The New "Necessity Exception" To the Hearsay Rule In Georgia: A New Rule of Inclusion?

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THE NEW "NECESSITY EXCEPTION" TO THE HEARSAY RULE IN GEORGIA: A NEW RULE OF INCLUSION?

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INTRODUCTION

During the last four years, the Georgia appellate courts reviewed the "necessity exception" to the hearsay rule with increasing frequency.1 Recent cases indicate a certain appellate fascination with the new exception that should attract others’ attention too. This Article analyzes appellate court treatment of the necessity exception.2 From that analysis, one could reasonably conclude that the courts are moving toward a controversial model of hearsay analysis, one that starts from a general rule of inclusion instead of the generally accepted rule of exclusion. Although some recent cases add and enforce a few procedural safeguards, the trend favors increased admissibility of second-hand stories.

I. BACKGROUND

The trouble with hearsay is that it permits jurors to consider a second-hand story as evidence even when the storyteller may

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2. This Article expands a shorter note dealing with the "necessity exception" published in the Georgia Bar Association, Criminal Law Section Newsletter, Summer 1998.
not be competent or truthful. It is well-settled that juries have
difficulties with hearsay; more importantly, judges, too,
struggle to exclude inadmissible, non-probative hearsay from
their deliberations. To its credit, Georgia still retains the
common-law definition of hearsay, which focuses upon the
declarant and the declarant's credibility. Other jurisdictions,
however, generally follow the federal model, which focuses
upon the declaration rather than the declarant.

In Georgia, “[h]earsay evidence is that which does not derive
its value solely from the credit of the witness but rests mainly
on the veracity and competency of other persons.” Thus, the
Georgia hearsay definition reflects a long-standing evidentiary
distrust for testimony not based upon personal knowledge. In
keeping with the common law, a general rule of exclusion
immediately follows the hearsay definition: “Hearsay evidence
is admitted only in specified cases from necessity.” The rule of

3. See Charles R. Nesson & Yochai Benkler, Constitutional Hearsay: Requiring
   Foundational Testing and Corroboration Under the Confrontation Clause, 81 VA. L. REV.
   149, 155 (1995) (“The judge’s role at the foundational level, then, is to exclude evidence
   that the jury should not believe, not evidence that the jury will not believe.”).
4. See, e.g., Aviva Orenstein, “My God!”: A Feminist Critique of the Excited
   (summarizing the predominant jury distrust rationale behind the exclusion of hearsay
   evidence).
   (reversing a non-jury probation revocation based on an out-of-court statement that was
   admitted solely for the limited purpose of explaining conduct—in other words, even the
   hearing judge could not follow his own limited ruling on the admissibility of the extra-
   judicial statement).
7. Federal Rule of Evidence 801(c) defines hearsay as “a statement, other than one
   made by the declarant while testifying at the trial or hearing, offered in evidence to
   prove the truth of the matter asserted.” FED. R. EVID. 801(C); see also Rule 801(c) ALA.
   R. EVID. promulgated on July 9, 1995, effective Jan. 1, 1996, Charles W. Gamble,
   Drafting, Adopting and Interpreting the New Alabama Rules of Evidence: A Reporter’s
   Perspective, 47 ALA. L. REV. 1, 4 (1995)); Rule 801(d) promulgated as TEX. R. CR. EVID.
   (“Evidence of a statement which is made other than by a witness while testifying at
   the hearing, offered to prove the truth of the matter stated, is hearsay evidence and
   inadmissible . . .”).
9. Id. § 24-3-1(b). “Specified cases” is analogous to “firmly rooted exceptions” under
   (holding that traditional “firmly rooted exceptions” have reliability); see also Idaho v.
   Wright, 497 U.S. 805, 814-17 (1990) (holding that residual exception to the hearsay rule

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exclusion allows judges to admit some second-hand stories in certain instances if qualified as “specified cases.” These specified cases, or exceptions, reflect a compromise with practical reality. Code sections 24-3-3 to 24-3-18 codified these cases, and this body of legislation represents the general hearsay rule of exclusion.

While Georgia appellate courts construe Code section 24-3-1 to allow some latitude for the creation of new exceptions, the Code does not specify a so-called “necessity exception.” The Georgia Supreme court in Higgs v. State12 promulgated the necessity exception to the extent that it exists today, although Georgia appellate courts foreshadowed this step in other cases.13 Looking to Code section 24-3-1, codified in 1863,14 the Georgia appellate courts only found a home for the new, court-created necessity exception in Code section 24-3-1(b) after the Higgs case.15 Under the new necessity exception, traditionally

in Idaho is not a “firmly rooted exception”).

10. See O.C.G.A. § 24-3-1(b).
11. See Rea v. Pursley, 170 Ga. 788, 792-93, 154 S.E. 325, 327-28 (1930) (“Our Code specifies a number of cases in which hearsay evidence is admitted . . . . Is this specification of cases in which hearsay evidence is admissible exhaustive and exclusive of all other cases? We think not.”).
13. Higgs is not the first case to admit out-of-court statements that did not fit within a codified exception to the hearsay rule. See, e.g., Jaakkola v. Doren, 244 Ga. 530, 531, 261 S.E.2d 701, 701 (1979) (admitting decedent’s statements regarding the sale of land as the only evidence on the point at issue); Rea, 170 Ga. at 798, 154 S.E. at 329 (admitting statements of a testatrix); see also Moore v. Atlanta Transit System, 105 Ga. App. 70, 123 S.E.2d 693 (1961) (citing cases in which hearsay was admitted out of extraordinary necessity), overruled in part by Chrysler Motor Corp. v. Davis, 226 Ga. 221, 173 S.E.2d 691 (1970) (recognizing judicial latitude for extraordinary cases and overruling Moore to the extent that Moore held that necessity alone is sufficient to allow admission of otherwise inadmissible hearsay).
excluded hearsay now may be admitted on a foundation of (1) necessity, and (2) trustworthiness and reliability. 16

Before *Higgs*, the Georgia hearsay rule paralleled the general hearsay rule of exclusion. 17 The courts that handed down the venerated hearsay decisions accepted that as a given. 18 Traditionally, ordinary hearsay evidence is inadmissible unless it is offered under a recognized exception to the general rule and otherwise has no probative value whatsoever. 19 The new “necessity exception” casts that traditional understanding into doubt.

The rationale for admitting certain categories of hearsay as exceptions to the general rule of exclusion is that certain foundational facts uniformly provide sufficient information for a fact-finder to believe and to evaluate the second-hand story. 20 Under the common law, courts considered the four principal dangers of hearsay—risk of insincerity, 21 poor perception,
inaccurate memory, 22 or ambiguous communication 23—so prejudicial that the classified exceptions relied only on factors that had a uniformly affirmative sincerity or reliability component. 24 For example, the venerable business record

Evidence, 28 Colum. L. Rev. 432, 437 (1928) (stating that it takes the average human mind “from 83 seconds to 3½” to communicate a deceptive reaction to a stimulating event); accord Thornton v. State, 107 Ga. 683, 686, 33 S.E. 673, 675 (1899) (affirming exclusion of a statement made within a minute or two after a defendant severely beat his wife and recognizing that “the necessity of saying something in extenuation of his conduct may come in a moment; yea, with the rapidity of a flash of lightning”).


23. See Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 218 (1948) (concluding that the rationalization for the rule against hearsay is not the formulation that statements offered for their truth are intrinsically suspect, but out-of-court statements are subject to the four dangers of insincerity, poor perception, inaccurate memory, or ambiguous communication). These dangers are present in all testimony, but are particularly troublesome when the testifying witness has no personal knowledge of the story he or she offers to the fact finder. Id. A common-law hearsay definition that parallels the Georgia codification emphasizes the distrust for testimony not based on personal knowledge: “By ‘hearsay’ is meant that kind of evidence which does not derive its value solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness has received his information.” Booker & Morton, supra note 18, at 18 (quoting B. Jones, Evidence § 288, at 614 (S. Garded 1958)) (emphasis added).

24. Compare Randolph N. Jonakait, The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony, 38 Case W. Res. L. Rev. 481, 476 n.24 (1988) (noting that the Federal Rules Advisory Committee adopted the traditional structure in deference to the time-honored affirmative factors associated with each hearsay exception), with John S. Strahorn, Jr., A Reconsideration of the Hearsay Rule and Admissions, 65 U. Pa. L. Rev. 484, 484-487 (1917). Strahorn identifies the in-court affirmative factors such as oath, potential prosecution for perjury, sequestration, discovery, publicity, confrontation, and cross-examination as “conditioning devices” and argues that departures from the general rule of exclusion can be justified only by (1) “some stimulus of equal efficacy with the conditioning devices” or (2) the exceptional trustworthiness of the statement due to “the intrinsic nature of the particular narration.” Id. Strahorn then argues that the law predetermines the probative value of out-of-court statements using the evidentiary foundations, which show an “absence of the normal likelihood of untrustworthiness in human narration.”) Id. Under both theories, the value of hearsay foundations is to sufficiently qualify the out-of-court statements in such a way that a fact-finder can consider them virtually at face value. Whether or not the jury should hear the foundation facts depends on whether or not one assumes that a jury is intelligent enough to evaluate the circumstances surrounding the statement, and whether the fact-finder should weigh different out-of-court statements differently once the court deems them admissible. See generally Note, The Theoretical Foundation of the Hearsay Rules, supra note 21. But see recurrent commentaries noting how courts do not always apply
exception developed under precepts of necessity, trustworthiness, and reliability, but proponents still had to lay a precise foundation. Additionally, courts admit "dying declarations" under Code section 24-3-6, in part because the declarant makes the statement under a profound motivation, regarded as more compelling than a testimonial oath to tell the truth. The res gestae exception for excited utterances requires the proponent to show the fact-finder circumstances in which the declarant had so little time for calm reflection that he would not likely lie about what he perceived. The res gestae


25. O.C.G.A. § 24-3-14 (1995). The Georgia business record exception provides that:
(a) Any writing or record, . . . made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible in evidence . . . if the trial judge shall find that it was made in the regular course of any business and that it was the regular course of such business to make the memorandum or record at the time of the act . . . or within a reasonable time thereafter.

Id.

27. See id.; see also Johnson v. State, 266 Ga. 775, 776, 470 S.E.2d 637, 639 (1996) (establishing through a record custodian's testimony that the records were maintained in the regular course of business and made at the time of the rental transaction they purported to memorialize); McAllister v. State, 258 Ga. 795, 375 S.E.2d 38, 39 (1989) (holding that court could not admit telephone company records without foundation).
28. O.C.G.A. § 24-3-6 (1995). The Georgia code defines dying declarations as: "Declarations by any person in the article of death, who is conscious of his condition, as to the cause of his death and the person who killed him, shall be admissible in evidence in a prosecution for the homicide." Id.

29. See Hubbard v. State, 208 Ga. 472, 476, 67 S.E.2d 562, 564-65 (1913); Hill v. State, 41 Ga. 484, 503 (1871) ("When dissolution is approaching, and the dying man has lost all hope of life, and the shadows of the grave are gathering in around him, and his mind is impressed with the full sense of his condition, the solemnity of the scene and hour gives to his statements sanctity of truth, more impressive and potential than the formalities of an oath.").

30. See O.C.G.A. § 24-3-3 (1995). The statute actually requires the statements to be "free from all suspicion of device or afterthought." Id; see also Walthour v. State, 269 Ga. 396, 397, 497 S.E.2d 799, 801 (1998) (allowing statements in response to a death threat and gunshot). The foundation elements are: (1) a startling event resulting in (2) declarations (3) about the event (4) made while the declarant is still under the influence of the event. See id, see also Augusta Factory v. Barnes, 72 Ga. 217, 223-27 (1884) (allowing a 14-year-old girl's father to testify about her account of an accident that left

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The necessity exception also allows courts to admit statements about the declarant’s presently-existing physical pain and its cause. The courts infer accuracy about the declarant’s description of present pain because he or she need not rely on memory, and the declarant’s perception of the pain provides simply the best indication of it. Sincerity is guaranteed by the person’s motive to be healed or relieved. If the motivation is doubtful, then at trial, an adversary can explore that possibility by cross-examining the witness to whom the declarant made the statement—perhaps by showing that the witness was not a doctor but rather a lawyer or an insurance agent.

This Article shows that the necessity exception, as developed by the Georgia appellate courts, is not based on any such similar, uniform, and profoundly affirmative factors as are required for the narrowly defined traditional exceptions. Properly analyzed, those exceptions assure that out-of-court declarants’ statements have a threshold level of probative value. On the other hand, the new necessity exception is based on a perceived need for the out-of-court statements, and the appellate courts seem willing to tolerate hearsay so long as the proponent provides only some conceivable indicia of reliability or trustworthiness. By adopting this deferential standard of review toward hearsay, one where this kind of evidence is admitted under an essentially ad hoc and standardless analysis, the appellate courts of Georgia are transforming the traditional rule of exclusion into a contemporary rule of inclusion.

The time has come to limit application of Code section 24-3-1(b) to cases in which standard replicable circumstances provide a principled foundation for evaluating, believing, and admitting

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her hand mangled in a textile loom; she told him her story a half hour after the event while she was still in excruciating pain. The uneven enforcement of the res gestae foundation is beyond the scope of this Article. But see Smith v. State, 270 Ga. 240, 244, 510 S.E.2d 1, 6-7 (1999) (noting without analysis that the trial court admitted a statement over objection under the res gestae doctrine or under the necessity exception because the declarant made the statement shortly after an argument). It is not easy to agree that excitement from an argument quells any suspicion of device or afterthought.

31. See Liberty Mutual Ins. Co. v. Meeks, 81 Ga. App. 800, 804, 60 S.E.2d 258, 261-62 (1950). The foundation elements are: (1) an injury and (2) present pain (3) while the victim describes the pain and its cause. See id.


33. See id.
statements made by out-of-court declarants. *Ledford v. State*,\(^{34}\) for example, provides precisely the kind of case in which the courts could create a new hearsay exception for product labels affixed on containers as proof of the containers' contents. In *Ledford*, the Georgia Court of Appeals, sitting en banc, reversed a conviction due to a lack of probative evidence that gold spray paint, which the defendant admitted "huffing," contained toluene\(^{35}\) even though the label on the can stated that the paint contained toluene.\(^{36}\) Yet in its decision, the majority regarded the label as non-probative hearsay;\(^{37}\) the necessity exception did not apply because no manifest necessity existed—the proponent showed only inconvenience and lack of expediency.\(^{38}\) The dissent argued that the necessity exception should apply as a new exception for consumer product labels.\(^{39}\) A special concurrence stated that even though the majority and the dissent made sense, only the Georgia Supreme Court or the General Assembly could create a new exception.\(^{40}\) Undoubtedly, the supreme court or the General Assembly could establish standardized foundational requirements for a new label exception.

As a matter of historical jurisprudence, since *Rea v. Pursley*,\(^{41}\) Code section 24-3-1(b) appears to convey precisely the authority necessary to create such a new "specified case" label exception to the general hearsay rule of exclusion. This traditional rule should be venerated and jealously guarded by the courts. The rule should be narrowly restricted to the truly extraordinary case in which ruling otherwise would cause a miscarriage of justice;\(^{42}\) it should not include other ad hoc out-of-court

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36. See id. at 238.
37. See id. at 238.
38. See id. at 238-41.
39. See id. at 242-45.
40. See id. at 242. The majority also would have deferred to the General Assembly. See id. at 241.
41. 170 Ga. 788, 154 S. E. 325 (1930); see also Dix v. State, 267 Ga. 429, 431, 479 S.E.2d 739, 742 (1997) ("Courts establish exceptions to the hearsay rule when the situation suggests that 'a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed.'" (quoting WIGMORE)).
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statements that do not occur under uniform and replicable circumstances.

During the 1960s, when the federal rules of evidence were being drafted, two commentators warned against completely overhauling the hearsay rules to make them favor general admissibility.43

Those who urge us to abandon the Hearsay rule in favor of unstated standards of reliability which look suspiciously like the judges' intuition, who tell us that the courts of the United States may well collapse unless they are permitted to resort to federal judge-evaluated gossip, would do well to stop and ask themselves whether they would be willing to have their right to life, liberty or property, their family rights, or their reputations judged before a court which denied them the right to cross-examination, or which abandoned the requirement that witnesses against them have firsthand knowledge of what they spoke about or both.44

The commentators' warning still applies to the Georgia hearsay doctrine as courts decide when and how to apply the increasingly popular necessity exception. Because it favors an ad hoc analysis without a carefully articulated and particularized foundation for a category of specified cases, the new necessity exception departs radically from traditional exceptions.45 Whether the courts limit the new necessity exception to narrowly defined and controlled special cases or allow it to become a broad new rule of inclusion is a matter of profound significance.

43. See Booker & Morton, supra note 18, at 48.

44. Id.

45. See Irving Younger, Reflections on the Rule Against Hearsay, 32 S.C. L. REV. 281, 281 (1980) ("When lawyers and judges ignore the theory, it is too bad for the theory, not for the lawyers and judges. It is time then to change the theory."); see also Myrna S. Raeder, Commentary, A Response to Professor Swift The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Discretion?, 76 MINN. L. REV. 507 (1992); Eleanor Swift, The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?, 76 MINN. L. REV. 473 (1992) (discussing how hearsay rules work in practice and acknowledging a trend toward increased admissibility under the res gestae and catch-all exceptions).
II. THE LEADING CASE: HIGGS v. STATE

In Higgs v. State, the Supreme Court of Georgia created the necessity exception using it to avoid the marital privilege. The defendant, Rollison Higgs, stood trial for murder after committing a fatal shooting witnessed by two people: a disinterested third party and Frankie Higgs, Rollison's wife. The disinterested party never saw the actual shooting but heard it and testified that Rollison Higgs was the only person near the victim when the shooting occurred. A ballistics witness testified that the gunman fired the fatal shot at close range. Frankie Higgs actually witnessed the shooting, but under the marital privilege, she refused to testify. Investigator Moses, from the Georgia Bureau of Investigation (GBI) interviewed Ms. Higgs several hours after the shooting. At that time, Frankie Higgs told Moses that she had seen her husband shoot the victim with a pistol and disappear. She made these statements after she had spoken with her lawyer.

The trial court ruled that ‘Frankie Higg’s “out-of-court statement [to the GBI investigator] was admissible as an exception to the hearsay rule.” The appellate court’s opinion does not reveal which hearsay exception the trial court relied upon to admit the evidence. Before the holdings in Momon v. State and Teague v. State, the obvious exception would have been “the police officer’s exception” offered as “original evidence” to explain the investigator's conduct in Higgs.

47. See 256 Ga. at 608, 351 S.E.2d at 450.
48. See id. at 606, 351 S.E.2d at 449.
49. See id. at 606, 351 S.E.2d at 449.
50. See id. at 606-07, 351 S.E.2d at 449.
51. See id. at 607, 351 S.E.2d at 450.
52. See id., 351 S.E.2d at 450.
53. See id., 351 S.E.2d at 450.
54. See id., 351 S.E.2d at 450.
55. See id., 351 S.E.2d at 450.
56. 249 Ga. 865, 294 S.E.2d 482 (1982).
58. See Momon, 249 Ga. 865 at 866, 294 S.E.2d 482. After years of abuse, the courts restricted application of the original evidence exception when it became clear that anything said to a police officer was thought to be admissible as original evidence to explain the officer's conduct. See id. at 865, 295 S.E.2d 482.
However, under *Momom* and *Teague*, original evidence is properly limited to applications in which the truth or falsity of the declarant's out-of-court statement does not matter.\(^{59}\) Statements made to a police officer are only admissible to explain an officer's conduct when it is in issue.\(^{60}\) Frankie Higgs's statement, on the other hand, became probative only if true. However, because her statement did not qualify as an exception to the hearsay rule, the court refused to admit it. Under *Momom* and *Teague*, the statement was likewise inadmissible as non-hearsay "original evidence." Nevertheless, on review, the appellate court affirmed the trial court's ruling under a newly created necessity exception.\(^{61}\)

According to the Georgia Supreme Court in *Higgs*, "[Code section] 24-3-1(b) provides that 'hearsay evidence is admitted in specified cases from necessity.'"\(^{62}\) The statute actually states that "hearsay evidence is admitted only in specified cases from necessity."\(^{63}\) Thus, by striking the word "only" from subsection (b),\(^{64}\) the supreme court in *Higgs* reinterpreted the traditional rule of exclusion to create a new rule of inclusion.\(^{65}\) According

59. *See* Johnson v. State, 149 Ga. App. 775, 776, 256 S.E.2d 51, 52 (1979) (instructing the jury not to consider the out-of-court statement, offered to explain the conduct of the police, for its truth); *see also* Strozier v. State, 236 Ga. App. 239, 240, 511 S.E.2d 295, 296 (1999) (finding it unnecessary to explain a police officer's conduct was inadmissible hearsay because police officers are expected to investigate crimes; conviction reversed because the inadmissible hearsay offered to explain the police officer's conduct was the only evidence connecting the defendant to the crime).

60. *See* Weems v. State, 269 Ga. 577, 578-79, 501 S.E.2d 806, 808-09 (1998); 252 Ga. at 536, 314 S.E.2d at 911 (1984) (holding that statements offered to explain a police officer's conduct are inadmissible because only in rare cases will a police officer's conduct need to be explained); *Strozier*, 236 Ga. App. at 240, 511 S.E.2d at 296 (1999).

61. *Id.* 256 Ga. at 607-08, 351 S.E.2d at 450-451.

62. *Id.* at 607, 351 S.E.2d at 450.

63. O.C.G.A. § 24-3-1(b) (1995) (emphasis added).

64. *But see* Sorrow v. State, 234 Ga. App. 357, 357, 505 S.E.2d 842, 843 (1998) (stating accurately the hearsay rule of exclusion and recognizing that the code sections that follow O.C.G.A. § 24-3-1 represent specific exceptions to the rule although not an exhaustive list of them).

65. The court in *Higgs* was not the first active judicial body to radically change traditional hearsay doctrine. *See* Jack B. Weinstein, *Alternatives to the Present Hearsay Rules*, 44 F.R.D. 375, 379 (1968) ("By an imaginative interpretation of Rule 43(a), some federal courts have, in effect, created a broad new exception that permits hearsay to come in wherever there is first, a substantial guarantee of trustworthiness and, second, some good reason why the hearsay declaration cannot be satisfactorily duplicated by present testimony."); *see also* Treadwell, *supra* note 2 (summarizing the dramatic expansion of the necessity exception and attributing the expansion in part to the
to the reasoning in *Higgs*, Code section 24-3-1(a) defines hearsay, and Code section 24-3-1(b) admits hearsay rather than excludes it. 66

The court in *Higgs* held that the "two underlying reasons for any exception to the hearsay rule [of exclusion were] a necessity for the exception and a circumstantial guaranty of the trustworthiness of the offered evidence."67 In other words, the foundation requires a necessity, something to substitute for the oath (guaranteeing sincerity) and something to substitute for the adversary’s cross-examination (guaranteeing accurate perception, communication, and memory).68

The court identified five factors that together guaranteed the trustworthiness of the otherwise inadmissible hearsay. They are as follows: (1) the declarant consulted with her attorney before making the statement; (2) the declarant made the statement within hours of the event it described; (3) the declarant made the statement in the course of an official investigation; (4) the declarant never disavowed her statement or recanted; and (5) prior to trial the declarant explained that she refused to testify because she loved her husband.69

The Court analogized its adoption of this exception to the "residual exception" found in Federal Rules of Evidence § 803(24) (now Federal Rules of Evidence § 807)—a model many states subsequently adopted.70 The court, however, did not...
address two critical differences between the exception that it adopted and the federal model residual exception. The federal rule requires the proponent to demonstrate extraordinary need by showing that the out-of-court statement is "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts"; the federal rule requires the proponent to give adequate notice "to provide the adverse party with a fair opportunity to prepare to meet [the out-of-court statement]." In contrast to the federal rule, the court in Higgs required only that the declarant be legitimately, but simply, unavailable.

Focusing on the declaration rather than the declarant and ruling that the declaration must have some indicia of trustworthiness and reliability, the court in Higgs ignored Georgia's common-law, declarant-oriented rule. The federal model "residual exception" notwithstanding, proper hearsay equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, 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 exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. FED. R. EVID. 807.

In combining the two former rules (Rule 803(24) and 804(b)), the Advisory Committee stated that "[n]o change in meaning [was] intended." FED. R. EVID. 807 advisory committee's notes. See also United States v. Dunford, 148 F.3d 385, 392 n.2 (4th Cir. 1998). The federal residual exception has not escaped scathing commentary; critics say it is too liberal in allowing bad evidence before the jury. See John Norman Scott, Michigan Catches Up to the "Catch-alls": How Much Hearsay Will They Catch? 14 T.M. COOLEY L. REV. 1, 1 n.3 (1997) (listing some of the leading articles on the federal rule).

71. FED. R. EVID. 807. For an in-depth analysis of the federal rule, see the articles listed in Scott, supra note 71, at 1 n.3; see also Stephen A. Saltzburg et al., In U.S.C.S. FEDERAL RULES OF EVIDENCE MANUAL 1930-1947 (7th ed. 1998).

72. See Higgs, 286 Ga. at 608, 351 S.E.2d at 450-51; see also Chapel v. State, 270 Ga. 151, 155, 510 S.E.2d 802, 807 (1998) (modifying the Higgs necessity test requires extraordinary necessity in that the proffered out-of-court statements must be more probative on a material point than any other reasonably procurable evidence); infra notes 75-77 and accompanying text.

analysis in Georgia must still depend upon circumstances that bear on the mind of the declarant because it is the declarant, not the declaration, that is conditioned by those circumstances. 74

If seriously enforced, the two-element foundation announced in Higgs would allow extraordinarily probative, competent, but otherwise inadmissible, hearsay into evidence and also completely satisfy federal Confrontation Clause analysis required by the Due Process Clause. 76 Because the United States Supreme Court has retreated from a general rule of availability as a component of Confrontation Clause analysis 78 and because modern jurists tend to believe that the hearsay rules and the Confrontation Clause protect the same values in the same ways, the necessity exception, as used by the Georgia court in Higgs, has the potential to focus all hearsay analysis on ad hoc inquiries about trustworthiness and reliability. 77 Thus, without strict guidelines on how to measure trustworthiness and

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74 For practical application of the common-law, declarant-oriented, hearsay definition (O.C.G.A. § 24-3-1(a) (1995)), Irving Younger advocates a mechanical formulation that asks (1) whether the declarant made the statement out-of-court; and (2) whether the proponent offers the statement for its truth. See ROBERT E. OLIPHANT, BASICS CONCEPT IN THE LAW OF EVIDENCE, AN OUTLINE OF THE YOUNGER LECTURES 60 (2d ed. 1982). That formulation was so simple that the Advisory Committee adopted it as the federal rules' definition of hearsay. See FED. R. EVID. 801(c). Younger's formulation has since become the express law in every state except Georgia. See O.C.G.A. § 24-3-1. The mechanical formulation is useful and is recognized in Georgia, though it is not the rule. See Moore v. State, 154 Ga. App. 535, 538, 288 S.E.2d 706, 709 (1980) ("Hearsay evidence is not admissible to prove the truth of the fact asserted, unless the evidence constitutes a recognized exception to the general rule excluding hearsay."); see also Edmund M. Morgan, Hearsay and Non-Hearsay, 48 HARV. L. REV. 1138, 1140 (1935). Morgan states, "[a]ny assertion offered for the truth of the matter asserted in it presents potentially all the perils against which cross-examination is designed to guard." Id. However, as the United States Supreme Court acknowledges, whatever its merits, "[s]implification has a measure of falsification." Lee v. Illinois, 476 U.S. 530, 543 n.4 (1986) (crediting MCCORMICK ON EVIDENCE).

75 See Sorrow v. State, 234 Ga. App. 307, 307-58, 505 S.E.2d 842, 843-44 (1998) (analyzing a Confrontation Clause issue by applying the foundation requirements for the Georgia necessity exception); Higgs, 258 Ga. at 608, 351 S.E.2d at 448; see also Idaho v. Wright, 497 U.S. 805, 814-15 (holding that the framework for analysis is based upon a preference for face-to-face accusations, for which out-of-court statements with adequate indicia of reliability may be substituted if the accuser is unavailable). In some Confrontation Clause cases, the face-to-face accusations may be disposed of, even without a showing of unavailability. See, e.g., White v. Illinois, 502 U.S. 346, 348-57 (finding admission of excited utterances and statements made for medical diagnosis to comply with the functional interests of the Confrontation Clause).


77 See generally PAUL S. MILICH, GEORGIA RULES OF EVIDENCE § 18.3 (1985).
reliability, admissibility may become driven by the perceived necessity urged by the proponent of otherwise incompetent and inadmissible hearsay.\(^78\)

III. FOUNDATION REQUIREMENTS FOR THE NECESSITY EXCEPTION

A decade after *Higgs*, the Georgia appellate courts have invigorated the required necessity showing\(^79\) but still enforce only a minimum threshold for trustworthiness and reliability analysis.\(^80\) Georgia courts still do not require advance notice under the Georgia necessity exception, unlike the federal model “residual exception” adopted by many states.

In practical applications of the new necessity exception, courts require that the proponent establish the following foundation: (1) an unavailable declarant, (2) whose unique statements are, (3) relevant to a material fact in issue, (4) trustworthy, and (5) reliable.

A. Extraordinary Necessity

In *Chapel v. State*,\(^81\) the Georgia Supreme Court strengthened the necessity requirement by adopting a three-part test for establishing extraordinary necessity.\(^82\) This test requires: (1) an

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78. For a candid comment suggesting that the Canadian equivalent of the new “necessity exception” is driven by extrinsic crime-control values instead of intrinsic guarantees of trustworthiness and reliability, see Bruce P. Archibald, *The Canadian Hearsay Revolution: Is Half a Loaf Better than No Loaf?* 25 Queen’s L.J. 1, 33 (1999).

79. *See infra* notes 82-86 and accompanying text.

80. *See infra* notes 176-228 and accompanying text.


82. *See id.* at 155, 510 S.E.2d at 807. The court cited State v. Felton, 330 N.C. 619, 412 S.E.2d 344, 357-58 (1982), *overruled in part on other grounds* by State v. Jackson, 348 N.C. 619, 412 S.E.2d 344 (1993), but the additional requirements reflect those originally adopted under the federal rules; these requirements are also part of the residual exception in many states. *See Perkins v. State*, 269 Ga. 791, 795-96, 505 S.E.2d 16, 20 (1998) (ruling testimony admissible where declarant was unavailable and was the only eyewitness to key evidence); Swain v. Citizens & So. Bank of Albany, 258 Ga. 547, 372 S.E.2d 425 (1988) (ruling testimony admissible because the out-of-court declarant was dead and was the only eyewitness); Lewis v. Emory Univ., 235 Ga. App. 811, 817, 509 S.E.2d 635, 642-43 (1998), *as amended*, FULTON COUNTY DAILY REP., Jan. 15, 1999, at 142 (holding that statements by a deceased out-of-court declarant were necessary even when there were four other eye witnesses, because the deceased declarant was said to have
unavailable declarant, (2) whose statements are relevant to a material fact in issue, and (3) more probative on that issue than other reasonably procurable evidence.\(^8^3\) Although the Georgia courts had, in many cases, permitted the proponent to establish necessity simply by showing the unavailability of the out-of-court declarant,\(^9^4\) those cases are no longer considered good law.\(^9^5\)

Generally, to establish unavailability, the proponent must show that a witness is dead, cannot be found, or is invoking a privilege not to testify.\(^9^6\) In a recent case, *Holmes v. State*,\(^9^7\) an equally divided Georgia Supreme Court considered whether it should make unavailability synonymous with inaccessibility for purposes of extraordinary necessity; however, the court could not achieve a consensus on the issue.\(^8^8\) The fact that a proponent cannot create a necessity through its "lack of diligence in

\(^8^3\) See *Chapel*, 270 Ga. at 155, 510 S.E.2d at 807.


\(^8^8\) See id. (evenly split decision with one Justice abstaining); see also id. at 141, 516 S.E.2d at 63 (Benham, C.J., special concurrence) (reviewing the cases and establishing that the court has not yet expanded unavailability analysis under the necessity exception to include inaccessibility as urged by the plurality).
Keeping track of its witnesses" is well-settled. Nor can both parties agree that a certain volatile witness is unavailable simply because the witness might cause a mistrial. Regarding privileges, however, Georgia appellate courts have never offered any rationale explaining why the new necessity exception supersedes these traditional concepts of unavailability. So far, the only vitiated privilege is the marital privilege. When courts admit hearsay under both the res gestae doctrine and the necessity exception, even extraordinary necessity to impeach the hearsay declarant with evidence involving privileged juvenile records will not vitiate the juvenile records privilege.

To establish the second requirement, material relevance, the proponent must show why the second-hand information falls under the necessity exception. Material relevance follows the general relevance rule. However, material relevance, as a foundational element, encourages courts to conduct probative and prejudicial "legal relevance" balancing tests before admitting hearsay under the necessity exception.

The third requirement that the offered hearsay be more probative than other reasonably procurable evidence means that the out-of-court statement must be unique. In Lewis v.


91. The Eleventh Circuit has held that the marital privilege does not bar hearsay. See United States v. Chapman, 866 F.2d 1326, 1332-33 (11th Cir. 1989); see also United States v. Tsimnijinne, 601 F.2d 1035, 1037-38 (6th Cir. 1979). However, Georgia courts have not decided whether the Eleventh Circuit rationale is persuasive or worth extending to other privileges.


94. See O.C.G.A. § 24-2-1 (1995) ("Evidence must relate to the questions being tried by the jury and bear upon them either directly or indirectly. Irrelevant matter should be excluded.").


96. See, e.g., Holsey v. State, 271 Ga. 858, 862, 524 S.E.2d 473, 479 (1999) (stating that eyewitness account of license plate transmitted by police radio was most probative evidence linking defendant's car to alleged shooting crime).
Emory University, the Georgia Court of Appeals initially held that the plaintiff failed to establish necessity because the defendant had four eyewitnesses whose testimony could not be impeached by the dead declarant's story. In the amended opinion, the court agreed that the plaintiff successfully established necessity because the dead declarant's story provided the only means to impeach the testimony of the defendant's four eyewitnesses. By contrast, in Harrison v. State, the reviewing court held that a spouse's out-of-court statement regarding an alleged simple battery did not provide the most probative evidence because the prosecution failed to interview and subpoena third-party eyewitnesses.

Despite some ambivalence expressed in the reported opinions, as indicated by the split decision in Holmes, the courts are supervising the "necessity" element of the new necessity exception to prevent the exception from swallowing the rule.

B. Trustworthiness and Reliability

To enforce trustworthiness and reliability, the reviewing courts have looked for ad hoc factors taken collectively or individually. As a result, the case law is both inconsistent and unpersuasive.

According to the courts, factors that show untrustworthiness and unreliability include: (1) the declarant made the statement to a friend, (2) the declarant had a motive to fabricate, (3) the

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98. Id.
99. See id. at 817, 509 S.E.2d at 842. Without referring to Chapel, the court of appeals, revised the opinion in Lewis, which was originally published before Chapel and adopted Chapel's same three-part analysis: (1) the declarant must be unavailable, (2) the evidence must be relevant, and (3) the evidence must be unique to the unavailable declarant ("i.e. only the unavailable declarant has it"). See id.
101. See id. at 486, 518 S.E.2d at 758.
102. See Imwinkelried, supra note 23, at 217-22 (discussing how "the common law long assumed that the primary hearsay danger was the declarant's insincerity [or trustworthiness], and that the other hearsay risks [going to accuracy or reliability] such as imperfect memory were of only secondary importance").
declarant made the declaration against his own penal interest,\textsuperscript{105} (4) the declarant's statements were self-serving;\textsuperscript{106} (5) the declarant made the statement in preparation for trial;\textsuperscript{107} (6) the declarant did not make the statement pursuant to an official investigation;\textsuperscript{108} (7) the declarant made the statement too long after a critical event;\textsuperscript{109} (8) the declarant proved mentally unstable;\textsuperscript{110} (9) the declarant made the statement while under the influence of alcohol;\textsuperscript{111} (10) the declarant made the statement out of anger;\textsuperscript{112} (11) the declarant subsequently made an inconsistent statement;\textsuperscript{113} (12) the declarant subsequently

to partiality); McConis v. State, 208 Ga. App. 354, 354, 430 S.E.2d 618, 619 (1993) (holding that dead declarant allegedly made statement to his wife on behalf of their neighbor). \textit{Compare} cases cited \textit{infra} note 126 (showing trustworthiness and reliability from the same factor).


105. \textit{See}, e.g., Ramsay v. State, 220 Ga. App. 618, 626, 469 S.E.2d 814, 822-23 (1998) (holding that statements of third persons, not testifying in court, that an absent third-person declarant—not the accused—perpetrated the offense, are not reliable as a matter of law because the statement is likely to subvert justice).


112. \textit{See id.}

recanted; and (13) parts of the declarant's statement were inconsistent with other evidence.

The first six factors concern the degree of insincerity with which the declarant spoke. The seventh and eighth factors apply to the declarant's inaccuracy. The ninth and tenth factors bear upon both insincerity and inaccuracy. The remaining three factors simply apply to a lack of corroboration of the initial declarations but have no bearing as circumstances surrounding the declarant when the initial declarations were made.

On the other hand, factors which together or alone have been found to show trustworthiness or reliability include: (1) the declarant gave a sworn statement under oath; the declarant made the statement while suffering from obvious physical pain; (3) the declarant needed urgent medical attention; the declarant made the statement under duress and fear; (5) the declarant made the statement to a personal confidant, family member, or close friend; (6) the declarant consulted with an attorney before making the statement to a third party; (7) the declarant made the statement to a law enforcement officer; (8) the declarant made the statement during an official

118. See id. at 562, 492 S.E.2d at 324.
119. See Quijano v. State, 271 Ga. 181, 184-85 (1999); 516 S.E.2d 81, 84-85 (1999); holding that the declarant's stress or fear would have made her speak more truthfully to the police; however, a provocative dissent in this 4-3 decision argued that the duress and fear made the declarant tell the police whatever they wanted to hear.
investigation;\textsuperscript{123} (9) the declarant made the statement while in a professional capacity to a fellow professional;\textsuperscript{124} (10) the declarant made the statement voluntarily;\textsuperscript{125} (11) the declarant made the statement spontaneously;\textsuperscript{126} (12) the declarant did not make the statement spontaneously;\textsuperscript{127} (13) the declarant’s mother told him to tell the truth;\textsuperscript{128} (14) the declarant had no apparent reason to lie;\textsuperscript{129} (15) the declarant’s statement proved adverse to the interest of the declarant’s employer;\textsuperscript{130} (16) the declarant’s statements were not made in her own interest or in the interest of the party offering the out-of-court statement;\textsuperscript{131} (17) the declarant’s statement was against her penal interest;\textsuperscript{132} (18) the declarant made the statement within hours of the event in question;\textsuperscript{133} (19) the declarant made the statement the next


day;\textsuperscript{134} (20) the declarant’s statement had been reduced to writing;\textsuperscript{135} (21) the declarant signed the written statement;\textsuperscript{136} (22) the declarant made the statement under oath and subject to cross-examination by an adversary representing similar interests to the party against whom the out-of-court statement had been offered;\textsuperscript{137} (23) the declarant made consistent statements;\textsuperscript{138} (24) the declarant never disavowed or recanted;\textsuperscript{139} (25) the declarant’s statement proved consistent with other hours of being released from the trunk of appellant’s car”); \textit{Higgs}, 256 Ga. at 608, 351 S.E.2d at 451; \textit{Sorrow}, 234 Ga. App. at 358, 505 S.E.2d at 844 (recognizing that a statement was made “shortly after the incident occurred”); Ingram v. State, 233 Ga. App. 357, 368, 504 S.E.2d 254, 258 (1998) (recognizing that a statement was made “immediately after the declarant was contacted by police”); Moore v. State, 207 Ga. App. 412, 417, 427 S.E.2d 779, 780 (1993) (recognizing that declarant made a statement “within hours after the rapes”); \textit{Jackson v. State}, 202 Ga. App. 582, 586, 414 S.E.2d 905, 906 (1990) (recognizing that declarant made a statement “shortly after the event”); Patterson v. State, 202 Ga. App. 440, 444, 414 S.E.2d 885, 898 (1992) (recognizing that declarant made a statement “immediately after being contacted”); Adams v. State, 191 Ga. App. 18, 18, 381 S.E.2d 69, 71 (1989) (recognizing that declarant made a statement “immediately after being apprehended”).


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2000] evidence or testimony; the declarant explained that she invoked the marital privilege because she loved her husband; (27) prior to trial, the two friends' repetitions of the declarant's story were materially consistent; (28) the in-court testifying witness heard the defendant threaten to hurt the declarant the night before; and (29) the declarant's statements were "not based upon a faulty recollection."

The first seventeen factors apply to the sincerity with which the declarant spoke. However, a person may speak sincerely and still be sincerely wrong. The next two factors concern the accuracy with which the declarant spoke. The twentieth factor diminishes concerns about language ambiguity. The twenty-first and twenty-second factors apply to both sincerity and accuracy. The next five factors serve only to corroborate the declarant's story. The twenty-eighth factor bears only on the credibility of the in-court testifying witness, not the hearsay declarant. The twenty-ninth factor is conclusory. In short, the emphasis seems to be on the sincerity or trustworthiness of the declarant. Most of the identified factors do not affirmatively guarantee the accuracy or reliability of the declarant at the moment when he or she makes the extra-judicial statements.

C. Evaluating the Foundational Factors through a Totality of Circumstances Test and Corroboration

Although at this time no preliminary hearing is necessary for the admission of out-of-court statements under the necessity exception, the trial court must independently analyze the


142. See Abrah, 271 Ga. at 314, 518 S.E.2d at 898.


144. See Sorrow, 234 Ga. App. at 358, 505 S.E.2d at 843.

trustworthiness and reliability of each witness’s testimony\textsuperscript{148} based upon a totality of the circumstances.\textsuperscript{147} The test is a threshold test.\textsuperscript{148} While each factor regarding trustworthiness and reliability is unlikely to occur as an isolated event—and on its own would be inconclusive—the courts find that an aggregate of factors provide the necessary factual context for evaluating the non-testifying declarant’s sincerity (the statement’s trustworthiness) and accuracy (the statement’s reliability).\textsuperscript{149}

Georgia courts do not quantify how many factors are necessary to reach the critical mass that guarantees the probative value of unsworn, uncross-examined statements.\textsuperscript{150} For example, in \textit{Smith v. State},\textsuperscript{151} the court held as insufficient the mere consistency of an unavailable declarant’s two statements, despite the fact that the declarant made them within two days of the fire at issue in the case.\textsuperscript{152} In \textit{Lane v. Tift County Hospital},\textsuperscript{153} the court held that thirteen factors indicating trustworthiness and reliability rendered the statement admissible.\textsuperscript{154} In \textit{Suits v. State},\textsuperscript{155} however, the court require a preliminary hearing on the admissibility of extra-judicial necessity exception statements outside the presence of the jury).


\textsuperscript{150} The United States Supreme Court has had the same reticence about quantifying the factors that lead to sufficient indicia of trustworthiness sufficient to dispense with procedural confrontation rights. See \textit{Idaho v. Wright}, 497 U.S. 805, 822 (1990) (“These [identified] factors are, of course, not exclusive, and courts have considerable leeway in their consideration of appropriate factors. We therefore decline to endorse a mechanical test for determining ‘particularized guarantees of trustworthiness’ under the [Confrontation] Clause. Rather, the unifying principle is that these factors relate to whether the . . . declarant was particularly likely to be telling the truth when the statement was made.”).

\textsuperscript{151} 266 Ga. 827, 470 S.E.2d 674 (1996).

\textsuperscript{152} See \textit{id.} at 830-31, 470 S.E.2d at 678.

\textsuperscript{153} 228 Ga. App. 554, 492 S.E.2d 317 (1997) (physical precedent only).

\textsuperscript{154} See \textit{id.} at 561-62, 491 S.E.2d at 323-25 (physical precedent only and affirming the lower court’s decision to admit the deceased’s statement under the necessity exception); see also \textit{supra} notes 115-16, \textit{infra} notes 233-34 and accompanying text.

found that only one factor proved sufficient. 156 Nor do the courts indicate exactly how to strike the balance between factors that favor admissibility and factors that urge exclusion, except to resolve doubt against the proponent. 157 Just like all totality tests, lawyers and litigants will find it difficult to know upon which factors the trial and appellate courts will focus or how the courts will balance them.

After the proponent has established extraordinary necessity, the necessity exception only requires the court to test for trustworthiness and reliability; however, Georgia courts occasionally consider corroborating evidence in their totality test. 158 In so doing, the courts disregard Georgia hearsay

156. See id. at 365, 507 S.E.2d at 754 (affirming the lower court's admission of the deceased declarant's statements under the necessity exception solely because the deceased placed "great confidence" in her sister); Smith v. State, 231 Ga. App. 677, 680, 489 S.E.2d 663, 687 (1998); see also Roper v. State, 283 Ga. 201, 203, 429 S.E.2d 688, 670 (1993).

157. See Fenimore v. State, 218 Ga. App. 735, 738-39, 463 S.E.2d 55, 57-58 (1995); Mallory v. State, 261 Ga. 523, 628, 409 S.E.2d 858, 841 (1991) (finding a statement did not qualify for necessity exception; on the one hand, the statement was trustworthy because the declarant made it to a friend, but this was counterbalanced by the declarant's contradictory statement to son); Nelson v. State, 226 Ga. App. 93, 94, 485 S.E.2d 585, 585 (1997) (finding that the trustworthiness of a written, signed, and notarized statement was counterbalanced by the fact that it was made too long after the event, it was made in preparation for trial, and it was inconsistent with another statement made to police).

158. See Perkins v. State, 289 Ga. 781, 785-86, 507 S.E.2d 15, 20 (1998) (holding that guaranty of trustworthiness was sufficient for the necessity exception because declarant made out-of-court statements to police officers in an official investigation, physical evidence and other witnesses' testimony corroborated the declarations, and the declarant never subsequently attempted to recant or disavow her statements); Lane, 228 Ga. App. at 561-62, 492 S.E.2d at 323-25 (physical precedent only and holding that an independent CT scan and X-rays corroborated declarant's statement) McBee v. State, 228 Ga. App. 16, 25, 491 S.E.2d 97, 106 (1997) (holding that the reliability of the out-of-court statement offered against the criminal defendant was corroborated by the fact that defendant never recanted and by testimony from other witnesses). Jones v. State, 240 Ga. App. 723, 724 (2) (1999) (corroboration by defendant and by co-defendant); Baker v. State, 241 Ga. App. 668 (12) (1999) (physical precedent only) (an extreme case in which the only factor showing particularized guarantee of trustworthiness was corroboration by defendant's own admission). See also supra notes 140-44 and accompanying text.
precedent as well as federal Confrontation Clause precedent. Corroborating evidence raises a risk that a court will "bootstrap" unreliable information (hearsay) to admissible evidence (the corroborating evidence) to corroborate the other (corroborating) evidence, all to reach a verdict based upon the totality of the evidence. The United States Supreme Court has expressly forbidden corroboration as probative of reliability for Confrontation Clause purposes. Because Confrontation Clause analysis is essentially a form of hearsay analysis, the bootstrapping concern becomes as applicable to evidentiary concerns as it is to constitutional concerns. Therefore, the better rule in both civil and criminal cases would require the trial court to inquire only into the circumstances at the time the declarant made the out-of-court statement.

Another problem with corroboration is that some of the corroborating factors only negate a finding of untrustworthiness. For example, the courts find that inconsistency shows a declarant to be untrustworthy and unreliable; it does not follow, however, that consistency shows that a declarant is telling the truth. A person can be consistently wrong, willfully or inadvertently. Under classic evidentiary

159. _Fennimore_, 218 Ga. App. at 738, 463 S.E.2d at 50 (finding that corroborating facts had no bearing on the reliability test and that the prosecution failed to meet its reliability burden by showing that the declarant (1) did not directly point the finger at the accused, (2) freely admitted that he did not know the answers to some questions, and (3) knew his statement would be further investigated, even though (4) the questions were asked in a non-leading manner. The declarant’s out-of-court statements were still self-serving); see _Roper_, 263 Ga. at 203 n.2, 429 S.E.2d at 670 n.2; see also _Shaver v. State_, 199 Ga. App. 428, 430, 405 S.E.2d 281, 283 (1991)("The argument that the hearsay is rendered trustworthy and admissible because corroborated by the defendant's confessions, while the confessions are simultaneously corroborated by the hearsay is unpersuasive. This would sanction admission of otherwise unreliable evidence by mutual bootstrapping.").


161. See _Wright_, 497 U.S. at 823 (noting the bootstrapping danger in the context of a child’s out-of-court statements offered under Idaho’s necessity or residual exception and suggesting that corroboration is more appropriate to harmless error analysis than reliability).

162. See _id.; Lilly_, 119 S.Ct. at 1900-01.

analysis, consistent out-of-court statements are simply inadmissible hearsay, probative of nothing unless offered to rehabilitate a witness. Furthermore, consistent statements are generally irrelevant for purposes of bolstering a witness's credibility. The same problem arises when dealing with no-apparent-motive-to-lie or subsequent recanting. The argument that an out-of-court declarant should not be believed has merit because the declarant had a motive to lie or subsequently recanted. These factors support the untrustworthy and unreliable suspicion associated with the declarant of an extra-judicial statement. However, it is false logic to argue that the absence of these factors affirms the declarant's trustworthiness and reliability.

Courts should eschew considering corroborating evidence as a means to validate the requisite evidentiary foundation for the necessity exception. Arguably, courts should only consider corroborating circumstances to validate a verdict based upon properly admissible hearsay. Alternatively, the courts could strengthen the foundational requirements for the necessity exception by requiring proponents to show a further foundational element of corroboration.

164. See Woodard v. State, 269 Ga. 317, 320, 496 S.E.2d 896, 899 (1998) (holding that prior consistent statements are inadmissible absent a showing that a witness on cross-examination has been charged with recent fabrication, improper influence, or improper motive because consistency alone improperly bolsters a witness's credibility in the eyes of the jury); see also Tome v. United States, 513 U.S. 150, 158 (1995) (holding that under Fed. R. Evid. 801(d)(2)(B), prior consistent statements are admissible to rebut a charge of recent fabrication, only if the declarant made the statements before the alleged improper motive to fabricate arose).

165. See United States v. Quinto, 582 F.2d 224, 232 (2d Cir. 1978); see also 4 WIGMORE, EVIDENCE § 1124 (Chadbourn rev. 1972) (stating that consistent statements are "unnecessary and valueless" because an untrustworthy statement "is not made more probable or more trustworthy by any number of repetitions of it").

166. See supra notes 105, 130, 140 and accompanying text.

167. But see Sorrow v. State, 234 Ga. App. 357, 358, 505 S.E.2d 842, 843 (1998) (finding the necessity exception constitutional as applied and noting the fact that reviewing courts consider the "extent to which the declarant's statement is supported by other evidence").

168. See Nesson & Benkler, supra note 4, at 170 (noting that corroboration may validate hearsay, but corroboration is just not a foundational element).

169. See White v. State, 269 Ga. 28, 30, 486 S.E.2d 338, 340 (1997) (finding a statement trustworthy and reliable when other information not generally known to the public corroborated by the statement); see also Atwater v. State, 233 Ga. App. 339, 342, 503 S.E.2d 919, 922 (1998) (treating lack of corroboration almost like another element and listing it as a final reason to explain why the "necessity exception" did not apply); State
D. The Trustworthiness and Reliability Factors

Critical evaluation of the individual factors that the Georgia appellate courts have identified suggests that the totality test for the new necessity exception has no actual standard.

Some factors have no intrinsic application to any of the four principal hearsay dangers (insincerity, poor perception, inaccurate memory, or ambiguous communication). For example, the Georgia Supreme Court, in White v. State, identified voluntariness as a factor, but in Quijano v. State, the court found voluntariness irrelevant. The Quijano rationale is more persuasive. Nearly every statement that an individual makes is made voluntarily, but voluntariness, if courts apply it to any hearsay danger goes only to sincerity. Voluntariness has nothing to do with the declarant’s perception of what happened, memory, or language skill, nor is it particularly probative of sincerity. In White, the court found trustworthiness and reliability in the declarant’s voluntariness, but in Quijano, the court ruled that the declarant’s involuntariness showed trustworthiness and reliability. The same lack of intrinsic evidence bearing on hearsay dangers applies to a mother’s admonition to tell the truth. Most mothers probably would testify that they trained their children to tell the truth; yet, how many children lie to their mothers, let alone others? Beyond the sincerity analysis, what does a mother’s advice have to do with

v. Sorenson, 143 Wis. 2d 228, 245-46, 421 N.W.2d 77, 84-85 (1988); infra notes 202-04 and accompanying text.
170. See supra notes 105-45 and accompanying text.
171. See supra notes 20-24 and accompanying text.
174. See Harrison v. State, 238 Ga. App. 485, 487, 518 S.E.2d 755, 758 (1999) (finding a married couple’s voluntary statements to police unreliable because they were motivated by their desire to justify their own conduct); Lee v. Illinois, 476 U.S. 530, 544 (1988) (finding that a co-conspirator’s “voluntary [confession] for Fifth Amendment purposes . . . does not bear on the question of whether the confession was also free from any desire, motive, or impulse [the declarant] may have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate [the defendant’s] involvement in retaliation . . . ”).
175. See White, 268 Ga. at 30, 486 S.E.2d at 340; see also supra note 126 and accompanying text.
176. See Quijano, 271 Ga. 181, 185-59, 516 S.E.2d 81, 84-85; see also supra note 126.
177. See supra note 129 and accompanying text.
a child's competency to perceive, remember, and tell what happened? Consider timeliness. Statements made within hours after an event\(^\text{178}\) are still subject to insincerity, poor perception, inaccurate memory, or ambiguous communication.\(^\text{179}\) Thus, voluntariness, mothers' admonitions, and timeliness—to focus on a few factors—simply do not test well for trustworthiness and reliability.

Some factors that the Georgia appellate courts use when evaluating the totality of the circumstances are simply neutral as to trustworthiness and reliability. For example, the courts have found that a statement that a declarant makes to a friend can either support reliability\(^\text{180}\) or refute reliability.\(^\text{181}\) The courts have decided that spontaneity can cut both ways as well. According to one court, the proponent established reliability, in part, because the declarant made the statement spontaneously;\(^\text{182}\) in another case, the court found that the proponent established reliability, in part, because the declarant did not make the statement spontaneously.\(^\text{183}\)

Consider statements made in preparation for trial. Inculpatory statements made by third parties to police officers are usually made in anticipation of a later trial, yet the courts have considered the out-of-court declarants to be reliable.\(^\text{184}\) However, an accomplice's inculpatory statements, elicited by police in preparation for trial and describing past events, are highly unlikely to pass Confrontation Clause scrutiny for trustworthiness and reliability.\(^\text{185}\) Meanwhile, the Georgia Court

\(^{178}\) See supra note 134 and accompanying text.
\(^{179}\) See Susan Estrich, Rape, 95 Yale L.J. 1087, 1136 (1986) (noting how the law recognizes that a woman's attitude to potential rape may be deeply ambivalent, her consent may be ambiguous, and her confusion at the time of an act may later resolve into non-consent). See generally supra notes 20, 23 and accompanying text.
\(^{185}\) See Lilly v. Virginia (plurality opinion); Livingston v. State, 280 Ga. 205, 211-12, 486 S.E.2d 845, 850 (1997) (holding a co-conspirator's statement inadmissible under the
of Appeals found a declarant’s statement made to a legal assistant unreliable, in part, because the declarant—a witness for the defense—made the statement a day before and in anticipation of a trial.  

IV. THE NEW NECESSITY EXCEPTION MAY RESURRECT THE OLD POLICE OFFICER’S EXCEPTION FORMERLY ADMITTED UNDER THE ORIGINAL EVIDENCE DOCTRINE

In addition to being non-probative of trustworthiness and reliability, a court’s reliance on intrinsically neutral factors also permits it to resurrect a police officer’s exception in criminal prosecutions. Under the new necessity exception, two factors effectively authorize the prosecution to enter into evidence anything that the officer heard while investigating the alleged crime: (1) the declarant made an out-of-court statement to a police officer, and (2) the declarant made the statement during the course of an official investigation. Therefore, statements that the courts barred under Code section 24-3-2 (statements to explain a police officer’s conduct when the officer’s conduct was not relevant) appear to be admissible under Code section 24-3-1(b). As applied to police officers’ testimony, the necessity exception only differs from the old “original evidence” exception by requiring that the prosecution show witness unavailability and some bootstrapping corroboration.

“necessity exception”).


187. See Quijano v. State, 271 Ga. 181, 188, 516 S.E.2d 81, 86 (1999) (Sears, J., concurring specially). The majority’s ruling may make the ad hoc determination of trustworthiness and reliability less fact-specific “and sanction the perfunctory admission of hearsay statements simply because they were made to law enforcement officers.” Id. (Sears, J. concurring specially); see also supra note 58 and accompanying text.

188. See supra note 123 and accompanying text.

189. See supra note 124 and accompanying text.


Yet statements made during a police investigation are almost certainly made with a bias in favor of the declarant or against the prospective defendant. In other words, police officers elicit statements with a view toward potential trials, and courts have found such statements unreliable, in part, because the declarant made them in preparation for trial.\textsuperscript{192} As a practical matter, statements the police take are far more likely to occur immediately after the event under investigation, while

\textsuperscript{381} S.E.2d 448, 450 (1987) (allowing under the necessity exception a law officer to testify to what the defendant's wife said because she talked with a lawyer before talking to the police two hours after the event she described, she never disavowed her statement, and she said that she would not testify against her husband because she loved him) \textit{and} Adams v. State, 191 Ga. App. 16, 18, 381 S.E.2d 67, 71 (1988) (allowing under the necessity exception a sheriff's detective to testify to what the defendant's unavailable niece said while she had been in custody as the defendant's accomplice because she never recanted) \textit{and} Patterson v. State, 202 Ga. App. 440, 444, 414 S.E.2d 895, 898 (1992) (allowing under the necessity exception a police officer to testify to what the defendant's wife said after she invoked the marital privilege because she spoke voluntarily immediately after being contacted in an official investigation, she never recanted, and other evidence corroborated her statement) \textit{and} Jackson v. State, 202 Ga. App. 582, 588, 414 S.E.2d 905, 909 (1992) (admitting a statement made by a police officer shortly after the event, during the course of an official investigation, and in the absence of subsequent recanting or contradiction) \textit{and} McKissick v. State, 283 Ga. 188, 189, 429 S.E.2d 655, 657 (1993) (allowing under the necessity exception two statements made to a law officer during an official investigation into a kidnapping because the statements were made within hours after the declarant was released from the defendant's car trunk) \textit{and} Hayes v. State, 265 Ga. 1, 3, 453 S.E.2d 11, 13 (1995) (allowing under the necessity exception a police officer to testify to what his informant told him about the defendant, who was on trial for murdering the informant because the informant, never disavowed) \textit{and} Drane v. State, 265 Ga. 663, 664, 461 S.E.2d 224, 224-25 (1995) (allowing under the necessity exception, a GBI investigator to testify about statements the declarant made during an official investigation because the declarant reaffirmed the statements under oath at a pre-trial hearing) \textit{and} White v. State, 268 Ga. 28, 30, 488 S.E.2d 338, 340 (1997) (admitting a juvenile's statement because it was "voluntarily made to a police officer in the course of an official investigation in the presence of an adult family member after the declarant had received a telephonic admonition from his mother to tell the truth; the statement had never been recanted by the declarant, and had been repeated without material deviation in the declarant's second statement to police") \textit{and} Sorrow v. State, 234 Ga. App. 357, 358, 508 S.E.2d 842, 843 (1998) (allowing under the necessity exception the arresting officer to testify as to what the defendant's wife said before she invoked the marital privilege because the wife talked to the police shortly after the event, never recanted, and had no apparent reason to lie).

192. \textit{See} Atwater, 233 Ga. App. at 342, 503 S.E.2d at 922 (excluding statements made in preparation for trial shortly before the trial because the court found the statements unreliable); Lilly v. Virginia (plurality opinion) (holding that statements that accomplices make in custody are generally unreliable); \textit{supra} notes 177-78 and accompanying text.
statements the defense develops are far more likely to occur closer to the trial. Nevertheless, psychological research suggests that it takes fewer than five minutes after an event has occurred for witnesses to assert self-serving statements about that event.\textsuperscript{103} Consequently, courts should be equally skeptical about any out-of-court statement offered or elicited in preparation for trial, whether the declarant makes the statement soon after an event or at a later time.

Courts continue to recognize, at least, that there is generally no necessity to explain an officer's conduct.\textsuperscript{104} Also, under \textit{Harrison v. State},\textsuperscript{105} if both parties in a fight make self-serving statements to a police officer, then they are each insufficiently reliable for a court to admit their statements under the necessity exception.\textsuperscript{106} \textit{Harrison} demonstrates that statements made to police officers during their investigations are not inherently trustworthy or reliable. The mere existence of O.C.G.A. 16-10-20, which criminalizes false statements to government officials, should caution against accepting the word of those interviewed by police investigators at face value.

\textit{Harrison} involved two co-defendants with mutually antagonistic defenses, and the court declined to engage in a \textit{Bruton} analysis.\textsuperscript{107} Another case, however, \textit{Livingston v. State},\textsuperscript{108} presented a \textit{Bruton} problem because it involved a non-testifying co-conspirator.\textsuperscript{109} In \textit{Livingston}, the court held that a co-conspirator's confession to a police officer implicating another conspirator did not fall under the necessity exception because another section in the Georgia Code expressly bars the use of such confessions.\textsuperscript{200} Both \textit{Harrison} and \textit{Livingston} may be distinguished from the trend that favors admissibility of police officers' testimony under the necessity exception because both

\begin{flushleft}
\textsuperscript{103} See supra note 22.
\textsuperscript{106} See id. at 487, 518 S.E.2d at 758.
\textsuperscript{107} See id. at 488, 518 S.E.2d at 760. See generally Bruton v. United States, 391 U.S. 123 (1968)(precluding a co-conspirator's extrajudicial confession that incriminated his co-defendant).
\textsuperscript{109} See id. at 211; see also Bruton, 391 U.S. at 123 (holding that the Confrontation Clause bars the introduction of a non-testifying co-defendant's confession against a jointly tried co-defendant).
\end{flushleft}
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cases presented classic confrontation problems involving co-defendants or co-conspirators. 201

V. THE NO-APPEARENT-REASON-TO-LIE AND NO DISAVOWAL FACTORS SHIFT THE BURDEN TO THE OPPONENT OF THE HEARSAY

Of greater concern than the Georgia appellate courts’ resurrection of a police officer’s exception 202 is their reliance on two additional factors to test reliability: (the no-apparent-reason-to-lie factor 203 and the no disavowal or recanting factor. 204 These factors actually shift the burden of foundation from the proponent to the opponent. 205 The courts do not require the proponent to offer foundational testimony for a judge to surmise that the declarant had no-apparent-reason-to-lie or did not disavow the statement. 206 A silent record adequately establishes both factors. 207 Nevertheless, once the courts allow the nebulous no-apparent-reason-to-lie or no-disavowal factors, then the opponent must either rebut a presumptive factor of admissibility or suffer the prejudice that results from the admission of an out-of-court declarant’s story. In other words, the courts should recognize that the no-apparent-reason-to-lie factor is not the same as affirmative circumstances showing that

201. See Lilly v. Virginia, 119 S.Ct. 1887, 1803 (1999) (Scalia, J., specially concurring) (stating that the Confrontation Clause is violated by the introduction of formalized extra-judicial testimonial evidence against a defendant).

202. See supra notes 188-91 and accompanying text.

203. See, e.g., Hayes v. State, 268 Ga. 809, 811-12, 493 S.E.2d 169, 172 (1997) (finding reliability because the exchange was spontaneous and declarant had no apparent motive to lie); Dix v. State, 267 Ga. 429, 431, 479 S.E.2d 739, 742 (1997) (stating that declarant had no apparent reason to lie). See also supra note 135 and accompanying text.

204. See supra note 140 and accompanying text.

205. For a general discussion of the burden of proof in trials see EDMUND M. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 71-73 (1956).

206. See supra notes 130, 140 and accompanying text.

207. See Perkins v. State, 269 Ga. 791, 796, 505 S.E.2d 16, 20 (1998) (giving no affirmative facts to support a determination that the wife who invoked her marital privilege “never attempted to recant or disavow her statements”); Hayes 268 Ga. at 811-12, 493 S.E.2d at 172 (reviewing court gave no facts to support its determination that an out-of-court declarant had no apparent reason to lie to the police); Dix, 287 Ga. at 431, 470 S.E.2d at 739 (“Pannell had no apparent reason to lie and presumably gave an accurate statement of facts to her attorney”); Smith v. State, 231 Ga. App. 677, 680, 499 S.E.2d 863, 867 (1998) (finding that declarant had no reason to lie to the police).
the declarant was telling the truth. One court reasoned "[i]t is not enough merely to find an absence of evidence that the statement was unreliable."

Notwithstanding the United States Supreme Court’s approval of the no-apparent-reason-to-lie factor in *Idaho v. Wright*, courts should not apply this factor to the hearsay declarant. Instead, courts should follow the better test, developed by the Wisconsin Supreme Court in *State v. Sorenson*. The court in *Sorenson* applied the no-reason-to-lie factor to the motives of the in-court testifying witness, not to the out-of-court declarant. In so doing, the Wisconsin court took a broader view of the totality of circumstances test than most courts. Determining whether the in-court witness has a reason to lie can be largely speculative; however, effective cross-examination can help the finder-of-fact evaluate the testifying witness’s motive. However, when courts apply the reason-to-lie factor to the non-testifying hearsay declarant, the witness’s motive

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211. 421 N.W.2d 77 (Wis. 1988).
212. See id.; 421 N.W.2d at 84-85; see also Mallory v. State, 261 Ga. 625, 628, 409 S.E.2d 389, 841 (1991) (noting that the prosecution argued that the no-motive-to-lie factor should apply to the in-court testifying witness).
213. See *Sorenson*, 421 N.W.2d at 84-85 (listing five factors courts should consider in assessing the admissibility of a young sexual assault victim’s out-of-court statement: (1) the attributes of the child; (2) the attributes of the person to whom the child spoke, including any motivation on the part of the recipient of the statement to fabricate or distort the communication; (3) the circumstances under which the statement was made; (4) the content of the statement; and (5) other corroborating evidence). Note only the third factor goes directly to the circumstances surrounding the declarant at the time the out-of-court statement was uttered. See id.; see also State v. Gerald L. C., 638 N.W.2d 777 (1995) (applying the *Sorenson* test).
cannot be explored in court. The Georgia courts should follow Sorenson and apply the no-apparent-reason-to-lie factor, if at all, to the in-court testifying witness for purposes of corroborating the sufficiency of the evidence.

Turning finally to those factors that are affirmatively persuasive of trustworthiness and reliability, the courts have identified some factors that also serve as the foundation for other recognized exceptions to the hearsay rule of exclusion. For instance, in Transamerica v. Thrift-Mar the court included prior testimony offered under oath as a factor while distinguishing the foundation for Code section 24-3-10 because the adversaries were not the same in the previous hearing. In Lane v. Tift Co. Hospital Authority, the court included the declarant’s urgent need for medical care as a factor, which would have supported independent admission under Code section 24-3-4 as a factor supporting trustworthiness and reliability.

Another factor, whether the declarant signed a statement under oath, bears affirmatively on reliability because the written statement comes into evidence without any risk of erroneous recollection. As long as the court presumes the out-of-court declarant respects the solemnity of the oath, it may even consider the out-of-court sworn statement sincere and trustworthy.

215. See supra note 138 and accompanying text.
216. O.C.G.A. § 24-3-10 (1995) provides that:
    The testimony of a witness since deceased, disqualified, or inaccessible for any cause which was given under oath on a former trial upon substantially the same issue and between substantially the same parties may be proved by anyone who heard it and who professes to remember the substance of the entire testimony as to the particular matter about which he testifies.
    Id.
219. See supra note 119 and accompanying text.
220. O.C.G.A. § 24-3-4 (1995) provides that: “[s]tatement made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admissible in evidence.” Id.
221. See Lane, 228 Ga. App. at 562, 492 S.E.2d at 324-25 (physical precedent only); see also infra notes 228-29 and accompanying text.
222. See supra note 137 and accompanying text.
To ensure confidence in the new necessity exception, the courts should require more of these affirmatively probative factors of trustworthiness and reliability instead of padding their totality test with neutral and utterly non-probative factors. If a court finds no affirmatively probative factors, then the proponent should not pass the threshold test, and the court should not admit the testimony. 223

VI. THREE CASES SHOW A PREFERENCE FOR THE NECESSITY EXCEPTION

Despite the weak intrinsic merit of the factors identified since the Higgs decision, Georgia courts continue to use those factors and others to validate trial court hearsay rulings. Three 1997 decisions illustrate that Georgia appellate courts now prefer to invoke the necessity exception rather than the traditional

223. See Lee v. State, 270 Ga. 626, 627, 513 S.E.2d 225, 227 (1999) (holding that the necessity foundation was inadequate and finding "no positive factors in the record showing trustworthiness."); Roper v. State, 263 Ga. 201, 202, 429 S.E.2d 668, 670 (1993) (noting the requirement that a declaration must be "coupled with circumstances which attribute verity to it").
categorical exceptions like the res gestae exception\textsuperscript{224} or statements made for medical diagnosis or treatment.\textsuperscript{225}

\textbf{A. Hayes v. State\textsuperscript{226}}

On December 3, 1997, the Georgia Supreme Court affirmed the conviction of Tyran Lamont Hayes for shooting a drug dealer in the head at close range.\textsuperscript{227} Hayes admitted to shooting the deceased, but claimed that it was an accident.\textsuperscript{228} During the presentation of evidence, the trial court allowed the victim’s associate to testify about the initial meeting between the victim and the defendant.\textsuperscript{229}

\begin{footnotesize}
\textsuperscript{224} See O.C.G.A. § 24-3-3 (1995). Res gestae exception applies to “[d]eclarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, shall be admissible in evidence as part of the res gestae.” \textit{Id.; see also supra note 25 and accompanying text. This Code section has become an exception to the hearsay rule despite its historical origin, which suggests that it applied to non-hearsay offered as original evidence simply for the fact that a statement was made. See Simon Greenleaf, A Treatise on the Law of Evidence § 108 (15th ed. 1892) (“There are other declarations which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation…. These surrounding circumstances, constituting parts of the res gestae, may always be shown to the jury, along with the principle fact…. ”); accord Carter v. Buchanon, 3 Ga. 513, 517-18 (1847) “Declarations, as parts of res gestae, made at the time of the transaction, are regarded as verbal acts, indicating a present purpose and intention, and are therefore admitted in proof like any other material facts.” \textit{Id. Although a more elaborate discussion is beyond the scope of this article, it is worth noting that the res gestae exception has been generally criticized, but it has maintained continuing vitality, particularly as an umbrella for more precise exceptions made for excited utterances, present sense impressions, and statements of body, mind or feeling, etc. See Milich, supra note 78, § 19.2. For an example of judicial restraint in the application of the hearsay rule, see Chrysler Motors Corp. v. Davis, 226 Ga. 221, 227, 173 S.E.2d 691, 695 (1970) (affirming a verdict, but expressly invoking the res gestae exception in preference to a special ad hoc necessity rationale as urged in the court below).}

\textsuperscript{225} See supra note 220. The medical diagnosis exception is codified at O.C.G.A. § 24-3-4. This Code section was enacted in 1977 by Ga. L. 1977, p. 228, § 1, and it expands the well-established res gestae principle admitting expressions of pain. \textit{See Broyles v. Frisock, 97 Ga. 843, 847 (1895) (“Complaints of pain which are made apparently in response to manipulation of the person do not come within the rule which excludes hearsay and self-serving declarations…. ”); Powell v. State, 101 Ga. 9, 10, 29 S.E. 307, 310 (1897) (“Holding admissible exclamations or expressions indicating the existence of present pain and suffering” made the same day as a homicide while “in the course of a medical examination or while describing his particular pain or trouble to another”).}

\textsuperscript{226} 228 Ga. 809, 493 S.E.2d 169 (1997).

\textsuperscript{227} See Hayes, 228 Ga. at 814, 493 S.E.2d at 170-71.

\textsuperscript{228} See id. at 811, 493 S.E.2d at 171-72.

\textsuperscript{229} See id. 493 S.E.2d at 172.
The statements in issue were at best peripherally relevant to the crime charged. The court allowed a state’s witness to testify that the last words the victim said to him were that the victim was trying to connect the defendant with a source for marijuana, that the victim indicated how much of an amount was being sought, and that the defendant expected to return soon.\footnote{See Childress v. State, 266 Ga. 425, 436, 487 S.E.2d 865, 873 (1990) (holding that prior inconsistent statements offered for impeachment purposes are not hearsay because they are not offered for their truth); Dover v. State, 250 Ga. 209, 212, 296 S.E.2d 710, 713 (1982) (finding hearsay evidence admissible because it was not offered for its truth but to explain the defendant’s state of mind.).}

Classic hearsay analysis asks whether this statement is offered for its truth.\footnote{See White v. State, 268 Ga. 28, 29, 488 S.E.2d 338, 340 (1997) (“The police detective’s testimony, as it related to the deceased youth’s statements, was hearsay since its value rested mainly on the veracity and competency of one other than the witness relating it.”). Cf. Sturkey v. State, 211 Ga. 572, 573-74 (2) (1999) (stating that threats are not hearsay if offered to show state of mind).} The answer is no. The hearsay rule excludes only those out-of-court statements that depend on a non-testifying declarant for their probative value.\footnote{See Hayes, 268 Ga. at 810-11, 493 S.E.2d at 171-72. Hayes was charged with murder and claimed the killing was accidental. See id.} Because the defendant was on trial for admittedly shooting the victim, the issue became whether the shooting was purposeful or accidental.\footnote{See O.C.G.A. § 24-3-2 (1995) (categorizing those statements not dependent on the credibility of the declaring witness as “original evidence,” not hearsay); see also Momon v. State, 249 Ga. 865, 867, 294 S.E.2d 482, 484 (1982).} It did not matter whether the victim was trying to connect the accused with another drug dealer who was not involved with the killing. It did not matter how much marijuana was involved. It did not matter that the victim expected to return soon. Since the information was not a second-hand story offered for its truth, the information was not hearsay.\footnote{See Hayes, 268 Ga. at 811-12, 493 S.E.2d at 172.} Nevertheless, on appeal, the Georgia Supreme Court upheld the trial court’s admission of the victim’s statements under the necessity exception.\footnote{See Hayes, 268 Ga. at 810-11, 493 S.E.2d at 171-72. Hayes was charged with murder and claimed the killing was accidental. See id.} Although irrelevant to the issue of intent and not apparently offered for their truth, the statements were prejudicial character evidence if the fact-finder considered them as true. Presumably, the defense objected on hearsay grounds to avoid that prejudice, but the reported opinion does not relay this fact.
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If the statements were offered as original evidence, the trial court would have needed to analyze them for legal relevance and might have excluded them to avoid undue prejudice. However, if the statements were relevant and offered as an exception to the hearsay rule, such legal balancing is generally not required. The reviewing court could have found some of the statements admissible under the res gestae exception for statements of future intent to prove conduct in conformance with that intent (the Hillmon doctrine). Instead, without discussing the trial court's basis for admitting the out-of-court statements, the reviewing court in Hayes invoked the necessity exception. In so doing, the court avoided the Hillmon issue and allowed the new necessity exception to supercede basic relevance analysis at the trial level.

B. Lane v. Tift Co. Hospital Authority

In Lane v. Tift Co. Hospital Authority, a wrongful death suit, the Georgia Court of Appeals reversed the trial court's ruling of summary judgment in favor of the defendant because the defendant failed to carry its burden of rebutting issues of

236. In Georgia, "original evidence" includes all evidence that is prima facie proof of a fact and that does not rely on the credibility of an out-of-court declarant. Original evidence is not hearsay. See Momon, 249 Ga. at 866-87, 294 S.E.2d at 484.
237. Cf. Pullen v. State, 208 Ga. App. 581, 585, 431 S.E.2d 696, 699 (1993) (stating the test for legal relevance as authority for properly restricting a defense witness from violating the rape shield statute). In Mooney v. State, the Georgia Supreme Court also held that the prejudicial nature of original evidence is largely determined by whether or not the testimony offends some other rule of evidence, but it is not apparent that the court in Mooney thought that the hearsay rule of exclusion qualified as such a rule. See Mooney v. State, 243 Ga. 373, 393, 254 S.E.2d 337, 351 (1979), cert. denied, 444 U.S. 886 (1979); accord, Black v. State, 100 Ga. App. 137, 137-38, 378 S.E.2d 342, 343-44 (1989).
238. See Hagen v. State, 169 Ga. App. 259, 259, 312 S.E.2d 357, 358 (1983) (ruling that the res gestae exception authorizes witnesses to testify that the defendant's wife told them that her husband planned to set the house on fire); see also Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295 (1892) (holding that statements of intent are admissible to prove the declarant's state of mind, which by inference may tend to prove conduct in conformity with that intent). Although Georgia has not expressly adopted the decision in Hillmon, good case law supports the doctrine, and the Hayes case presented a fairly innocuous context in which to adopt or reject it. See Hayes, 288 Ga. at 811, 493 S.E.2d at 172. Cf. Stewart v. Lanier House Co., 75 Ga. 582, 600-01 (1885) (holding that out-of-court statements of a person's belief are admissible to prove that the conditions forming the belief were true).
239. See Hayes, 288 Ga. at 811-12, 493 S.E.2d at 172.
material fact establishing its liability.241 Because the appellate court knew that the case could be retried based upon its decision, the court included in the opinion an analysis of the admissibility and probative value of the deceased victim's hearsay statement establishing liability—the victim claimed that two of the hospital's attendants had dropped him.242 The court recognized the statement's admissibility under the medical diagnosis exception,243 rejecting the lower court's medical diagnosis analysis.244 The court also analyzed the victim's statement under the necessity exception, finding it reliable enough for the proponent to present it to the jury.245 The court's opinion lists thirteen factors that show sincerity, accuracy, or corroboration.246 The two concurring judges rejected that analysis, agreeing only on the ultimate admissibility of the deceased's statements under an abuse of discretion standard of review.247 Because the concurring opinion does not embrace the court's opinion, the case has no general value as precedent supporting the necessity exception.248 A thorough marshaling of thirteen factors to support the necessity exception became merely the law of the case.

Lane signals an intention on the part of the Georgia appellate courts to forego traditional analysis and embrace the essentially standardless, ad hoc, totality-of-the-circumstances test.249 The concurring opinion actively embraced the necessity exception by refusing to engage in a de novo review of the trustworthiness, reliability, and corroborating factors that supported their opinion.250

For litigators, this decision may mean that the appellate courts will likely treat hearsay as a fertile issue during future appeals. Eventually, the appellate courts may resolve the trustworthiness and reliability issues under the equivalent of

241. See id. at 555-57, 492 S.E.2d at 319-22 (1997) (physical precedent only).
242. See id. at 559, 492 S.E.2d at 322 (physical precedent only).
243. See id. at 557-58, 492 S.E.2d at 321 (physical precedent only). The medical diagnosis exception is codified at O.C.G.A. § 24-3-4 (1995). See supra note 221.
244. See Lane, 228 Ga. App. at 561-62, 492 S.E.2d at 323-25 (physical precedent only).
245. See id. at 561-62, 492 S.E.2d at 323-25 (physical precedent only).
246. See id., 492 S.E.2d at 323-25 (physical precedent only).
247. See id. at 563, 492 S.E.2d at 325 (physical precedent only).
248. See id. (physical precedent only).
249. See id. (physical precedent only).
250. See id. (physical precedent only).
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traditional, categorical exceptions by creating new special cases. Just as it took years to develop those exceptions or special cases in the first place, it could also take years before hearsay admissibility under the new necessity exception may become reestablished upon firm foundational grounds.

Alternatively, under the new necessity exception, the reviewing courts could simply abandon the effort to find affirmative guarantees of trustworthiness and reliability; they could defer tough decisions to the trial courts and discourage appeals by invoking the abuse of discretion standard of review. That approach, whether intentional or not, would enshrine a new necessity exception as a generally inclusive rule allowing the admissibility of out-of-court statements, absent rebuttal by overwhelming indications of insincerity, fabrication, or inaccuracy.

C. Fetty v. State

On September 15, 1997, the Georgia Supreme Court affirmed the conviction of Jason Fetty for killing his lover shortly after she told her neighbor and close friend that she had put some of his things on the front porch and shut the door in his face. Because the prosecution presented evidence of stalking, these statements could have been admissible under the res gestae exception as an excited utterance. Instead, the court held that these statements were sufficiently reliable under the necessity exception to be admissible as evidence against the defendant because the victim made them to a close confidant and never disavowed them.

252. See id. at 369, 489 S.E.2d at 817.
253. See, e.g., Brantley v. State, 282 Ga. 786, 790 n.4, 427 S.E.2d 758, 768 n.4 (1993) (citing MCCORMICK ON EVIDENCE for the proposition that the res gestae doctrine includes excited utterances); House v. State, 252 Ga. 409, 410, 314 S.E.2d 185, 197 (1984) (admitting a statement made shortly after the defendant cocked a pistol on the victim because the statement embodied a "spontaneous reaction to the event rather than the result of 'reflective thought'.")
254. See Fetty, 288 Ga. at 368, 489 S.E.2d at 816-17 (finding that other testimony offered under the necessity exception was harmless error if any; however, as to Ms. Bonds's testimony, the court expressly held the out-of-court statements admissible under the necessity exception).
The defense presented statements that the victim wrote in her diary to rebut evidence of prior difficulties. The trial court, however, excluded these statements. On appeal, the court found the writings unreliable under the necessity exception because the defendant neglected to establish a foundation for the diary. The defendant failed to authenticate the diary and failed to invoke a hearsay exception authorizing admission of the victim's written statements within the diary. As to the victim's out-of-court statements, the diary writings appeared to be at least equivalent to the statements the victim made to her neighbor, admitted by the trial court because they were made to a confidant. After all, a diary is written to oneself. Unless intended for publication, a diary would seem to be even more confidential than a statement communicated to a close confidant. Further, statements in the diary should have been found corroborated—just like the victim's admissible statements to the neighbor—because the declarant never recanted or revoked the statements. The decision in Fetty represents the collapse of predictable hearsay exclusion. Under an abuse of discretion standard of review, the trial court's inconsistent rulings on the necessity exception were affirmed. When inconsistent rulings are found in separate cases, it is easier to avoid an appearance of injustice. However, when evidentiary rules are applied to benefit one adversary by allowing information into evidence and yet applied to exclude the opposing party's similarly founded evidence, clarity disappears with due process. If the new necessity exception were a substantive law, the Fetty decision would be subject to a void for vagueness challenge, at least as applied.

255. See 268 Ga. at 369-70, 489 S.E.2d at 817-18.
256. See 268 Ga. at 370, 489 S.E.2d at 818.
257. See id., 489 S.E.2d at 818.
258. See id. at 368, 489 S.E.2d at 817.
260. The profound danger in statutes that courts declare void for vagueness is their capacity to encourage arbitrary and capricious application of law to those with whom an officer of the law is displeased. See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972). A similar risk arises under the new necessity exception for the party who displease the court.
VII. APPELLATE SUPERVISION OF THE NEW NECESSITY EXCEPTION

Not only do these three case studies illustrate a nascent preference in the Georgia appellate courts for the necessity exception, they also illustrate a functional anomaly of the necessity exception. The necessity exception has no definite standards, no rules of thumb by which to judge evidentiary admissibility. The necessity exception requires ad hoc rulings on admissibility for every out-of-court statement offered under its authority. The appellate courts have not only opened the door to trial by affidavit, but they have also paved the way for endless appeals on every possible necessity exception determination or abandoned their supervisory role over the trial courts’ hearsay determinations.\textsuperscript{281}

When reviewing courts favor the necessity exception over traditional categorical exceptions that also apply to the facts, they encourage a more flexible approach to trial level determinations of evidentiary admissibility. Without strict guidelines, this flexibility amounts to a \textit{de facto} redefinition of the general rule excluding hearsay to a general rule admitting hearsay.

Such a redefinition raises considerable problems. The traditional codified exceptions\textsuperscript{282} make hearsay evidentiary determinations predictable and enforceable. Without affirmative standards of reliability, the necessity exception\textsuperscript{283} makes hearsay evidentiary determinations unpredictable, ad hoc, result-driven, and uncomfortably subject to the intuitive understandings of individual judges. In civil cases, settlements will be hampered even though a general rule of admissibility can be partially diffused by reliance upon the discovery process.\textsuperscript{284} However, in criminal cases, where the discovery process is not so well-developed, defendants will sometimes fail

\begin{footnotesize}
\begin{enumerate}
\item See \textit{generally} Nesson \& Benkler, \textit{supra} note 4 (discussing the gate-keeping role of the trial judge and the importance of limiting evidence in order to sustain social respect for our judicial system).
\item See O.C.G.A. §§ 24-3-3 to 24-3-14 (1995).
\item See \textit{id.} § 24-3-1(b) (construing \textit{Higgs v. State}, 156 Ga. 606, 351 S.E.2d 448 (1987)).
\item An inability to properly evaluate the potential strength of an opponent’s case will inevitably lead to trials that otherwise could have been settled. See Raeder, note 46 at 516-17.
\end{enumerate}
\end{footnotesize}
to present critical circumstances to enable the trier-of-fact to properly evaluate hearsay. Notice of intent to offer out-of-court statements under the necessity exception should be mandatory.

A. Cases Dealing with Hearsay in Georgia Teach Conflicting Lessons on Whether the Appellate Courts Will Actively Supervise the Ad Hoc Necessity Exception

As previously noted, the Georgia Supreme Court in *Livingston v. State*\(^{265}\) refused to extend the necessity exception to authorize the admissibility of a co-conspirator’s out-of-court confession as evidence against another conspirator, citing the Confrontation Clause and Code section 24-3-52, which prohibits that practice.\(^{266}\)

On the other hand, the appellate courts generally exercise deferential review toward the trial court’s relaxed hearsay rulings. Even before the Georgia Supreme Court created the new necessity exception in *Higgs*,\(^{267}\) the Georgia Court of Appeals revealed a willingness to affirm a lower court’s admission of hearsay without qualifying it under any recognized exception.\(^{268}\) Under the child hearsay exception, Code section 24-3-16,\(^{269}\) the appellate courts have presumed from an empty record that the trial court found affirmatively reliable factors to qualify out-of-court statements.\(^{270}\) Both the child hearsay exception and the necessity exception require trial courts to test for trustworthiness and reliability. Regarding the necessity exception, however, the reviewing court in *McBee v. State*\(^{271}\)

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267. *See supra* notes 13, 65 and accompanying text.
268. *See* Jaakkola v. Doren, 244 Ga. 530, 531, 261 S.E.2d 701, 701-02 (1979) (holding that the court found “no reason in the present case to question the trustworthiness of the decedent’s declarations”).
269. O.C.G.A. § 24-3-16 (1995). The Code section states in pertinent part: “[a] statement made by a child . . . is admissible in evidence . . . if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability.” *Id.*
simply presumed trustworthiness and reliability by deferring to the trial court's implicit findings of reliability.\textsuperscript{272}

In recent necessity exception cases, the reviewing courts have allowed hearsay to support a verdict on the most tenuous foundations. In a civil case, \textit{Star Gas of Hawkinsville v. Robinson}, the proponent offered no indicia of trustworthiness or reliability.\textsuperscript{273} In a criminal case, \textit{Hayes v. State},\textsuperscript{274} the single fact that the statements were "part of a spontaneous exchange," corroborated by the court's finding that the declarant had no apparent motive to lie, proved sufficient.\textsuperscript{275} The court in \textit{Suits v. State}\textsuperscript{276} affirmed the lower court's ruling based upon one single indicium of reliability, that the declarant placed great confidence in the sister with whom she spoke.\textsuperscript{277} The court in \textit{Smith v. State}\textsuperscript{278} affirmed the lower court's trustworthiness and reliability analyses based upon two indicia: first, the declarant talked to close friends, and second, the conversations took place near the time of the declarant's death.\textsuperscript{279}

Even when the appellate courts refuse to defer to the trial court's rulings, they may invoke a harmless error standard of review. In \textit{Lee v. State},\textsuperscript{280} the Georgia Supreme Court found "no positive factors in the record [showing] trustworthiness."\textsuperscript{281} The circumstances surrounding the statement suggested that the declarant had a motive to lie.\textsuperscript{282} Nevertheless, a unanimous court applied harmless error review of the necessity exception and

\textsuperscript{272} \textit{See id. at 25, 491 S.E.2d at 108.}

\textsuperscript{273} 225 Ga. App. 594, 484 S.E.2d 266 (1997) (holding that the deceased's statements were not self-serving when made, and other evidence corroborated her statements.)

\textsuperscript{274} 268 Ga. 409, 493 S.E.2d 169 (1997).

\textsuperscript{275} \textit{See id. at 811-12, 493 S.E.2d at 172} (noting that, with respect to the "spontaneous exchange" in the Hayes case, "spontaneous" is a legal term of art meaning conduct "so dominated by considerations external to the self, that rational thought or personal will plays no part"); Robert M. Hutchins & Stephen Slesinger, supra note 22 at 432 n.2. The court in \textit{Hayes} found that spontaneity did not guarantee the reliability of a conversation between two drug-dealing confederates about their plan for dealing drugs with a new buyer.


\textsuperscript{277} \textit{See id. at 385, 507 S.E.2d at 754; see also Roper v. State, 283 Ga. 201, 202-03, 429 S.E.2d 698, 870 (1993) (affirming the lower court's ruling based upon the same single indicium).}


\textsuperscript{279} \textit{See id. at 880, 499 S.E.2d at 667.}

\textsuperscript{280} 270 Ga. 926, 513 S.E.2d 225 (1999).

\textsuperscript{281} \textit{See id. at 627, 513 S.E.2d at 227.}

\textsuperscript{282} \textit{See id.}
affirmed a conviction based in part upon evidence that proved "cumulative [and] did not touch on the central issue in the case."\textsuperscript{283} Again, in \textit{Clark v. State},\textsuperscript{284} a unanimous court found that the trial court erred in failing to inquire into the particular guarantees of trustworthiness but determined the error harmless because the evidence was cumulative.\textsuperscript{285} Harmless error review by the appellate courts is an inappropriate method for clarifying the new necessity exception for trial judges, lawyers, and litigants because it encourages arbitrary and capricious rulings in the lower courts.

To "help ensure that the necessity exception does not render the rules of evidence meaningless," the Supreme Court of Georgia, in \textit{Chapel v. State},\textsuperscript{286} added two foundation elements.\textsuperscript{287} The \textit{Chapel} test requires proponents to establish that necessity exception hearsay is relevant to a material fact in issue and more probative on that point than any other reasonably available evidence.\textsuperscript{288} However, in \textit{Holmes v. State},\textsuperscript{289} decided less than six months after \textit{Chapel}, a plurality opinion in an equally-divided court attempted to mitigate the \textit{Chapel} test by expanding the definition of unavailability.\textsuperscript{290} The plurality opinion argued that the new \textit{Chapel} safeguards eliminated the need to restrict unavailability to instances of death, privilege, and deliberate hiding.\textsuperscript{291} Invoking the harmless error standard of review, the concurring opinion found any error surrounding the availability analysis to be harmless because the evidence offered under the necessity exception proved cumulative.\textsuperscript{292} Properly enforced, however, the necessity exception cannot tolerate harmless-error-because-cumulative review. Properly laid, the foundation for the exception bars all except the most probative evidence on a material fact in issue. Applying a harmless-error-because-cumulative standard of review

\begin{itemize}
\item \textsuperscript{283} \textit{Id.}
\item \textsuperscript{284} 271 Ga. 6, 515 S.E.2d 155 (1999).
\item \textsuperscript{285} \textit{See id.} at 10, 515 S.E.2d at 159-60.
\item \textsuperscript{286} 270 Ga. 151, 510 S.E.2d 802 (1998).
\item \textsuperscript{287} \textit{See id.} at 155, 510 S.E.2d at 807.
\item \textsuperscript{288} \textit{See id.}
\item \textsuperscript{289} 271 Ga. 138, 516 S.E.2d 61 (1999).
\item \textsuperscript{290} \textit{See id.} at 138, 516 S.E.2d at 62-63; \textit{see also supra} notes 84-90 and accompanying text.
\item \textsuperscript{291} \textit{See Holmes,} 271 Ga. at 140-41, 516 S.E.2d at 63.
\item \textsuperscript{292} \textit{See id.} at 141-44, 516 S.E.2d at 63-66 (Benham, J., concurring specially).
\end{itemize}
neutralizes the new safeguards established by the court in *Chapel*. Under harmless error review, if evidence is the most probative then it may become admissible under the necessity exception, but if it is not the most probative, then the trial court should not have excluded the evidence.

In *Higgs*, the case that created the new necessity exception, the reviewing court found five factors that showed trustworthiness and reliability. In *Roper v. State*, six years later, the reviewing court found that one factor by itself showed the requisite trustworthiness and reliability—the declarant made the out-of-court statement in confidence to a friend; although that factor was corroborated, the court held that corroboration was not critical to its holding. In *Suits v. State*, decided six years after *Roper*, the court continued to hold that same single factor sufficient, even without corroboration. The Georgia Supreme Court decided *Suits* only one week after it had strengthened the necessity analysis in *Chapel* to prevent the necessity exception from swallowing the hearsay rule. Yet *Suits* fits into a consistent line of cases, extending from 1993 through 1999, that has allowed necessity exception statements into evidence based primarily on the single, particularized, sincerity factor that the declarant spoke in confidence to a friend or family member. Bear in mind that under the new

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293. *See supra* notes 13 and 65 and accompanying text.
295. *See id.* at 203, 249 S.E.2d at 680. Corroboration is more applicable to harmless error review. *See id.* at 203 n.2, 249 S.E.2d at 680 n.2.
297. *See id.*, at 385, 507 S.E.2d at 754 (“As for the trustworthiness requirement, we conclude that it is satisfied with regard to the statements she made to her sister, in that there is evidence that the victim placed ‘great confidence’ in her sister and often turned to her ‘for help with her problems . . .’”).
299. *See, e.g.,* Abrahams v. State, 271 Ga. 309, 313, 518 S.E.2d 894, 898-98 (1999) (holding that statements made to friends in confidence were properly admitted and corroborated by being consistent as well as by physical evidence of the murder); Azizi v. State, 270 Ga. 709, 711-12, 512 S.E.2d 622, 625-26 (1999) (holding that statements made to sisters were properly admitted and were corroborated because they were consistent, but admitting statements made to the murder victim’s lover was reversible error); McGee v. State, 267 Ga. 560, 568, 486 S.E.2d 577, 582-84 (1997) (admitting statements made to a close friend, without more, and properly admitting other statements made to a father and a boyfriend, because they were consistent with other statements and corroborated by McGee’s own admissions to these witnesses); Fetty v. State, 266 Ga. 365, 368, 489 S.E.2d 813, 816-17 (1997) (admitting statements made to confidants immediately before the
necessity exception, out-of-court statements made in confidence have been held trustworthy when made to sisters, yet untrustworthy when made to lovers; statements made to a friend have been held both to support reliability and to refute reliability. Therefore, the appellate court's own jurisprudence suggests that a declarant making a statement in confidence to a friend is not sufficiently trustworthy and reliable for the statement, unqualified by oath and untested by cross-examination, to be admissible evidence through a third party.

In order for any hearsay exception to aid in the discovery of truth, the fact-finder must be capable of evaluating admissible hearsay. The proponent should first establish the foundation declarant's death and corroborated by never having been disavowed, although declarant died almost immediately after making the statements); Roper, 283 Ga. at 203, 429 S.E.2d at 870 (admitting statements made to a sister, without more); Smith v. State, 231 Ga. App. 677, 680, 499 S.E.2d 63, 667-68 (1998) (admitting statements made to close friends near the time the declarant was murdered and corroborated by the fact that declarant had no apparent motive to lie); McKibbons v. State, 228 Ga. App. 452, 454, 488 S.E.2d 879, 881 (1997) (admitting statements made to a friend and mentor and corroborated by testimony that the defendant subsequently acknowledged the statements). But see Carr v. State, 287 Ga. 701, 705-06, 482 S.E.2d 314, 318-19 (1997) (holding that sincerity of statements made to confidants was counterbalanced by motive to cast adulterous conduct in most favorable light); Mallory v. State, 261 Ga. 625, 628, 409 S.E.2d 839, 841 (1991) (finding that sincerity of statements made to close friends or relatives was counterbalanced by contradictory statements); see also supra note 94 (holding that declarant's statements to friends untrustworthy).

300. See Azizi, 270 Ga. at 711-12, 512 S.E.2d at 625.
301. See id. at 712, 512 S.E.2d at 625-26; see also Wisconsin v. Gerald L. C., 535 N.W.2d 777, 781 (1995) (holding that statements allegedly made by the victim to her boyfriend did not have the same circumstantial guarantees of trustworthiness as those made to a mother or family member).

302. See supra notes 173-74 and accompanying text.
304. See Eleanor Swift, A Foundation Fact Approach to Hearsay, 75 CAL. L. REV. 1339 (1987) (arguing that current hearsay law glosses over the critical need to evaluate evidence for its truth and probity); see also supra note 46 and accompanying text. With respect to the federal residual exceptions, one commentator proposes a useful four step analytical approach to foundation admissibility:

First, the court must isolate the circumstances existing when the hearsay was made. Second, the court must decide whether those circumstances reduce some or all of the hearsay dangers. Third the court must determine that those circumstances do not exist for all hearsay or for a broad range of inadmissible hearsay. Fourth, the court must decide whether the reduction in the dangers is comparable to that of a specific exception.

Jonakait, supra note 25, at 478-79. Of course, the courts may already be following a similar analysis but simply not articulating it on the record.
on the record before offering any out-of-court statement. To ensure fairness between adversaries and reliable verdicts, the appellate courts should insist that trial courts and hearsay proponents articulate on the record the specific indicia that they think guarantee the trustworthiness and reliability of an out-of-court statement. Absent on-the-record findings, the appellate courts are at the same disadvantage as the fact-finder for whom no foundation has been laid. Without a specific on-the-record foundation, the appellate courts can only attempt to recreate the trial court's use of discretion. Without a record, proper deferential review is actually impossible.

B. Practitioners May Wish to Include a “Foundation First,” Pre-trial Motion In Limine Requesting the Trial Court to Find On the Record What Particularized Factors Affirmatively Justify Admission of Extra-Judicial Statements Under the Necessity Exception

Based on trial records, appellate courts can go beyond case-by-case review and identify those factors that affirmatively qualify out-of-court statements in ways that allow the fact-finder to accurately evaluate evidence offered free of oath and without cross-examination. In so doing, the courts could extend the traditional hearsay rules by judicially creating certain new

305. See Fenimore v. State, 218 Ga. App. 735, 739, 483 S.E.2d 55, 58 (1995) (finding that the trial court erred by admitting statements because state did not first carry its burden of showing circumstantial guarantees of trustworthiness); see also Shaver v. State, 199 Ga. App. 428, 433, 405 S.E.2d 281, 283 (1991) (Beasley, J., dissenting) (stating that to avoid reversible error from the improper admission of hearsay under the child hearsay exception, which requires testing for trustworthiness and reliability, "the foundation for the hearsay should first be laid"); Minnich v. First Nat'l Bank of Atlanta, 152 Ga. App. 833, 838, 284 S.E.2d 287, 290 (1979) (Smith, J., dissenting) ("[T]he business record exception to the hearsay rule should be treated like [the codified section] requires and like any other hearsay exception, with the required foundation first having established admissibility."); Royal Oil Co. v. Hooks, 111 Ga. App. 779, 779, 143 S.E.2d 441, 443 (1965) (finding that hearsay statements "should have been excluded upon timely objection thereto, unless a proper foundation was first laid").

306. See Lagana v. State, 219 Ga. App. 220, 222, 464 S.E.2d 625, 627 (1995) (directing the trial court to determine reliability under a list of factors and implicitly insisting that the trial court make that determination on the record). It is beyond the scope of this Article to comment on the probative value of those factors identified as imbuing child hearsay with trustworthiness and reliability.

307. See United States v. Tome, 61 F.3d 1446, 1451 n.4 (10th Cir. 1995).
categories or specified cases, which would be admissible as exceptions to the general rule of exclusion.308

The reviewing courts will maintain the traditional rule of hearsay exclusion only by narrowly limiting the new necessity exception to new circumstances not otherwise covered by traditional exceptions. In so doing, the appellate courts will save a lot of time for themselves, the lower courts, and litigants. Courts are more likely to reach valid verdicts when they require foundational facts to address the four principal hearsay dangers. Trial lawyers should be guaranteed notice about their adversaries’ intent to introduce necessity exception testimony so that a court does not rubber stamp a prima facie showing of admissibility by default. The notice requirement may encourage greater use of the traditional exceptions so as not to reveal trial strategy. Given more effective adversarial arguments, the reviewing courts may be able to better isolate particularized guarantees of trustworthiness or reliability. If out-of-court statements cannot be grouped into particular sets of foundation facts, then the necessity exception will still be available for those truly extraordinary cases in which the court’s use of the general rule of exclusion would cause a miscarriage of justice.309

C. Practitioners May Wish to Include a Pre-trial Motion Requesting Notice of Opposing Counsel’s Intent to Offer Hearsay Under the Necessity Exception.310

If the appellate courts elect not to oversee the new necessity exception, then trial courts will continue to erode the codified exceptions by admitting “near miss” hearsay that almost qualifies under the statutory exceptions but does not quite fit.311 If an out-of-court statement almost qualifies as a specified exception to the hearsay rule, then the new ad hoc necessity

310. Don Samuels, Address at the Georgia Indigent Defense Counsel Seminar (Feb. 11, 1999).
311. See supra notes 216, 220 and accompanying text. Hearsay that narrowly misses fitting into a recognized exception has increasingly been admitted under the residual exceptions in other jurisdictions. For an overview of leading federal cases, see Scott, supra note 71, at 53-57.
exception cures the foundational defect. The opponent can only try to rebut the relaxed admissibility. The former hearsay rule of exclusion becomes a rule of inclusion.

CONCLUSION

Initially used to avoid the traditional rule of exclusion based on the marital privilege, the judicially created necessity exception has, in its application by the Georgia courts, essentially subsumed the traditional hearsay rules. Unfettered, it could vitiate not only the time-honored rules of hearsay and privilege but all other carefully developed limits on evidentiary proof in Georgia as well. Necessity can be a seductive hook proponents can use to get courts to admit evidence. To proponents, every fact that buttresses their theory of past events is necessary evidence at trial, no matter how privileged, unfair, incredible, or irrelevant. Without more rigorous appellate supervision, the necessity exception could become the sole rule of evidence.

In order to maintain the common law, courts should develop some way to deal with new evidentiary situations caused by changes in technology or culture. For the evidentiary law of hearsay, there ought to be a way to create new categories of hearsay, whether by legislative action or judicial activism. The new categories, however, should be clearly defined and narrowly applied because a new category for every case is unfair and judicially wasteful.

The new necessity exception has the positive potential to deal with new situations that did not exist when the traditional exceptions were developed. Under the current trend, however, the new necessity exception may negate hundreds of years of preference for live, in-court testimony. Unless narrowly limited, the new necessity exception may transform the general rule of exclusion into a general rule of inclusion; this would place the burden on the opposing party to show why traditionally unreliable out-of-court statements should not be generally admissible under the new necessity exception.

312. See supra notes 35-41 and accompanying text.
Therefore, a more rigorous foundation for the necessity exception would require: (1) notice at least ten days prior to trial; (2) pre-trial on-the-record particularized findings of (3) an unavailable declarant (4) whose unique statements are (5) relevant to a material fact in issue, (6) and are of a kind which are uniformly (7) trustworthy and (8) reliable.

Immediately before the introduction of hearsay admitted under the new "necessity exception," and on request by counsel, the trial court should give a cautionary instruction to the jury about the four inherent dangers of hearsay and emphasizing that the weight to be assigned to the "necessity exception" hearsay is a matter solely for the jury to determine. A similar charge should be included, on request, at the conclusion of the trial.313