. *Id.* at *6.

[157] *Id.* at *8–9.

[158] *Id.* at *8. The suicide note suggested that the declarant committed suicide because he was in turmoil. *See id.* at *6 ("I just cant take it no more I wuld rather die I tryed to talk to the crisis lady but they ant let me I told them no one listen to me . . . . [T]he guards keep fucking with me."). The suicide note also apologized and told his friends and family that he loved them. *Id.*

[159] *Id.* at *8–9.

[160] *See infra* notes 161–171 and accompanying text.

[161] Garza v. Delta Tau Delta Fraternity Nat'l, 948 So. 2d 84, 97 (La. 2006).

[162] *Id.* at 95.

[163] *Id.*

[164] *Id.* at 96 (citing State v. Satterfield, 457 S.E.2d 440, 440 (W. Va. 1995)).

*Satterfield* suicide note was offered to exculpate the declarant of committing a murder, and the declarant had been cross-examined while under oath.[165] In *Garza*, by contrast, the declarant's suicide note accused someone of rape, and because the declarant committed suicide, the defendant accused of rape was never given a chance to cross-examine her at trial.[166] The *Garza* court concluded that the surrounding circumstances of the note did not indicate that the declarant's suicide note was trustworthy.[167] Finally, the court added that because a bodily injury, as opposed to a mental one, was not present when the declarant wrote the suicide note, the suicide note failed the imminence requirement.[168]

Similarly, in 2011, in *Kincaid v. Kincaid*, the Court of Appeal of California, Second Appellate District refused to admit the declarant's suicide note that accused her father of sexual abuse under the dying declaration exception.[169] The *Kincaid* court reasoned that the declarant's control over the timing of her death defeated the presumption of trustworthiness.[170] The court then explained that because the declarant experienced depression, abused drugs, and engaged in criminal activity, the declarant had a motive to lie and pin blame on someone like her father. Thus, the court refused to admit the suicide note under the dying declaration exception.[171]

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[165] *Id.* (citing *Satterfield*, 457 S.E.2d at 446–47) (explaining that in *Satterfield*, the State introduced a suicide note written by the declarant, a witness in a murder trial, wherein he proclaimed his innocence and stated that he could not handle the pressure of going through trial).

[166] *Id.* at 87–88, 96. In 2006, in *Garza v. Delta Tau Delta Fraternity National*, there were multiple defendants as parties to the action, but the decedent accused only one of them of rape, Paul Upshaw. *Id.* at 84, 88. The declarant's suicide note contained an account of her rape and "consist[ed] of goodbyes to family, instructions for getting in touch with friends, and instructions for her funeral." *Id.* at 87–88. The Supreme Court of Louisiana explained that because the case was a civil suit, and not a criminal prosecution, the Confrontation Clause did not apply. *Id.* at 90. Even so, the court stressed the importance of a defendant's opportunity to cross-examine witnesses. *Id.*

[167] *Id.* at 95–96.

[168] *Id.* at 97. The *Garza* court applied the Louisiana Code of Evidence, but the requirements of the Louisiana dying declaration exception parallel those of the Federal Rules of Evidence, except that Louisiana's dying declaration exception is permissible in all criminal and civil cases. *See id.* at 89–90 (applying Louisiana's law on the dying declaration exception). *Compare* FED. R. EVID. 804(b)(2) ("In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances."), *with* LA. C. EVID. 804(b)(2) ("A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.").

[169] Kincaid v. Kincaid, 127 Cal. Rptr. 3d 863, 873–75 (Ct. App. 2011). In 2011, in *Kincaid v. Kincaid*, the Court of Appeal of California, Second Appellate District did not clarify to whom the declarant explicitly addressed the suicide note, but the declarant spoke directly to her mother in the note. *See id.* at 873.

[170] *Id.* at 875 (citing *Garza*, 948 So. 2d at 95).

[171] *Id.* The *Kincaid* court applied the California Code of Evidence, but the requirements of the California dying declaration exception parallel those of the Federal Rules of Evidence, except that the California dying declaration exception does not specify whether the exception applies in civil cases, criminal cases, or both. *See id.* at 873 (applying California's law on the dying declaration exception).

These cases demonstrate that some courts admit suicide notes under the dying declaration exception because the close proximity of death renders a declarant's last few statements trustworthy and case law that supports their conclusion.[172] Although not all courts agree that suicide notes are trustworthy, those courts still explain their reasoning in detail, noting that retaining control over one's death defeats its imminence and the attendant presumption of trustworthiness.[173] Therefore, because these courts closely analyzed the trustworthiness of suicide notes, they provide a helpful blueprint to a court tasked with the question of whether to admit a suicide note under the residual exception.[174]

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*Compare* FED. R. EVID. 804(b)(2) ("In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances."), *with* CAL. EVID. CODE § 1242 ("Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death.").

[172] *See, e.g.*, Pittman v. Cnty. of Madison, No. 08-cv-890, 2015 U.S. Dist. LEXIS 15883, at *6–9 (S.D. Ill. Feb. 10, 2015); *see also* State v. Satterfield, 457 S.E.2d 440, 447–48, 450 (W. Va. 1995). In *Pittman*, the district court noted that the suicide note was admissible under the dying declaration exception because the writer detailed the reasons and circumstances of his death and wrote it a few hours before his death, rendering the note trustworthy. 2015 U.S. Dist. LEXIS 15883, at *6–9. The court also explained that an "impending death" often renders a note trustworthy and relied on other case law where courts admitted suicide notes under the dying declaration exception. *Id.* The court's relevant analysis consisted of three paragraphs in the opinion. *Id.* Additionally, in *Satterfield*, the West Virginia Supreme Court held that the suicide note was admissible under the dying declaration exception and noted that because the individual who committed suicide wrote the note close in time to the suicide, the note was sufficiently trustworthy. 457 S.E.2d at 447–48, 450. The court also explained that trustworthiness reasoning is a historical principle upon which the dying declaration relies to admit evidence and spent two pages in its opinion discussing trustworthiness. *Id.*

[173] *See, e.g.*, *Kincaid*, 127 Cal. Rptr. 3d at 874–75; *Garza*, 948 So. 2d at 90–98. In *Garza*, the Louisiana Supreme Court concluded that the suicide note was inadmissible under the dying declaration exception. 948 So. 2d at 97. It noted that an individual who chooses to commit suicide may have a motive to write false statements in a suicide note and can write whatever the individual wants in the suicide note, thus defeating the presumption of trustworthiness. *Id.* at 95. The court explained its reasoning and cited precedent that supports its conclusion over multiple pages. *Id.* at 90–98. Furthermore, in *Kincaid*, the California Court of Appeal concluded that the suicide note was inadmissible under the dying declaration exception for lack of trustworthiness because the writer possessed a motive to pin blame on her father for her depression, drinking and drug abuse, and other illegal activities. 127 Cal. Rptr. 3d at 874–75. The court thus explained why the note was trustworthy and relied on other case law in two long paragraphs. *Id.* For a more in-depth discussion on the trustworthiness of suicide notes in the context of the dying declaration exception, see generally Lau, *supra* note 95.

[174] *Compare, e.g.*, United States v. Hammers, 942 F.3d 1001, 1011–12 (10th Cir. 2019) (explaining that the suicide note was not trustworthy in two paragraphs and referring to only one case discussing the admissibility of a suicide note under the residual exception), *and* United States v. Angleton, 269 F. Supp. 2d 878, 891 (S.D. Tex. 2003) (noting that the circumstances under which the suicide notes were written were not trustworthy in one paragraph, but failing to list those circumstances, and relying on no precedent discussing admissibility), *with supra* notes 172–173 and accompanying text (illustrating courts that describe their reasoning in detail when deciding on the admissibility of suicide notes under the dying declaration exception, including their reliance on case law).

### *B. Research Analyzing Whether Suicide Notes Are Trustworthy*

Critics argue that suicide notes are not sufficiently trustworthy to admit into evidentiary records because the discovery of a suicide note does not guarantee that it was actually a suicide note written by the person who committed suicide.[175] They further posit that because people who do commit suicide may be prone to distortions, these notes could also lack the requisite trustworthiness.[176]

First, critics indicate that the death of the author of the note may, in fact, be the result of something other than a suicide.[177] One study examined the death of a Canadian jockey who left behind two notes.[178] The issue in the case was whether the individual actually committed suicide or whether his death was the result of something else.[179] Based on examining the notes' content, a social scientist told the Canadian inquest that the jockey's death did look like a suicide.[180] The study disputed the social scientist's determination because, in the scientist's testimony at trial, he: (1) did not mention any research; (2) used an unfamiliar procedure to examine the note; and (3) solely relied on the note to make the determination.[181] Despite the presence of two notes written by the deceased, the court concluded that the jockey did not commit suicide.[182] This

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[175] *See* Leenaars, *supra* note 17, at 42–43 (explaining the drawbacks of suicide notes). In one study, half of the coroner's officer sought to deem the cause of death a suicide based on the presence of a suicide note, but the "number of people who kill themselves and leave a note" is somewhere between "12% to 36%." *Id.* at 39 (citing D.S. Syer & J.P. Wyndowe, *How Coroner's Attitudes Towards Suicide Affect Certificate Procedures*, *in* DEPRESSION AND SUICIDE 36–39 (Pergamon Press 1981)). Based on the number of individuals who commit suicide and leave a note, this could imply that just because someone left a note, it does not necessarily mean that the person always committed suicide (i.e., maybe that person was held hostage and their captivator forced them to write a note). *Id.* It also could imply that there is an "under-reporting of suicide." *Id.*

[176] *Id.* at 44–45. Suicide notes can demonstrate mistaken, constricted, and subjective beliefs, so it makes one wonder whether one can "be truthful in such a state of mind?" *Id.* at 45.

[177] *Id.* at 42 (explaining that a death of an individual who wrote a suicide note could be an "accident, natural death, suicide or homicide").

[178] *Id.* at 41. The individual allegedly left two suicide notes behind: one addressed to his wife and one addressed to his son. *Id.*

[179] *Id.*

[180] *Id.* The social scientist, who was not an expert in suicide notes, testified that the content of the note was consistent with a suicidal state of mind because the note included references to shame, blame, and loss of hope. *Id.* Therefore, the social scientist deemed the death a suicide. *Id. But see supra* notes 113–117 and accompanying text (describing shame, blame, and loss of hope as common topics discussed in genuine suicide notes). The study examining the case took issue with the fact that the social scientist should have looked beyond the suicide note to research suicide notes more generally. Leenaars, *supra* note 17, at 41.

[181] Leenaars, *supra* note 17, at 41.

[182] *Id.* at 43. The study closely examined the jockey's suicide and determined from the note that the jockey expressed pain and hurt, unresolved personal issues, anger toward someone, some sort of mental disorder, forgiveness and love, desire to leave, incapableness, and narrow thinking. *Id.* at 42–43. The study explained, however, that questions arose about the jockey's expressions that could not be answered solely from the note, such as why he was hurt, who he was angry toward, or what kind of

outcome illustrates that relying solely on the content of a suicide note may lead to inaccurate conclusions about an individual's mode of death; therefore, as later described in more detail, it would be beneficial for courts determining whether to admit a suicide note under the residual exception to review the note with other evidence about the writer to ensure it is a genuine suicide note.[183]

Furthermore, some scholars argue that even if the individual who wrote the suicide note did commit suicide, the content of the note may not be sufficiently trustworthy.[184] This is because individuals who write notes relay a situation as they see it personally.[185] As such, these individuals are often, but not always, prone to muddle reality with imagination.[186] An individual who commits suicide may also indicate that one thing led to suicide, but scholars suggest that the reasons for suicide are typically multifaceted and difficult to articulate in a note.[187]

Proponents of admitting suicide notes argue that, although the notes may raise various questions of trustworthiness, these notes are invaluable pieces of evidence when an individual actually committed suicide and the statements made in the note are corroborated by additional independent evidence.[188] First, to determine whether an individual who wrote a note committed suicide, one study suggests that the individual's intentions must be examined.[189] This can be accomplished by reviewing the suicide note in conjunction with other evidence obtained about that individual, such as interviews with relatives and

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mental disorder he had. *Id.* Then it explained that, "[t]he final verdict in the case, based on divergent forensic data, was that Michael Parcel's [the jockey] death was not a suicide." *Id.* at 43.

[183] *See id.* at 41, 43 (arguing that the social scientist in the case came to the wrong conclusion because he only reviewed the content of the suicide note and failed to utilize research analyzing suicide notes and other data about the individual). The court came to a different conclusion than the scientist based on reviewing the suicide note and scientific data. *Id.* at 43.

[184] *See id.* at 42, 43 (explaining that two problems with suicide notes in the courtroom are that there is no guarantee that just because someone left a note means that individual committed suicide, and even if evidence indicates that the individual committed suicide, the contents of the note are not always trustworthy).

[185] *Id.* at 43. Oftentimes, an individual who commits suicide is likely not even aware whether they are writing down the objective truth. *Id.*

[186] *Id.* at 43, 45. The study indicated that some individuals who commit suicide often confuse "reality and fantasy, objective and subjective, feelings and the outside world." *Id.* at 45. This means that a suicide note may not always be trustworthy. *Id.*

[187] *Id.* at 45. Individuals who commit suicide and leave behind suicide notes commonly blame their suicide on pain, disease, or unsteadiness, but that may actually reflect the complexity of the situation that an individual faces when contemplating suicide. *Id.*

[188] *See id.* at 42, 45, 47 (recognizing that suicide notes can be inaccurate pieces of evidence when only reviewing a note's content, but then explaining that if "one knows the empirical basis for understanding them and they are considered within the context of other data" the notes can be important and trustworthy pieces of evidence in the courtroom).

[189] *Id.* at 41. The study concluded that to ensure a death is a suicide, the individual must have acted in a way wherein they intended to die. *Id.* at 42. The study explained that this includes more than just reviewing the contents of a suicide note. *Id.*

friends.[190] If this other evidence reasonably leads to the conclusion that the individual expressed signs of wanting to commit suicide and went through with it, the note is likely a suicide note.[191] Even if the death is determined not to be a suicide, the note might still be useful because it may help determine the writer's actual cause of death.[192]

In support of the notion that suicide notes are useful pieces of evidence, another study assessing the content of sixty-three suicide notes concluded that the writers' explanations for their suicides in their notes were honest, so therefore, the notes were trustworthy.[193] The results of the study found substantial similarity between the reasons in the suicide note and corroborating statements given by relatives, friends, and doctors.[194] The results suggested that the content of a suicide note is truthful when the reasons in a cited note align with the corroborating evidence.[195] Thus, this research demonstrates that although some critics argue suicide notes are not automatically trustworthy, proponents have

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[190] *Id.* Other evidence that may be useful is interviews with doctors and colleagues, an autopsy, and police reports. *Id.* One must use this evidence to answer questions including the reason behind the suicide, the timing of the suicide, and the specific method used to commit the suicide. *Id.*

[191] *See id.* ("[I]f a note of a decedent is determined, by a scientific method of analysis, to be a suicide note, one can conclude that in all probability at the time of writing the note the person had suicide on his/her mind."). The evidence could also lead to the conclusion that the individual's death was not a suicide, but instead an accident, murder, natural death, or something else. *Id.*

[192] *See id.* (explaining a suicide note is an invaluable piece of evidence because it helps to assess the individual's state of mind and then determine that the individual probably died by suicide or by something else). The study examined two cases where both individuals wrote suicide notes. *Id.* at 41, 43. For one case, the study explained that the court's final verdict was that individual did not die by suicide. *Id.* at 43. For the other case, the study explained that the individual did not commit suicide, but because the court determined that the defendant's letters demonstrated that he had contemplated suicide and were therefore trustworthy, the court spared him the death penalty. *See id.* at 43, 45, 47. The other case law and research analyzing suicide notes, however, is simply not applicable unless the person committed suicide. *See supra* notes 86–139, 145–174 and accompanying text (describing case law and research analyzing suicide notes); *infra* notes 193–195 and accompanying text (describing research analyzing the trustworthiness of suicide notes).

[193] Jacob Tuckman et al., *Credibility of Suicide Notes*, 116 AM. J. PSYCHIATRY 1104, 1104–05 (1960). The study explained that there is skepticism of a suicide note's trustworthiness because before an individual commits suicide, the individual may be too distracted to clearly comprehend the circumstances surrounding that person's suicide. *Id.* at 1104.

[194] *Id.* at 1105. The study explained that the reasons articulated in the suicide note were less specific than the reasons elicited by the informants. *Id.* at 1104. It noted that this is not surprising because official investigators directly questioned informants. *Id.* Individuals who commit suicide, however, write their notes voluntarily and typically address them to people who were familiar with their situation. *Id.*

[195] *See id.* at 1105 (explaining that the results were 75% agreement, 18% compatibility, and only 7% percent disagreement between the reasons for suicide explained in the note and the corroborating evidence). Compatibility is defined as a situation where the reasons given in the suicide note compared with the corroborating evidence were not completely in agreement or disagreement, but somewhere in the middle. *Id.* at 1104. The study explained that it would be unreasonable to assume that the informant would have access to the note or provide the reason the writer articulated for committing suicide unless the informant also knew that reason to be accurate. *Id.* at 1106.

established that they can be deemed trustworthy if the individual who wrote the note actually committed suicide and the note's content is corroborated by other evidence.[196]

In sum, a court should review judicial opinions examining suicide notes under the dying declaration exception and studies reviewing the trustworthiness of suicide notes when assessing the trustworthiness of a suicide note under the residual exception.[197]

## III. A Solution: How to Review the Trustworthiness of a Suicide Note with Judicial Care

Correctly analyzing a suicide note is a difficult task, but nonetheless a viable one.[198] A judge's role in assessing whether a suicide note is admissible under the federal residual exception is particularly important because that decision may significantly impact the outcome of a case.[199] Precedent suggests that most courts do not admit suicide notes under the residual exception, reasoning that the notes are not sufficiently trustworthy.[200] Research reveals, however, that trustworthy suicide notes share common attributes.[201] Case law demonstrates that suicide notes may be trustworthy evidence under a proper analysis, as some courts applying the dying declaration exception to suicide notes have already concluded.[202] Accordingly, this Part proposes a three-part balancing

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[196] *See supra* notes 175–195 and accompany text (examining the views of critics and proponents on whether suicide notes are trustworthy).

[197] *See supra* notes 145–195 and accompanying text (examining case law and research that analyze whether a suicide note is trustworthy).

[198] *See* Lester, *supra* note 103, at 642 (explaining that the college students who possessed a sympathetic outlook toward suicide were more likely to correctly identify whether a suicide note was genuine or simulated); *Analyzing the Language of Suicide Notes to Help Save Lives*, *supra* note 87 (explaining that mental health professionals were only accurate half of the time when deciding whether a suicide note was genuine or simulated).

[199] *See, e.g.*, United States v. Hammers, 942 F.3d 1001, 1008, 1012, 1019 (10th Cir. 2019) (explaining that a suicide note exculpating the defendant was inadmissible and affirming the defendant's conviction).

[200] *See id.* at 1011–12 (reasoning that a suicide note was not trustworthy under the residual exception); United States v. Esmurria, No. 02-1556-cr, 2006 U.S. App. LEXIS 13513, at *5–6 (2d Cir. May 26, 2006) (same); United States v. Angleton, 269 F. Supp. 2d 878, 891 (S.D. Tex. 2003) (same); Commonwealth v. Pope, 491 N.E.2d 240, 244 (Mass. 1986) (same); State v. Brown, 752 P.2d 204, 207 (Mont. 1988) (same).

[201] *See* Desmet & Hoste, *supra* note 86, at 6355 fig.3 (indicating that love, hopelessness, and instructions were some of the most common topics addressed in the suicide notes analyzed); Ioannou & Debowska, *supra* note 99, at 157 (concluding that genuine suicide notes referred more to relationships, love, instructions, and constrictions when compared with simulated suicide notes); Jones & Bennell, *supra* note 97, at 225, 228 (concluding that genuine suicide referred to instructions and positive affection toward loved ones when compared with simulated suicide notes).

[202] *See* Pittman v. Cnty. of Madison, No. 08-cv-890, 2015 U.S. Dist. LEXIS 15883, at *7–9 (S.D. Ill. Feb. 10, 2015) (concluding that the declarant wrote the suicide note close in time to his death, thus

test that accounts for applicable psychological research and case law to assist judges in holistically analyzing the trustworthiness requirement of the residual exception.[203]

A statement is trustworthy under the amended residual exception if the circumstances under which the declarant elicited it and independent corroborating evidence suggest that it is trustworthy.[204] A judge's analysis of this requirement should be separated into a three-part review of (1) the circumstances under which the individual who committed suicide wrote the suicide note, (2) the content of the suicide note, and (3) the presence and extent of any corroborating evidence.[205] Ultimately, this analysis of the trustworthiness requirement is a balancing test in which a court possesses a significant amount of discretion.[206]

When applying this test, a judge should first review the circumstances under which the suicide note was written.[207] In *People v. Miller* (*Miller I*), the Michigan Court of Appeals used seven factors to analyze the circumstances under which the suicide note was written.[208] The proposed first step adopts those factors, which are whether the suicide note was (1) spontaneous, (2) voluntary, (3) internally consistent, (4) written close in time to the declarant's death, (5) based upon personal knowledge, (6) directed to family members,

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rendering the suicide note trustworthy and fulfilling the imminence requirement of the dying declaration exception); State v. Satterfield, 457 S.E.2d 440, 447, 450 (W. Va. 1995) (same).

[203] *See infra* notes 204–231 accompanying text.

[204] FED. R. EVID. 807(a)(1) ("[T]he statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement . . . .").

[205] *See id.* (noting that the analysis requires assessing the circumstances surrounding the hearsay statement and any corroborating evidence); Tuckman et al., *supra* note 193, at 1104–05 (assessing the content of sixty-three suicide notes and concluding "that credence can be given to the reason found in the suicide note").

[206] *See* FED. R. EVID. 807(a)(1) (explaining that a court must analyze the trustworthiness of a hearsay statement by considering "the totality of the circumstances under which it was made and evidence, if any, corroborating the statement"); *id.* R. 807 advisory committee's note to 2019 amendment (noting that a court has discretion when applying the trustworthiness requirement to a hearsay statement). The abuse of discretion standard applies to appellate courts reviewing trial courts' evidentiary decisions (for example, a court's decision to admit a suicide note under the residual exception). *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997) (explaining that when an appellate court reviews a "district court's evidentiary rulings," the abuse of discretion standard applies); *see also* People v. Miller (*Miller I*), No. 233018, 2003 WL 21465338, at *1 (Mich. Ct. App. June 24, 2003) (per curiam) (same), *habeas corpus granted conditionally sub nom.*, Miller v. Stovall, 573 F. Supp. 2d 964 (E.D. Mich. 2008), *habeas corpus denied*, No. 05–73447, 2012 WL 3151541 (E.D. Mich. 2012), *aff'd*, 742 F.3d 642 (6th Cir. 2014).

[207] *See* FED. R. EVID. 807(a)(1) (noting that a court must consider the circumstances under which the hearsay statement was made); *Miller I*, 2003 WL 21465338, at *2 (explaining that to satisfy the trustworthiness requirement of the residual exception, a court must analyze the circumstances surrounding the making a suicide note).

[208] *Miller I*, 2003 WL 21465338, at *2.

and (7) written by a now-unavailable declarant.[209] The factor concerning temporal proximity adopts the reasoning of the courts that have admitted suicide notes under the dying declaration exception.[210] That factor is also supported by a study that noted that suicide notes are typically written minutes or hours before committing suicide.[211] The presence of all of these factors suggests that a suicide note is potentially trustworthy.[212] The absence of a factor is not outcome-determinative, but a judge should take that into consideration when making a final decision about whether to admit the suicide note under the residual exception.[213]

Second, a judge should assess the actual content of the suicide note to ensure its trustworthiness.[214] The judge should initially assess the language and structure of the suicide note to determine whether the note contains more than a few sentences, possesses a significant number of nouns, and has sentence fragments.[215] These factors also weigh in favor of a suicide note's trustworthiness because research suggests that these characteristics are commonly found in genuine suicide notes.[216]

As a part of this second step, a judge should also look to whether any of the following topics are present: positive affection toward loved ones; instructions to loved ones; hopelessness; and other signs of emotions including de-

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[209] *See id.* (citing People v. Lee, 622 N.W.2d 71, 80 (Mich. Ct. App. 2000)). In 2003, in *Miller I*, the Michigan Court of Appeals noted that if a declarant addresses a suicide note to family members, the declarant is more likely to be honest. *Id.*; *see also* Pittman v. Cnty. of Madison, No. 08-cv-890, 2015 U.S. Dist. LEXIS 15883, at *5, *9 (S.D. Ill. Feb. 10, 2015) (concluding that the suicide note addressed to the declarant's family members was admissible under the dying declaration exception).

[210] *See, e.g.*, State v. Satterfield, 457 S.E.2d 440, 447 (W. Va. 1995) (explaining that the sense that death is near is presumed to remove any motive to lie and thus assures as much trustworthiness as if that person were under oath).

[211] *See* Black, *supra* note 94, at 699 (explaining that the approximate time between when an individual writes a suicide note and commits suicide is typically less than hours beforehand).

[212] *See Miller I*, 2003 WL 21465338, at *2 (holding that the declarant's suicide note was sufficiently trustworthy because the suicide note was voluntarily written, uniform, drafted close in time to the writer's death, based on the writer's own knowledge, addressed to the writer's family, and the writer was unavailable to testify in court because he killed himself).

[213] *See id.* (explaining it is a "totality of the circumstances" test).

[214] *See* Leenaars, *supra* note 17, at 43, 45 (explaining that although there is some research suggesting that suicide notes are trustworthy, it is important to use other evidence to validate the content of a suicide note to further ensure its trustworthiness); Tuckman et al., *supra* note 193, at 1105 (demonstrating that there was 90% agreement and compatibility between the content in the suicide note and the information that informants gave about why the individual committed suicide).

[215] *See* Jones & Bennell, *supra* note 97, at 225, 228 (concluding that when compared with simulated suicide notes, genuine suicide notes were longer as well as contained more nouns and shorter sentences).

[216] *See id.* at 228 (explaining that the structure of genuine suicide notes demonstrates that genuine suicide notes are written to convey important information that the authors want their loved ones to know after they have committed suicide and "support[s] the theory that the suicidal individual is experiencing a high degree of cognitive arousal").

pression, narrow-thinking, and regret.[217] According to research, these sentiments tend to support a finding of trustworthiness because these sentiments are commonly found in genuine suicide notes (as opposed to simulated notes).[218] Some courts analyzing the admissibility of a suicide note under the dying declaration exception have been skeptical to admit a suicide note that blames someone else for a certain action.[219] For example, in 2006, in *Garza v. Delta Tau Delta Fraternity National*, the Supreme Court of Louisiana concluded that a suicide note blaming a fraternity member for the decedent's rape was inadmissible under the dying declaration exception.[220] The court specifically noted that "her accusations of others contained in the note are tainted with possible motives of self-exoneration," and thus defeated the trustworthiness presumption of the dying declaration exception associated with an individual who dies unexpectedly.[221] Scholars, however, disagree on whether blaming others calls for this amount of skepticism.[222] Therefore, to combat a potentially false accu-

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[217] *See* Coster & Lester, *supra* note 89, at 142 tbl.2 (suggesting that depression was the most common emotion present in the suicide notes reviewed); Desmet & Hoste, *supra* note 86, at 6355 fig.3 (indicating that love, hopelessness, and instructions were some of the most common topics found in the analyzed suicide notes); Ioannou & Debowska, *supra* note 99, at 157 (concluding that genuine suicide notes referred to relationships, love, instructions, and constrictions when compared with simulated suicide notes); Pestian et al., *supra* note 113, at 2, 5 tbl.3 (demonstrating that instructions, hopelessness, and love were the most common topics found in the analyzed suicide notes); Sanger & Veach, *supra* note 113, at 358 tbl.1 (showing that instructions and positive relationships were the most common topics mentioned in the analyzed suicide notes).

[218] *See supra* note 217 and accompanying text (explaining that research examining the content of suicide notes indicates that certain topics are consistently present in genuine suicide notes).

[219] *See* Kincaid v. Kincaid, 127 Cal. Rptr. 3d 863, 873–75 (Ct. App. 2011) (concluding that the suicide note, accusing an individual's father of sexual abuse, was inadmissible and noting that it was untrustworthy because the declarant accused her father of raping her); Garza v. Delta Tau Delta Fraternity Nat'l, 948 So. 2d 84, 88, 96, 97 (La. 2006) (concluding that the suicide note, containing an accusation of rape, was inadmissible under the dying declaration exception and explaining that the suicide note was less likely to be trustworthy because the declarant accused someone of rape).

[220] *Garza*, 948 So. 2d at 88, 97.

[221] *Id.* at 88, 95–96. In 2006, in *Garza v. Delta Tau Fraternity National*, the Supreme Court of Louisiana explained that a suicide note is less reliable because the declarant has complete control over the time of death and can craft the note to his or her liking, whereas declarants who die unexpectedly are more likely to tell the truth during their final moments because they believe death is near and lack any control over their death. *Id.* at 92, 95. Researcher Timothy T. Lau explained that admitting a hearsay statement containing blame "may result in wrongful convictions" and is "the easiest and probably the most common form of deception." Lau, *supra* note 95, at 396.

[222] *Compare* Sanger & Veach, *supra* note 113, at 358 tbl.1 (noting that blame of others was only present in 8% of the 186 suicide notes reviewed), *with* McClelland et al., *supra* note 114, at 230, 233 (noting that blame of others was present in 20% of the suicide notes reviewed, but the topic of blame was present in 87% of suicide notes reviewed). Additionally, researcher Lau argued that blame toward others in suicide notes is uncommon, but that does not mean it is never present. Lau, *supra* note 95, at 398–99.

sation in a suicide note, if a suicide note blames another, a judge *must* find corroborating evidence of that blame under the third step of the analysis.[223]

Finally, for the third step, a judge should assess whether and to what extent there is any independent corroborating evidence, paying close attention to its strength and quality, as mandated by the Advisory Committee.[224] This could include witnesses close to the declarant or in frequent interaction with the declarant, an autopsy examining the individual's body, police reports, and any other corroborating evidence.[225] This evidence would help to ensure that the individual died as a result of suicide, and consequently ensure that the note is a genuine suicide note.[226] The presence of this corroborating evidence should not be dispositive of the admissibility question.[227] If other evidence corroborates the content of the note or the circumstances under which it was written, a court should deem the note sufficiently trustworthy.[228]

Even atop this framework, there is no guarantee that a judge's answer to the trustworthiness question will be accurate, especially considering that trained professionals are often incorrect when it comes to determining whether a suicide note is genuine or not.[229] But in analyzing the admissibility of a suicide note, a judge is tasked only with a threshold inquiry: is the note *sufficiently* trustworthy to reach the jury?[230] This balancing test therefore helps to ensure

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[223] *See* Leenaars, *supra* note 17, at 45 (explaining that to determine whether a suicide note is trustworthy, a court must review corroborating evidence).

[224] *See* FED. R. EVID. 807(a)(1) (explaining that a court must review any evidence corroborating the hearsay statement); *id.* R. 807 advisory committee's note to 2019 amendment (noting that a court must consider "the strength and quality of that evidence"); Leenaars, *supra* note 17, at 45 (explaining that it is important to review a suicide note's content and validate it with other data to determine its trustworthiness).

[225] *See* Leenaars, *supra* note 17, at 42 (explaining that other independent evidence should be reviewed in conjunction with the content of a suicide note).

[226] *See id.* (explaining that to determine whether an individual's death is actually a suicide, a court must examine the individual's intention by obtaining independent evidence such as statements from the individual's family, friends, doctors, and colleagues, an autopsy, and police files).

[227] FED. R. EVID. 807 advisory committee's note to 2019 amendment (requiring a court to analyze whether there is corroborating evidence but noting that its absence is not completely outcome determinative).

[228] *See id.* R. 807(a)(1) (requiring a review of the content of the hearsay statement in conjunction with the circumstances and any corroborating evidence); Leenaars, *supra* note 17, at 45 (explaining that one cannot know "from a note alone that what the person writes is true or false" but placing a suicide note in the context of other evidence creates "convergent validity").

[229] *See Analyzing the Language of Suicide Notes to Help Save Lives*, *supra* note 87 (illustrating that trained mental health professionals were only correct 50% of the time when determining whether a suicide note was genuine or simulated).

[230] *See* FED. R. EVID. 807(a)(1) ("[T]he statement is supported by *sufficient* guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement . . . ." (emphasis added)). A statement only needs to be *sufficiently* trustworthy, not *completely* trustworthy. *See id.*

that a litigant offering a suicide note into evidence will be afforded a fair and just admissibility review.[231]

## CONCLUSION

In federal courts, judges decide whether evidence is admissible under the Federal Rules of Evidence. The federal residual exception, recently amended in 2019, is an exception to the general rule against admitting hearsay. A judge applying that exception considers whether the proffered evidence satisfies the exception's three requirements: (1) whether it is trustworthy; (2) whether it is probative evidence; and (3) whether the offering party gave notice to the nonoffering party. When the proffered evidence is a suicide note, case law indicates that nearly all courts deem a suicide note untrustworthy, therefore failing the first requirement of the residual exception. Rarely do courts give anything more than short shrift to the other requirements. This Note proposes a three-part balancing test to analyze the trustworthiness of suicide notes by accounting for relevant court holdings analyzing suicide notes and psychological research. This framework will help to ensure that courts prudentially conduct nonbiased and precise admissibility reviews. In the context of suicide notes, a careful analysis is critically important because the admission or rejection of a suicide note may be dispositive of guilt. More extensive analyses will also serve as well-reasoned precedent and guidance for future courts tasked with assessing the admissibility of suicide notes under the residual exception.

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[231] *See id.* R. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."); *supra* notes 207–228 and accompanying text (describing an objective balancing test for a court to use when analyzing the trustworthiness of a suicide note). As a reminder, this Note's focus is only on analyzing the trustworthiness requirement of the residual exception. *See supra* notes 1–230 and accompanying text. Pursuant to the other requirements of the residual exception, if a court concludes that a suicide note is sufficiently trustworthy, it must still decide whether the note is more probative than any other evidence offered and whether the offering party fulfilled the notice requirement. *See* FED. R. EVID. 807 (indicating that the three requirements of the residual exception are trustworthiness, probative value, and notice to the opposing party).