ADVISORY COMMITTEE
ON
EVIDENCE RULES

Meeting & Symposium

Chicago, IL
October 9, 2015

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TAB 9 **SUGGESTION TO AMEND RULE 611(b)**

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Chicago, Illinois

October 9, 2015

I. Opening Business

Opening business includes:

! Approval of the minutes of the Spring, 2015 meeting.

! A report on the June, 2015 meeting of the Standing Committee.

II. Symposium on Hearsay Reform

The morning of the Fall meeting will be devoted to a Symposium on hearsay reform. The agenda book contains the Reporter's memorandum describing the topics to be discussed and setting forth the list of participants. The Reporter's memorandum also contains three attachments, all concerning the possibility of expanding the substantive use of prior inconsistent statements.

III. Possible Amendment to Rule 803(16) – Public Comment

The Committee's proposal to abrogate Rule 803(16), the hearsay exception for ancient documents, was issued for public comment in August. The agenda book contains a Reporter's memorandum reviewing the comment that has been received thus far.

IV. Possible Amendments to Rule 902 for Certifying Authenticity of Certain Electronic Evidence

The Committee's proposals to amend Rule 902 to provide for self-authentication of machine-generated evidence (Rule 902(13)) and for self-authentication of copies of electronic data (Rule 902(14)) have been issued for public comment. The agenda book contains a Reporter's

memorandum reviewing the comment that has been received thus far.

V. Possible Amendments to Certain Notice Provisions of the Evidence Rules

The agenda book contains a memo that discusses possible changes to certain notice provisions in the Evidence Rules, which the Committee at the last meeting either agreed upon in principle or agreed to further consider. These changes include: 1) deleting the provision in Rule 404(b) that conditions notice on the defendant's request; and 2) adding a good cause exception to Rule 807.

VI. Best Practices for Authenticating Certain Electronic Evidence

The Committee has been working on a project that would provide Abest practices@ for authenticating electronic evidence. The agenda book contains the second prepared sample of best practices for the Committee=s review: authentication of social media evidence. The agenda book also contains an updates draft of previously-submitted chapters on emails and text messages.

VII. Hearsay Exception for Recent Perceptions

The Committee has decided to defer action on an amendment that would add a Arecent perceptions@ exception to Rule 804(b) C an exception that would be designed primarily to provide broader admissibility for electronic communications such as texts and tweets. The Committee directed the Reporter to monitor developments in the case law on admissibility of social media communications. The agenda book contains the Reporter=s updated outline of recent federal case law on electronic communications and the hearsay rule.

VIII. *Crawford* Outline

The agenda book contains the Reporter=s updated outline on cases applying the Supreme Court=s Confrontation Clause jurisprudence.

IX. Suggestion for an Amendment to Limit the Possibility of Waiver of Fifth Amendment Rights on Cross-examination.

A member of the public has recommended an amendment to the Evidence Rules directed to the risk that a criminal defendant, by testifying, could be found to waive Fifth Amendment rights to be silent as to matters that are brought up on cross-examination --- even if those matters are beyond the scope of the direct examination. The agenda book contains the Reporter's memorandum evaluating the proposal.

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TAB 1

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Advisory Committee on Evidence Rules

Minutes of the Meeting of April 17, 2015

New York, New York

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 17, 2015 at Fordham University School of Law.

The following members of the Committee were present:

Hon. William K. Sessions, Chair
Hon. Brent R. Appel (by phone)
Hon. Debra Ann Livingston
Hon. John T. Marten
Hon. John A. Woodcock, Jr.
Daniel P. Collins, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure
Hon. Richard C. Wesley, Liaison from the Committee on Rules of Practice and Procedure
Hon. Paul S. Diamond, Liaison from the Civil Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
James C. Duff, Director of the Administrative Office
Professor Daniel Coquillette, Reporter to the Standing Committee
Catherine R. Borden, Esq., Federal Judicial Center
Timothy Lau, Federal Judicial Center
Rebecca A. Womeldorf, Chief, Rules Committee Support Office
Professor Stephen A. Saltzburg, Representative of ABA Section of Criminal Justice
John Haried, Esq., Attorney, Department of Justice
Frances Skilling, Rules Committee Support Office

I. Opening Business

Welcoming Remarks

Judge Sessions welcomed everyone to the Committee meeting. He thanked Director Duff for attending the meeting and expressed the pleasure of everyone that Director Duff has returned to the Directorship of the Administrative Office. Director Duff stated that he was honored to be back at the AO and to work with the Committee.

Approval of Minutes

The minutes of the Fall, 2014 Committee meeting were approved.

January Meeting of the Standing Committee

Judge Sessions reported on the January meeting of the Standing Committee. The Evidence Rules Committee presented no action items at the meeting. Judge Sessions stated that he reported to the Standing Committee on the Committee's agenda on electronic evidence. He noted the positive response of Committee members on the proposals regarding ancient documents (Rule 803(16)) and self-authentication of certain electronic evidence (Rules 902(13) and (14)). He also noted support for the Committee's undertaking a project on the hearsay rule and admissibility of prior statements of testifying witnesses.

Judge Sessions and Judge Sutton reported on some of the pilot projects that were presented at the Standing Committee meeting. These pilot projects include voluntary disclosure, rocket dockets, and streamlined procedures in simpler cases.

FJC Video

The FJC has determined that a good way to instruct judges on rule amendments is to produce videos in which the Chair and Reporter of an Advisory Committee would discuss a recent amendment. The FJC asked Judge Sessions and Professor Capra to be the first to prepare such a video. The video covered the 2014 amendments to Evidence Rules 801(d)(1)(B) and Rules 803(6)-(8). That video is now accessible to judges on the FJC website. The video was played for members at the Committee meeting.

II. Possible Amendment to Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. At the Fall, 2014 meeting the Committee considered the Reporter's memorandum raising the possibility that Rule 803(16) should be abrogated or amended because of the development of electronically stored information. The rationale for the exception has always been questionable, because a document does not become reliable just because it is old; and a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20. The Reporter's memorandum noted that the exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. But because electronically stored information can be retained for more than 20 years, it is possible that the ancient documents exception will be used much more frequently in the coming years. And it could be used to admit only unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception or the residual exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there may well be a lot of *reliable* electronic data available to prove any dispute of fact.

At the Fall meeting, Committee members unanimously agreed that Rule 803(16) was problematic, as it was based on the false premise that authenticity of a document means that the assertions in the document are reliable. The Committee also unanimously agreed that an amendment would be necessary to prevent the ancient documents exception from providing a loophole to admit large amounts of old, unreliable ESI. But the Committee was divided on two matters: 1) whether an amendment was necessary at this point, given the fact that no reported cases have been found in which old ESI has been admitted under the ancient documents exception; and 2) which alternative for amendment should be chosen.

At the Committee's direction, the Reporter prepared a memorandum for the Spring meeting that provided four formal proposals for amending the rule. The proposals were: 1) abrogation; 2) limiting the exception to hardcopy; 3) adding the necessity requirement from the residual exception (Rule 807); and 4) adding the Rule 803(6) requirement that the document would be excluded if the opponent could show that the document was untrustworthy under the circumstances.

Committee discussion indicated that some members who had thought it unnecessary to amend Rule 803(16) at this time had changed their mind. Committee members raised the following arguments against retaining the current Rule 803(16):

● The exception, which is based on necessity, is in fact unnecessary because an ancient document that is reliable can be admitted under other hearsay exceptions, such as Rule 807 or Rule 803(6). In fact, the only case that the original Advisory Committee relied upon in support of the ancient documents exception was one in which the court found an old document admissible because it was reliable --- an analysis which today would have rendered it admissible as residual hearsay. So the only real "use" for the exception is to admit unreliable hearsay --- as has happened in several reported cases.

● The exception can be especially problematic in criminal cases where statutes of limitations are not applicable, such as cases involving sexual abuse and conspiracy.

● Many forms of ESI have just become or are about to become more than 20 years old, and there is a real risk that substantial amounts of unreliable ESI will be stockpiled and subject to essentially automatic admissibility under the existing exception.

● The ancient documents exception is not a venerated exception under the common law. While the common law has traditionally provided for *authenticity* of documents based on age, the hearsay exception is of relatively recent vintage. Moreover, it was originally intended to cover property-related cases to ease proof of title. It was subsequently expanded, without significant consideration, to every kind of case in which an old document would be relevant. Thus, abrogating the exception would not present the kind of serious uprooting as might exist with other rules in the Federal Rules of Evidence.

● The ancient documents exception is based on necessity (lack of other proof), but where the document is necessary it will likely satisfy at least one of the admissibility requirements of the residual exception --- i.e., that the hearsay is more probative than any other evidence reasonably available. So if the document is reliable it will be admissible as residual hearsay --- and if it is unreliable it should be excluded no matter how "necessary" it is.

The discussion indicated general agreement that the Committee should act now to propose a change to Rule 803(16). The question then turned to which of the four proposals to adopt. There was no support for the proposal that would limit the exception to hardcopy, as the distinction between ESI and hardcopy would be fraught with questions and difficult to draw. For example, is a scanned copy of an old document, or a digitized version of an old book, ESI or hardcopy? As to the proposals to import either necessity or reliability requirements into the rule, Committee members generally agreed that they would be problematic because they would draw the ancient documents exception closer to the residual exception, thus raising questions about how to distinguish those exceptions.

The Committee concluded that the problems presented by the ancient documents exception could not be fixed by tinkering with it --- the appropriate remedy would be to abrogate the exception and leave the field to other hearsay exceptions such as the residual exception and the business records exception.

A motion was made and seconded to recommend to the Standing Committee that a proposal to abrogate Rule 803(16) be issued for public comment. That motion was approved unanimously.

The Committee approved the Committee Note prepared by the Reporter, with an additional suggestion that the Note emphasize that other hearsay exceptions (particularly Rules 807 and 803(6)) would be available to provide for admissibility of ancient documents that are reliable.

The Committee Note approved by the Committee provides as follows:

The ancient documents exception to the rule against hearsay has been abrogated. The exception was based on the flawed premise that the contents of a document are reliable merely because the document is old. While it is appropriate to conclude that a document is *genuine* when it is old and located in a place where it would likely be — *see* Rule 901(b)(8) — it simply does not follow that the contents of such a document are truthful.

The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to be available and will likely satisfy a reliability-based hearsay exception – such as Rule 807 or Rule 803(6). Thus the ancient documents exception is not necessary to qualify dated information that is reliable. And abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible, and would be admissible under the exception simply because it has been preserved electronically for 20 years.

III. Possible Amendments to the Notice Provisions in the Federal Rules of Evidence

The Committee considered a memo prepared by the Reporter on the inconsistencies in the notice provisions of the Federal Rules of Evidence. The Reporter's memo indicated that some notice provisions require notice by the time of trial, others require notice a certain number of days before trial, and some provide the flexible standard of enough time to allow the opponent to challenge the evidence. Moreover, while most of the notice provisions with a specific timing requirement provide an exception for good cause, the residual exception (Rule 807) does not. Other inconsistencies include the fact that Rule 404(b) requires the defendant to request notice from the government, while no such requirement is imposed in any other notice provision. Moreover, the particulars of what must be provided in the notice vary from rule to rule; and the rules also differ as to whether written notice is required.

The Reporter's memo suggested that more uniformity could be provided in two ways: 1) structure the notice provisions to require notice to be given before trial (or a number of days before trial) and include a good cause exception; or 2) structure the notice provisions to provide the more flexible standard that the proponent must provide reasonable notice so that the opponent would have enough time to challenge the evidence. The Reporter's memo also suggested that any attempt to provide uniformity to the notice provisions should not include Rule 412 (the rape shield rule) because the detailed notice and motion requirements in that rule are

designed to protect privacy interests of rape victims, whereas none of the other notice provisions raise that sensitive issue.

The Committee extensively discussed the Reporter's memorandum, and the following points among others were made:

1) The absence of a good cause exception in Rule 807 was problematic and had led to a dispute in the courts about whether that exception should be read into the rule. A good cause exception is particularly necessary in Rule 807 for cases where a witness becomes unavailable after the trial starts and the proponent may need to introduce a hearsay statement from that witness. And it is particularly important to allow for good cause when it is a criminal defendant who fails to provide pretrial notice. On the merits, Committee members approved in principle the suggestion that a good cause requirement should be added to Rule 807, with or without any attempt to provide uniformity to the notice provisions.

2) The absence of a good cause exception in the text of Rule 807 may be due to the fact that Congress wanted the residual exception to be used only rarely, and so imposed strict procedural requirements on its invocation. But perhaps it is now time to consider whether the strictures of the residual exception --- both procedural and substantive --- should be loosened. Judge Posner has argued for an expansion of the coverage of the residual exception, so it might be a good idea to break out the residual exception from the rest of the rules with notice provisions, and to consider not only whether to add a good cause exception but also whether to loosen the standards of reliability and necessity found in the current Rule 807.

3) Judge Sutton contended that rules should not be changed simply for the purposes of uniformity, if substantive changes must be made to do so. Rather, the Committee should proceed rule by rule and determine whether the substantive requirements in any particular rule make sense and are working. He argued, for example, that the requirement of 15 days' notice in Rules 413-415 (which were directly enacted by Congress) may have been the result of a substantive decision that should not be changed simply to make those provisions uniform with other notice provisions. A member of the Committee speculated that the length of the notice provisions in Rules 413-15 may have been due to the fact that those rules are applicable mostly to litigation arising in Indian country, and so the specified time period may have been intended to account for special considerations in those locations. (Unfortunately there is no legislative history to indicate why Congress opted for the 15-day notice provision).

4) The DOJ representative stated that the Department is opposed to any attempt to provide uniformity in the notice provisions. She suggested that Congress might be concerned about changes to the Rules that it enacted directly --- i.e., Rules 413-415 --- and that any changes to those rules would not be worth the cost because they are so seldom used. She noted that local rules provide notice requirements and that there would be transaction costs if the national rules are changed. And she stated that any change to the notice rules could come with other unintended consequences.

5) A few Committee members objected to the proposal that the requirement of written notice should be deleted from the two rules that impose that requirement --- Rules 609(b) and 902(11). They noted that the requirement of a writing was a way of avoiding disputes as to whether notice was actually given. The Reporter responded that in those cases in which the opponent received actual notice but not written notice, the courts have excused the writing requirement anyway, so it is questionable whether having a requirement of written notice in a rule does anything more than impose litigation costs and a trap for the unwary. In any case, the Committee determined that the question that should be considered is whether written notice should be required in all the notice rules or none, and that this was a difficult question that required further consideration.

6) Committee members were in agreement that the request requirement in Rule 404(b) --- that the criminal defendant must request notice before the government is obligated to give it --- was an unnecessary requirement that serves as a trap for the unwary. The DOJ representative noted that most local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. In many cases, notice is inevitably provided anyway when the government moves in limine for an advance ruling on admissibility of Rule 404(b) evidence. In other cases the request is little more than a boilerplate addition to a Rule 16 request. Committee members therefore determined that there was no compelling reason to retain the Rule 404(b) request requirement --- and that an amendment to Rule 404(b) to limit that requirement should be considered even independently of any effort to provide uniformity to the notice provisions.

In the end, the Committee agreed that amendments that would make the notice provisions more uniform raised a number of difficult questions that required further consideration. The Committee did determine, however, that any further consideration of uniformity in the notice provisions should exclude Rules 412-15. These rules could be justifiably excluded from a uniformity project because they were all congressionally-enacted, are rarely used, and raise policy questions on what procedural requirements should apply in cases involving sexual assaults.

The Reporter was directed to provide a memorandum to the Committee for the next meeting that would explore possible amendments to the remaining Rules that contained notice provisions --- Rules 404(b), 609(b), 807, and 902(11). Three of the proposals for possible amendment are independent from any interest in uniformity. They are:

- Deleting the requirement that notice be requested under Rule 404(b);
- Adding a good cause exception to Rule 807; and
- Broadening Rule 807 to admit more hearsay not covered by other exceptions.

Two of the proposals are grounded in uniformity. They are:

● Either adding a written notice requirement to Rules 404(b) and 807, or deleting the written notice requirement in Rules 609(b) and 807; and

● Amending Rules 609(b) and 902(11) to provide that notice must be provided before trial, but that pretrial notice can be excused for good cause --- i.e., to follow the same approach currently taken in Rule 404(b).

IV. Proposed Amendment to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence

At its last meeting, the Committee approved in principle changes that would allow certain electronic evidence to be authenticated by a certification of a qualified person --- in lieu of that person's testimony at trial. The changes would be implemented by two new provisions added to Rule 902. The first provision would allow self-authentication of machine-generated information, upon a submission of a certificate prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, media or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee found that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience --- and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event.

The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence. Under those rules a business record is authenticated by a certificate, but the opponent is given "a fair opportunity" to challenge both the certificate and the underlying record. The proposals for new Rules 902(13) and 902(14) would have the same effect of shifting to the opponent the burden of going forward (not the burden of proof) on authenticity disputes.

At the previous meeting, the Committee carefully considered whether the self-authentication proposals would raise a Confrontation Clause concern when the certificate of authenticity is offered against a criminal defendant. The Committee was satisfied that there would be no constitutional issue, because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* that even when a certificate is prepared for litigation, the admission of that certificate litigation is consistent with the right to confrontation if it does nothing more than authenticate another document or item of evidence. That is all that these certificates would be doing under the Rule 902(13) and (14) proposals. The Committee also relied on the fact that the lower courts had uniformly held that certificates prepared under Rules 902(11) and (12) do not

violate the right to confrontation --- those courts have relied on the Supreme Court's statement in *Melendez-Diaz.* The Committee determined that the problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation. The certificates that would be prepared under proposed Rules 902(13) and (14) would not be certifying the accuracy of any contents or any factual assertions. They would only be certifying that the evidence to be introduced was generated by the machine (Rule 902(13)) or is data copied from the original (Rule 902(14)).

At the Committee's direction, the Reporter prepared formal proposals for amending Rule 902. The Committee reviewed the proposals at the meeting and provided a number of suggestions for improvement. Among them were:

● Clarifying, in proposed Rule 902(14) that what will be admitted through the certification is not a copy of an electronic device, but rather a copy of data taken from an electronic device.

● Streamlining the draft by tying the requirements of notice to those already set forth in Rule 902(11). This change had the added advantage that, if the notice provisions of Rule 902(11) were to be amended as part of a uniformity project, Rules 902(13) and (14) would not have to be changed.

● Streamlining the draft by tying the certification requirements to those already set forth in Rule 902(11) as to domestic certifications and Rule 902(12) as to foreign certifications.

● Adding material to the proposed Committee Note to Rule 902(13) to clarify that the goal of the amendment was a narrow one: to allow electronic information that would otherwise be established by a witness under Rule 901(b)(9) to be established through a certification by that same witness.

A motion was made and seconded to recommend to the Standing Committee that the proposed amendments to Rule 902, together with the proposed Committee Notes, be issued for public comment. The motion was unanimously approved by the Committee.

Proposed Rule 902(13) as sent to the Standing Committee provides as follows:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(13) ***Certified Records Generated by an Electronic Process or System.*** A record generated by an electronic process or system that produces an accurate result, as shown by a certification by a qualified person that complies with the certification requirements of Rule 902(11) or Rule 902(12). The proponent must meet the notice requirements of Rule 902(11).

Proposed Committee Note to Rule 902(13)

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The intent of the Rule is to allow the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

A certification under this Rule can only establish that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the item on other grounds. For example, if a webpage is authenticated by a certificate under this rule, that authentication does not mean that the

assertions on the webpage are admissible for their truth. It means only that the item is what the proponent says it is, i.e., a particular web page that was posted at a particular time. Likewise, the certification of a process or system of testing means only that the system described in the certification produced the item that is being authenticated.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

Proposed Rule 902(13) as sent to the Standing Committee provides as follows:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(14) ***Certified Data Copied From an Electronic Device, Storage Media or File.*** Data copied from an electronic device, storage media, or electronic file, if authenticated by a process of digital identification, as shown by a certification by a qualified person that complies with the certification requirements of Rule 902(11) or Rule 902(12). The proponent must meet the notice requirements of Rule 902(11).

Proposed Committee Note to Rule 902(14)

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a unique alpha-numeric sequence of approximately 30 characters that an algorithm determines based upon the digital contents of a drive, media, or file. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-

authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the item on other grounds. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

V. Consideration of Prior Statements of Testifying Witnesses and the Rule Against Hearsay

For many years there has been a dispute over whether prior statements of testifying witnesses should be treated as hearsay when they are offered for their truth. The Federal Rules of Evidence treat such statements as hearsay, and provide for relatively narrow hearsay exceptions. The argument against treating prior witness statements as hearsay is that the declarant is on the stand testifying under oath and subject to cross-examination. Moreover, the prior statement is nearer in time to the event and so likely to be more reliable than trial testimony. And finally, admitting prior witness statements for substantive effect dispenses with the need to give a nonsensical instruction that the prior statement is admissible only for credibility purposes and not for its truth.

The Reporter prepared a memorandum for the Committee that raised the arguments both in favor of the current federal treatment and against it. The memorandum also described different approaches taken in some of the states. Finally, the memorandum discussed whether, if prior statements are to continue to be treated as hearsay, the current exceptions to the rule should be broadened . The most important question on this sub-question is whether the Congressional

limitation on substantive admissibility of prior inconsistent statements --- that they must have been made under oath at a former proceeding --- should be retained, limited, or abrogated.

At the meeting, the Reporter emphasized that there was no proposed amendment currently on the table. The treatment of prior statements of testifying witnesses under the hearsay rule is a complex question that has been debated for many years, and any proposed change would require significant study. The question for the Committee was whether a project to consider broader substantive admissibility of prior witness statements was worth undertaking. The Chair stated that the first step in that project would be to hold a symposium on the morning of the Fall 2015 Committee meeting in Chicago, at which scholars, judges and practitioners in the Chicago area could discuss these matters for the benefit of the Committee.

In discussion of the project, the Committee raised the following points among others:

● Most of the focus should be on prior inconsistent statements. The Committee has already expanded the substantive admissibility of prior consistent statements in the 2014 amendment to Rule 801(d)(1)(B). That amendment provides that a prior consistent statement is admissible when --- but only when – it properly rehabilitates the witness. Tying substantive admissibility to rehabilitation imposes an important limitation: that prior consistent statements should not be admissible if all they do is bolster the witness's credibility. That limitation also assures that parties will not try to generate prior consistent statements for trial. Thus, any further expansion of prior consistent statements will be problematic.

● The Committee should look at the practice in the states that did not adopt the Congressional limitation, i.e., where prior inconsistent statements are broadly admissible for substantive effect. The Reporter noted that Wisconsin is such a state and experts about the practice in Wisconsin can be invited to a symposium in Chicago. The Reporter also stated that he would provide information on the practice in the other states that admit prior inconsistent statements substantively without limitation.

● One concern with broader substantive admissibility of prior inconsistent statements is that they potentially could be found to provide sufficient evidence to convict a criminal defendant. The Committee should explore whether there might be limits on sufficiency that could be placed on substantively admissible prior inconsistent statements. Another possibility would be to expand substantive admissibility of prior inconsistent statements in civil cases only.

● Another concern from the criminal defense side is that if counsel impeaches a government witness with an inconsistent statement, there may be other assertions in that statement that could be used substantively. So any rule should take account of that risk.

● An oft-stated concern about admitting prior inconsistent statements is that the witness rendering the statement may just be making it up. That was at least one reason why Congress required that the prior statement be made at a formal hearing --- as there would then be no doubt that the statement was made. The Reporter noted, however, that the concern about fabricating the statement is not a hearsay concern, because the alleged fabricator is in court testifying under oath and subject to cross-examination that the statement was made. The Reporter also noted that

several states have rules with less stringent requirements than the Congressional limitation, designed to assure that the statement was actually made. For example, some states limit substantive admissibility to prior statements that are written or recorded. Illinois is one such state, and someone familiar with the Illinois practice could be invited to a symposium in Chicago.

● A project to consider expanding admissibility of prior witness statements might usefully be paired with a project that was discussed earlier in the meeting --- whether the residual exception should be amended to provide an easier road to admissibility for reliable statements that do not fit under standard hearsay exceptions. One Committee member noted that Judge Posner has advocated for a revision of the Federal Rules of Evidence that would scrap most or all of the hearsay exceptions in favor of a broadened version of the residual exception. The Chair remarked that if the Committee approved the idea of a symposium, there could be two panels --- one on prior witness statements and the other on the residual exception --- and that Judge Posner would be invited to make a presentation on his proposal.

The Committee approved the proposal that a symposium be held in Chicago on the morning of the Fall 2015 meeting. That symposium would contain two panels. Panel one would consider expansion of substantive admissibility of prior witness statements, with an emphasis on prior inconsistent statements. Panel Two would consider expansion of the residual exception.

VI. Best Practices Manual on Authentication of Electronic Evidence

At the Electronic Evidence Symposium in 2014, Greg Joseph made a presentation intended to generate discussion about whether standards could be added to Rules 901 to 902 that would specifically treat authentication of electronic evidence. There are dozens of reported cases that set forth standards for authenticating electronic evidence. These cases apply the existing, flexible provisions on authenticity currently found in Federal Rules 901 and 902 and their state counterparts. Greg crafted specialized authenticity rules to cover email, website evidence and texts; these draft rules were intended to codify the case law, as indicated by the extensive footnoted authority that Greg provided. At the Fall meeting, the Committee reviewed the draft rules to determine whether to propose them, along with any revisions, as amendments to Rule 901 and 902. The Committee decided that it would not propose extensive amendments to the authenticity rule to cover electronic evidence. Such proposals would end up being too detailed for the text of a rule; they could not account for how a court can and should balance all the factors relevant to authenticating electronic evidence in every case; and there was a risk that any factors listed would become outmoded by technological advances.

The Committee did, however, unanimously agree that it could provide significant assistance to courts and litigants, in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual —along the lines of the work done by Greg Joseph in footnoting the support for his draft amendments. A best practices manual could be amended as necessary, avoiding the problem of having to amend rules to keep up with

technological changes. It could include copious citations, which a rule could not. And it could be set forth in any number of formats, such as draft rules with comments, or all text with no rule.

At the Spring meeting, the Reporter submitted two preliminary drafts of best practices: authenticating email, and use of judicial notice. He informed the Committee that the FJC had already commissioned a best practices manual to be prepared by Greg Joseph and Judge Paul Grimm --- and they had both enthusiastically agreed to include the Committee on this project. When the project is completed, the Committee and the Standing Committee would then have to decide whether it should be designated as a Committee project or described in some other way.

The Reporter informed the Committee that the next drafts would cover social media postings, and would be submitted to the Committee for its next meeting. He also noted that Judge Grimm is preparing an introductory chapter that would discuss how Rules 104(a) and 104(b) interact when electronic evidence is authenticated.

VII. Recent Perceptions (eHearsay)

At the Fall meeting, the Committee decided not to approve a proposal that would add a hearsay exception intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without the exception reliable electronic communications will be either be 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for "recent perceptions" of an unavailable declarant.

The Committee at the Fall meeting decided not to proceed with the recent perceptions exception, mainly out of the concern that the exception would lead to the admission of unreliable evidence. The Committee did, however, resolve to continue to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable hearsay either being excluded or improperly admitted by misapplying the existing exceptions. The Committee also expressed interest in determining how the recent perceptions exception was being applied in those few states that have adopted that exception.

At the Spring meeting, the Reporter submitted an extensive report that was graciously prepared by Professor Dan Blinka, an expert on evidence at Marquette Law School. Wisconsin is one of the states that applies the recent perceptions exception. Professor Blinka provided detailed analysis of how that exception was being applied in Wisconsin, and he also reported on a survey that he conducted in which Wisconsin state judges provided their input on the recent perceptions exception in particular and on treatment of electronic evidence more generally. Professor Blinka concluded that there was not much controversy over the application of the recent perceptions exception in Wisconsin; that it can and has been used to admit reliable electronic evidence; and that state Wisconsin state judges were generally satisfied with the application of the recent perceptions exception and its application to eHearsay.

The Reporter also submitted, for the Committee's information, a short outline on federal case law involving eHearsay. Nothing in the outline to date indicates that reliable eHearsay is being excluded, nor that it is being improperly admitted under other exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all.

The Committee expressed its profound thanks to Professor Blinka. And the Committee asked the Reporter and Professor Broun to continue to monitor both federal and state case law to monitor how personal electronic communications are being treated in the courts.

VIII. *Crawford* Developments

The Reporter provided the Committee with a case digest and commentary on all federal circuit cases discussing *Crawford v. Washington* and its progeny. The cases are grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Reporter's memorandum noted that the law of Confrontation continued to remain in flux. The Supreme Court has denied certiorari in a number of cases raising the question about the meaning of the Supreme Court's muddled decision in *Williams v. Illinois*: meaning that courts are still trying to work through how and when it is permissible for an expert to testify on the basis of testimonial hearsay. Moreover, the Supreme Court has recently heard arguments on a case involving whether statements made by a victim of abuse to a teacher are testimonial, when the teacher is statutorily required to report such statements. This forthcoming decision, together with the uncertainty created by *Williams* and other decisions, suggests that it is not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VI. Next Meeting

The Fall 2015 meeting of the Committee is scheduled for Friday, October 9 in Chicago.

Respectfully submitted,

Daniel J. Capra

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FORDHAM

University School of Law

Lincoln Center, 150 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Symposium on Hearsay Reform
Date: September 10, 2015

The Advisory Committee is sponsoring a symposium on hearsay reform, scheduled for the morning of its Fall meeting on October 9, 2015. This memo provides information about the Symposium for the Committee. Part I sets forth the agenda and the participants. Part II attaches background reading materials.

I. Agenda and Participants

I. Welcoming Remarks --- Dean John Corkery, John Marshall Law School

II. Introductory Remarks

A. Hon. Jeffrey S. Sutton, Sixth Circuit Court of Appeals, Chair of the Standing Committee

B. Hon. William K. Sessions, District of Vermont, Chair of the Advisory Committee

C. Professor Daniel J. Capra, Fordham Law School, Reporter to the Advisory Committee (Moderator)

III. Topic One --- Using an Expanded Residual Exception in Place of Certain Standard Hearsay Exceptions.

A. Hon. Richard A. Posner, Seventh Circuit Court of Appeals --- Eliminating some standard hearsay exceptions and expanding a case-by-case trustworthiness approach to hearsay.

B. Hon. Patrick J. Schiltz, District of Minnesota --- How the suggestions for change to the hearsay exceptions reflects current trial practice.

C. Professor Ronald J. Allen, Northwestern University School of Law --- The hearsay rule as a form of regulation.

D. Professor Mark S. Brodin, Boston College School of Law --- Hearsay exception based on trial court's determination of trustworthiness – the practice in England.

E. Mini-Roundtable --- Lawyers discuss the effect of an expanded residual exception on litigation practice.

1. Lawrence R. Desideri, Esq., Winston & Strawn, Chicago

2. Daniel Gillogly, Esq., Assistant United States Attorney, Northern District of Illinois.

3. Ronald S. Safer, Esq., Schiff Hardin, Chicago

4. Reid J. Schar, Esq., Jenner & Block, Chicago

5. David J. Stetler, Esq., Stetler, Duffy & Rotert, Chicago

F. Professor Liesa Richter, University of Oklahoma School of Law --- Alternatives to expanding the residual exception.

G. Professor Stephen A. Saltzburg, George Washington University School of Law --- In defense of the hearsay exceptions for excited utterances and present sense impressions.

IV. Topic Two --- Expanded Admissibility for Prior Statements of Testifying Witnesses

A. Hon. J. Amy St. Eve, Northern District of Illinois --- Judicial perspective on the current limitations on prior statements of testifying witnesses.

B. John W. Vaudreuil, United States Attorney, Western District of Wisconsin --- Costs of complying with the requirements for substantive admissibility of prior inconsistent statements.

C. Professor Hugh Mundy, John Marshall School of Law --- Advantages and disadvantages of lifting or loosening restrictions on substantive admissibility.

D. Professor Daniel D. Blinka, Marquette University School of Law --- Lessons from the Wisconsin rule providing for substantive admissibility of all prior inconsistent statements.

E. Mini-roundtable --- Lawyers discuss the effect of the limits on substantive admissibility of prior statements of witnesses (and the effect of abrogating these limits) on practice.

1. Lori E. Lightfoot, Esq., Mayer Brown

2. John Murphy, Federal Public Defender

F. Professor Stephen A. Saltzburg --- difficulties in cross-examining witnesses about their prior inconsistent statements.

G. Professor Liesa Richter --- Prior consistent statements after the 2014 amendment.

II. Background Materials

Attached are the following:

1. Judge Posner's concurring opinion in *United States v. Boyes*, which advocates 1) abrogating the exceptions for excited utterances and present sense impressions; and 2) scrapping most of the categorical exceptions in favor of an expanded version of Rule 807 -- allowing the trial judge to admit hearsay upon a finding that the statement is trustworthy.

2. The Reporter's background memo on possible changes to the rules on admissibility of prior statements of testifying witnesses (submitted for the Spring 2015 Committee meeting, with minor changes and updates).

3. A memorandum by Professor Broun on reported cases in which substantive admissibility (or the lack thereof) of a prior inconsistent statement made a difference in the result.

4. A memorandum by Professor Broun on sufficiency of evidence issues when a conviction is based only on a prior inconsistent statement (or other hearsay statement).

5. A memorandum by Professor Broun on practices in some of the states with rules that differ from Federal Rule 801(d)(1)(A).

APPENDICES

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Appendix 1 --- United States v. Boyce, concurring opinion, Posner, J. , 742 F.3d 792, 799 (7th Cir. 2014).

POSNER, Circuit Judge, concurring.

I agree that the district court should be affirmed—and indeed I disagree with nothing in the court's opinion. I write separately only to express concern with Federal Rules of Evidence 803(1) and (2), which figure in this case. That concern is *800 expressed in a paragraph of the majority opinion; I seek merely to amplify it.

Portis's conversation with the 911 operator was a major piece of evidence of the defendant's guilt. What she said in the conversation, though recorded, was hearsay, because it was an out-of-court statement offered "to prove the truth of the matter asserted," Fed.R.Evid. 801(c)(2)—namely that the defendant (Boyce) had a gun—rather than to rebut a charge of recent fabrication or of a recently formed improper motive, Fed.R.Evid. 801(d)(1)(B), by showing that the person making the statement had said the same thing before the alleged fabrication or the formation of the improper motive. 30B Michael H. Graham, *Federal Practice & Procedure* § 7012, pp. 128–45 (interim ed.2011). But the government argued and the district court agreed that Portis's recorded statement was admissible as a "present sense impression" and an "excited utterance." No doubt it was both those things, but there is profound doubt whether either should be an exception to the rule against the admission of hearsay evidence.

One reason that hearsay normally is inadmissible (though the bar to it is riddled with exceptions) is that it often is no better than rumor or gossip, and another, which is closely related, is that it can't be tested by cross-examination of its author. But in this case either party could have called Portis to testify, and her testimony would not have been hearsay. Neither party called her—the government, doubtless because Portis recanted her story that Boyce had had a gun after he wrote her several letters from prison asking her to lie for him and giving her detailed instructions on what story she should make up; Boyce, because her testimony would have been likely to reinforce the evidence of the letters that he had attempted to suborn perjury, and also because his sexual relationship with Portis began when she was only 15. Boyce's counsel said "the concern is that if Ms. Portis were to testify, she does look somewhat young and so the jury could infer ... that this relationship could have started when she was underage."

To get her recorded statement admitted into evidence, the government invoked two exceptions to the hearsay rule. One, stated in Rule 803(1) and captioned "present sense impression," allows into evidence "a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." The other—the "excited utterance" exception of Rule 803(2)—allows into evidence "a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."

The rationale for the exception for a "present sense impression" is that if the event described and the statement describing it are near to each other in time, this "negate[s] the likelihood of deliberate or conscious misrepresentation." Advisory Committee Notes to 1972 Proposed Rules. I don't get it, especially when "immediacy" is interpreted to encompass periods as long as 23 minutes, as in *United States v. Blakey*, 607 F.2d 779, 785–86 (7th Cir.1979), 16

minutes in *United States v. Mejia–Velez*, 855 F.Supp. 607, 614 (E.D.N.Y.1994), and 10 minutes in *State v. Odom*, 316 N.C. 306, 341 S.E.2d 332, 335–36 (1986). Even real immediacy is not a guarantor of truthfulness. It's not true that people can't make up a lie in a short period of time. Most lies in fact are spontaneous. See, e.g., Monica T. Whitty et al., "Not All Lies Are Spontaneous: An Examination of Deception Across Different Modes of Communication," 63 *J. Am. Society of Information Sci. & Technology* 208, 208–09, 214 (2012), where we read that "as with previous research, we found that *801 planned lies were rarer than spontaneous lies." *Id.* at 214. Suppose I run into an acquaintance on the street and he has a new dog with him—a little yappy thing—and he asks me, "Isn't he beautiful"? I answer yes, though I'm a cat person and consider his dog hideous.

I am not alone in deriding the "present sense impression" exception to the hearsay rule. To the majority opinion's quotation from *Lust v. Sealy, Inc.*, 383 F.3d 580, 588 (7th Cir.2004)—"as with much of the folk psychology of evidence, it is difficult to take this rationale [that immediacy negates the likelihood of fabrication] entirely seriously, since people are entirely capable of spontaneous lies in emotional circumstances"—I would add the further statement that " 'old and new studies agree that less than one second is required to fabricate a lie.' " *Id.*, quoting Douglas D. McFarland, "Present Sense Impressions Cannot Live in the Past," 28 *Fla. State U.L.Rev.* 907, 916 (2001); see also Jeffrey Bellin, "Facebook, Twitter, and the Uncertain Future of Present Sense Impressions," 160 *U. Pa. L. Rev.* 331, 362–66 (2012); I. Daniel Stewart, Jr., "Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence," 1970 *Utah L.Rev.* 1, 27–29. Wigmore made the point emphatically 110 years ago. 3 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 1757, p. 2268 (1904) ("to admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test, and to remove all limits of principle").

It is time the law awakened from its dogmatic slumber. The "present sense impression" exception never had any grounding in psychology. It entered American law in the nineteenth century, see Jon R. Waltz, "The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes," 66 *Iowa L.Rev.* 869, 871 (1981), long before there was a field of cognitive psychology; it has neither a theoretical nor an empirical basis; and it's not even common sense—it's not even good folk psychology.

The Advisory Committee Notes provide an even less convincing justification for the second hearsay exception at issue in this case, the "excited utterance" rule. The proffered justification is "simply that circumstances *may* produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of *conscious* fabrication." The two words I've italicized drain the attempted justification of any content. And even if a person is so excited by something that he loses the capacity for reflection (which doubtless does happen), how can there be any confidence that his unreflective utterance, provoked by excitement, is reliable? "One need not be a psychologist to distrust an observation made under emotional stress; everybody accepts such statements with mental reservation." Robert M. Hutchins & Donald Slesinger, "Some Observations on the Law of Evidence: Spontaneous Exclamations," 28 *Colum. L.Rev.* 432, 437 (1928). (This is more evidence that these exceptions to the hearsay rule don't even have support in folk psychology.)

As pointed out in the passage that the majority opinion quotes from the McCormick treatise, "The entire basis for the [excited utterance] exception may ... be questioned. While psychologists would probably concede that excitement minimizes the possibility of reflective self-interest influencing the declarant's statements, they have questioned whether this might be outweighed by the distorting effect of shock and excitement upon the declarant's observation and judgement." 2 *McCormick *802 on Evidence* § 272, p. 366 (7th ed.2013).

The Advisory Committee Notes go on to say that while the excited utterance exception has been criticized, "it finds support in cases without number." I find that less than reassuring. Like the exception for present sense impressions, the exception for excited utterances rests on no firmer ground than judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogmas.

I don't want to leave the impression that in questioning the present sense and excited utterance exceptions to the hearsay rule I want to reduce the amount of hearsay evidence admissible in federal trials. What I would like to see is Rule 807 ("Residual Exception") swallow much of Rules 801 through 806 and thus many of the exclusions from evidence, exceptions to the exclusions, and notes of the Advisory Committee. The "hearsay rule" is too complex, as well as being archaic. Trials would go better with a simpler rule, the core of which would be the proposition (essentially a simplification of Rule 807) that hearsay evidence should be admissible when it is reliable, when the jury can understand its strengths and limitations, and when it will materially enhance the likelihood of a correct outcome.

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Appendix 2 --- Reporter's Memorandum on Prior Statements of Testifying Witnesses and the Hearsay Rule

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Consideration of Prior Statements of Testifying Witnesses and the Hearsay Rule
Date: March 15, 2015

At its last meeting, the Committee considered a proposed amendment that would add a new hearsay exception to Rule 801(d)(1) for statements of recent perception when the declarant testifies and is subject to cross-examination at trial. The Committee rejected the proposal in large part because it would have raised conflicts and problematic overlap with the provisions of Rule 801(d)(1) that covered prior consistent and inconsistent statements. The Committee resolved that a better approach would be to review the Rule 801(d)(1) exemptions from the ground up. The minutes of the last meeting describe the Committee's resolution as follows:

The Reporter proposed that if the Committee were interested in revisiting the entire category of hearsay exceptions for prior statements of testifying witnesses, then he would provide the Committee with the necessary background for a systematic review of the subject at a future meeting. That review would include consideration of whether prior statements of testifying witnesses ought to be defined as hearsay in the first place, given the fact that by definition the person who made the statement is subject to cross-examination about it. The Committee agreed that a systematic review of the entire category of prior statements of testifying witnesses would be preferable to adding another hearsay exception to that category without working through how it might affect the other exceptions.

This memo is intended to begin that systematic review of prior statements of testifying witnesses and the hearsay rule --- a review, by the way, that was encouraged by members of the Standing Committee at its January meeting. This is only a beginning step --- the Committee is not being asked to take action on any specific proposal. Before a specific proposal can be set forth, the Committee needs to work through several important substantive decisions. Among those decisions are:

1) Should prior statements of testifying witnesses be placed outside the hearsay definition – or should an exception be established --- given the fact that the declarant is subject to cross-examination about the statement?

2) Assuming that prior witness statements remain subject to the hearsay rule, should the current exemption in Rule 801(d)(1)(A) be expanded to allow substantive admissibility of all (or more if not all) prior inconsistent statements?

3) Assuming that prior statements of testifying witnesses remain subject to the hearsay rule, is there any reason to expand the exemption for prior consistent statements --- Rule 801(d)(1)(B) --- given the recent expansion that became effective in 2014?

4) Assuming that prior statements of testifying witnesses remain subject to the hearsay rule, is there any reason to alter the existing exemption in Rule 801(d)(1)(C) for statements of identification?

If the Committee is interested in pursuing any or all of these matters, the Chair and the Reporter will put together a symposium on the hearsay rule and prior statements of testifying witnesses at the Fall 2015 meeting. We would hope to bring together a panel of judges, practitioners and professors who could provide the Committee with useful information and insight on whether to amend the Evidence Rules respecting prior statements of testifying witnesses.

This memo is divided into five parts. Part One discusses the arguments for and against classifying prior statements of testifying witnesses as hearsay. Part Two discusses the history behind the Federal Rules' treatment of prior inconsistent statements; and Part Two also discusses different approaches taken in some of the states. Part Three provides the history of the Federal Rules' treatment of prior consistent statements, including the 2014 amendment; and Part Three also discusses different approaches taken in some of the states. Part Four briefly discusses prior statements of identification, and considers whether any changes to the existing exemption would be useful. Part Five provides preliminary drafting alternatives.

I. Should Prior Statements of Testifying Witnesses Be Treated as Hearsay?

A. Arguments in Favor of Admitting Prior Statements of Witnesses as Substantive Evidence

Federal Rule 801(c) defines hearsay as a statement that "the declarant does not make while testifying at the current trial or hearing." Thus a prior statement of a testifying witness, when offered for its truth, is hearsay. Many have argued that prior statements of testifying witnesses should not be classified as hearsay. Probably the leading proponent for placing prior statements of testifying witnesses outside the hearsay rule was Morgan.[1] Morgan's basic argument is that the reason for the hearsay rule is a concern the declarant is making the statement out of court and so her credibility cannot be assessed by the traditional methods of oath, cross-examination, and view of demeanor. But when the declarant *is* the witness at trial, she *will* be under oath and subject to cross-examination and review of demeanor. Morgan makes this point, and some others, in the following passage in his famous article, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L.Rev. 177, 192-94 (1948):

But there is one situation where the courts are prone to call hearsay what does not in fact involve in any substantial degree any of the hearsay risks. When the Declarant is also a witness,

[1] Morgan drafted the Model Code of Evidence in 1942. The Model Code contained a definition of hearsay that covered prior statements of testifying witnesses, but further provided that hearsay was admissible whenever the declarant either was "unavailable as a witness" or was "present and subject to cross-examination." But the provision was not well-received at the time. *See* David Sklansky, *Hearsay's Last Hurrah*, 2009 Sup.Ct. Rev. 1, 15.

it is difficult to justify classifying as hearsay evidence of his own prior statements. * * * The courts declare the prior statement to be hearsay because it was not made under oath, subject to the penalty for perjury or to the test of cross-examination. To which the answer might well be: "The declarant as a witness is now under oath and now purports to remember and narrate accurately. The adversary can now expose every element that may carry a danger of misleading the trier of fact both in the previous statement and in the present testimony, and the trier can judge whether both the previous declaration and the present testimony are reliable in whole or in part."

* * *

In these situations it is unquestionably true that the trier is being asked to treat the former utterance as if it were now being made by the witness on the stand. But whether or not the declarant at the time of the utterance was subject to all the conditions usually imposed upon witnesses should be immaterial, for the declarant is now present as a witness. If his prior statement is consistent with his present testimony, he now affirms it under oath subject to all sanctions and to cross-examination in the presence of the trier who is to value it. Perhaps it ought not to be received because unnecessary, but surely the rejection should not be on the ground that the statement involves any danger inherent in hearsay. If the witness testifies that all the statements he made were true, * * * then the only debatable question is whether he made the statement; and as to that the trier has all the witnesses before him, and has also the benefit of thorough cross-examination as to the facts which are the subject matter of the statement. If the witness denies having made any statement at all, the situation is but little different, for he will usually swear that he tried to tell the truth in anything that he may have said. If he concedes that he made the statement but now swears that it wasn't true, the experience in human affairs which the average trier brings to a controversy will enable him to decide which story represents the truth in the light of all the facts, such as the demeanor of the witness, the matter brought out on his direct and cross-examination, and the testimony of others. In any of these situations Proponent is not asking Trier to rely upon the credibility of anyone who is not present and subject to all the conditions imposed upon a witness. Adversary has all the protection which oath and cross-examination can give him. Trier is in a position to consider the evidence impartially and to give it no more than its reasonable persuasive effect. Consequently there is no real reason for classifying the evidence as hearsay.

To this classic argument, two other points can be made in support of exempting prior statements of witnesses from the hearsay rule. First, the prior statement is by definition closer in time to the event described, and so is less likely to be impaired by faulty memory or a litigation motive.[2] Second, treating all statements of testifying witnesses as outside the hearsay rule would dispense with the need to give confusing limiting instructions as to those statements that would be admissible anyway for credibility purposes.[3] Indeed the interest in avoiding difficult-to-follow

[2] *See* Comments of Standing Committee on Rules of Practice and Procedure and Advisory Committee on Rules of Evidence, enclosed in the Letter of May 22, 1974, Judge Thomsen to Senator Eastland, Senate Hearings 53, 64–66 ("The prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play.").

[3] *See*, Morgan, *supra*, at 194: "Furthermore, it must be remembered that the trier of fact is often permitted to hear these prior statements to impeach or rehabilitate the declarant-witness. In such event, of course, the trier will be told

instructions was the animating reason behind the 2014 amendment to Rule 801(d)(1)(B), discussed infra.

B. Arguments in Favor of Treating Prior Statements of Witnesses as Hearsay

The classic argument for treating prior statements of witnesses as hearsay was set forth by Justice Stone of the Minnesota Supreme Court in *State v. Saporen,* 285 N.W. 898, 901 (Minn. 1939). He contended that delayed cross-examination is simply not the same as cross-examination at the time the statement is made:

> The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.

The *Saporen* court's view of cross-examination at trial as "striking while the iron is hot" is surely overstated. It is not as if an adversary's witness is speaking extemporaneously and off-the-cuff during direct testimony. Trial testimony is usually prepared in advance and elicited in a formal q and a. For the cross-examiner of a witness at trial, the iron is not really hot. Put another way, the asserted gap in effectiveness between cross-examination about a prior statement and cross-examination of trial testimony is surely not as wide as the *Saporen* court would have it. That said, there is certainly dispute in the profession about the comparative effectiveness of delayed cross-examination and cross-examination of trial testimony --- and that is one of the reasons a symposium on treatment of prior statements of witnesses as hearsay might be useful.

There are two other arguments in favor of treating prior statements of witnesses as hearsay. The first is illustrated by *United States v. Check,* 582 F.2d 628 (2nd Cir. 1978), a case decided in the early days of the Federal Rules, in which the prosecution and the trial judge were apparently under the misimpression that prior statements of testifying witnesses were not hearsay. A government agent testified to a conversation he had with Check's accomplice. The testimony was carefully crafted to refer only to what the agent had said, and not to what the accomplice had said --- because that would be hearsay. So here is an example of the agent's trial testimony:

> "It told William Cali that I didn't particularly care whether or not the cocaine which I was supposed to get was 70 percent pure, nor the fact that it was supposed to come from a captain of detectives [i.e., Check]."

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that he must not treat the statement as evidence of the truth of the matter stated. But to what practical effect? * * * Do the judges deceive themselves or do they realize that they are indulging in a pious fraud?"

See also Steven DeBraccio, *The Case for Expanding Admission of Prior Inconsistent Statements in New York Criminal Trials,* 78 Albany L. Rev. 269, 297 (2014) ("it would be more beneficial to our trial process to simply allow the jurors to consider the evidence as truth and avoid the never-ending discussion of the usefulness of limiting instructions").

The government took the position that the agent's testimony was not hearsay because it only referred to his own prior statements. So it can be argued that, if the rule actually were that prior statements of witnesses are not hearsay, cases like *Check* would arise and parties would offer one side of a conversation to actually prove the other side --- that is, treating prior statements of witnesses as not hearsay would result in those statements serving as conduits and abusing the hearsay rule. This concern is overwrought, however, as shown by the result in *Check*. The Second Circuit reversed the conviction for two reasons. First, the trial court and the prosecution were wrong in believing that the agent's own statements could not be hearsay just because the agent was testifying. But even if they were right, the agent's statements should not have been admitted because "notwithstanding the artful phrasing * * * [the agent] was on numerous occasions throughout his testimony in essence conveying to the jury the precise substance of out-of-court statements Cali made to him." The court concluded that "in substance, significant portions of Spinelli's testimony regarding his conversations with Cali were indeed hearsay, for that testimony was a transparent attempt to incorporate into the officer's testimony information supplied by the informant who did not testify at trial." In other words, even if the hearsay rule is changed to allow admission of prior statements of witnesses for their truth, those statements would still be excluded if they were being used to carry in hearsay statements of other declarants.[4]

The other argument in favor of excluding prior witness statements as hearsay is probably the strongest, and it focuses on prior consistent statements. If all prior statements could be admitted for their truth, there would be an incentive for parties to have their witnesses generate consistent statements before trial. Then the witness, on direct examination, could be asked about all the previous statements that he made --- to his grandmother, to the church congregation, to the bus driver on the way to testify, etc. etc. The focus could then be shifted to the prior statements as opposed to the in-court testimony. [5]

There are several counter-arguments responding to the concern about manufactured consistent statements. First, you don't need an overbroad hearsay rule to regulate that problem, because litigation-generated extrinsic statements can be excluded under Rule 403 as cumulative and unduly prejudicial.[6] Second, the witness can be cross-examined about the context and generation of the consistent statements.[7] Third, this concern about overuse of consistent statements, even if valid, should not lead to a rule that *all* prior statements are hearsay; there is

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[4] *See also,* ***Error! Main Document Only.****United States v. Meises*, 645 F.3d 5 (1st Cir. 2011) (hearsay rule violated even though the government did not introduce the hearsay statements directly; because the statements were effectively before the jury in the context of the trial "any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant's statements into another witness's testimony by implication.").

[5] *See State v. Saporen*, 285 N.W. 898, 901 (Minn. 1939) (noting the "practical reason" for treating prior witness statements as hearsay --- that it would create temptation and opportunity to manufacture evidence).

[6] The corresponding response to the Rule 403 argument is that the rule is highly discretionary and only operates to exclude evidence where its probative value is *substantially* outweighed by the risk of prejudice, confusion and delay.

[7] The response here is, once again, that cross-examination must strike while the iron is hot.

no risk of witnesses manufacturing *inconsistent* statements, for example, and so the concern about generating evidence is localized and should be addressed to prior consistent statements only.

There is a fourth argument against admitting prior witness statements in criminal cases that can be dismissed. That argument is that admitting a prior statement of a witness against a criminal defendant violates his right to confrontation. The Supreme Court has rejected that argument in at least three cases, finding that an opportunity to cross-examine the witness about his prior statement satisfies the Confrontation Clause.[8]

C. State Variations

A few jurisdictions admit all prior statements of witnesses for their truth. For example, **Kansas (**K.S.A. 60-460) states its hearsay rule and then provides an exception for all prior statements of testifying witnesses:

60-460. Hearsay evidence excluded; exceptions

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 except:

(a) *Previous statements of persons present.* A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness. * * *

Similarly, **Puerto Rico** provides substantive admissibility for *all* prior statements of witnesses, in a hearsay exception:

Rule 63. Prior statement by witness. As an exception to the hearsay rule, a prior statement made by a witness who appears at a trial or hearing and who is subject to cross-examination as to the prior statement is admissible, provided that such statement is admissible if made by the declarant appearing as witness.

[8] *See California v. Green*, 399 U.S. 149 (1970) (rejecting confrontation claim where the defendant had an opportunity to cross-examine a prosecution witness about the witness's prior statement); *United States v. Owens*, 484 U.S. 554 (1988) (no confrontation violation where witness was subject to cross-examination about his prior statement of identification, even though he had no memory about why he made the identification); *Crawford v. Washington*, 541 U.S. 36, 59, n.9 (2004) ("Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. * * * The clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.") (citing *Green*).

Delaware has a similar provision. 11 Del. Code §3507 provides that any voluntary prior statement of a testifying witness "may be used as affirmative evidence with substantive independent testimonial value" and the party need not show surprise.

On the opposite side of the spectrum, three states --- North Carolina, Tennessee, and Virginia --- not only treat prior witness statements as hearsay, but also provide no exception for any such statements such as is provided in Federal Rule 801(d)(1).

If the Committee decides to proceed with an inquiry into prior witness statements, experience under the wide open Puerto Rico and Delaware rules, as well as the experience under the exclusionary systems in North Carolina, Tennessee, and Virginia, would certainly be useful to investigate.

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In sum, the arguments about treating prior witness statements as hearsay are longstanding and multifaceted. If the Committee wishes, these arguments can be vetted by a panel of experts in the Fall. We now move to the Federal Rule and the treatment of inconsistent statements, consistent statements, and statements of identification.

II. Prior Inconsistent Statements

A. How Did We Get Here?: The History of Federal Rule 801(d)(1)(A)

The common-law approach to prior inconsistent statements was that they were hearsay and were only admissible to impeach the declarant-witness. The original Advisory Committee thought that the common-law rule, distinguishing between impeachment and substantive use of prior inconsistent statements, was "troublesome."[9] It noted that the major concern of the hearsay rule is that an out-of-court statement could not be tested for reliability because the person who made the statement could not be cross-examined about it. But with prior inconsistent statements, "[t]he declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter." And the Committee thought that it had "never been satisfactorily explained why cross-examination cannot be subsequently conducted with success." Moreover, "[t]he trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency." Finally, "the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation."

[9] Advisory Committee Note to Rule 801(d)(1)(A).

For all these reasons, the Advisory Committee's proposed Rule 801(d)(1)(A) would have exempted all prior inconsistent statements of testifying witnesses from the hearsay rule. The Advisory Committee's Note to the proposal makes this clear: "Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence."

Congress, however, cut back on the Advisory Committee proposal. In the form ultimately adopted, Rule 801(d)(1)(A) states that only those prior inconsistent statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition" are admissible as substantive evidence. The rationales for this limitation, as expressed by the House Committee on the Judiciary, are that: 1) if the statement was given under oath at a formal proceeding, "there can be no dispute as to whether the prior statement was made"; and 2) the requirements of oath and formality of proceeding "provide firm additional assurances of the reliability of the prior statement."

There are problems with the rationales for Congress's tightening of the hearsay exception for prior inconsistent statements. The first Congressional concern --- as to whether the statement was ever made --- is not a hearsay concern. Whether the statement was made (as distinguished from whether it is true) is a question ordinarily addressed by in-court regulators--the in-court witness to the statement testifies and is cross-examined, or other admissible evidence is presented that the statement was or was not made, and this becomes a jury question.[10] Second, the requirements of oath and formality surely do add reliable circumstances, and thus these requirements do respond to a hearsay concern. But as the Advisory Committee noted, the oath "receives much less emphasis than cross-examination as a truth-telling device."

The end result of this Congressional intervention is to render the hearsay exception for prior inconsistent statements relatively useless. It goes without saying that the vast majority of prior inconsistent statements are not made under oath at a formal proceeding. Essentially the only function for Rule 801(d)(1)(A) is to protect the proponent (usually the government) from having its substantive case sapped by turncoat witnesses. It can be argued that Congress's rationales for adding the oath and formality requirements are not strong enough to justify gutting the exception proposed by the Advisory Committee. This is especially so because the limitation comes with significant negative consequences, including the following:

1) excluding testimony as hearsay even though the declarant can be cross-examined;

2) requiring a difficult-to-follow jury instruction, i.e., that the statement can be used only to impeach the witness but not for its truth --- even though it only really impeaches the witness if it is true;

3) raising the possibility that parties will seek to evade the rule by calling witnesses to "impeach" them with prior inconsistent statements, with the hope that the jury will use the

[10] Of course the inconsistent statement could be proven up through hearsay subject to an exception, such as a business or public record. The point is that concerns about whether the statement was ever made are not a reason, under the hearsay rule, to exclude the statement itself.

statements as proof of the matter asserted --- and thereby raising a problem for the courts in having to determine the motivation of the proponent for calling the witness (motivation that would be irrelevant if the prior statement were substantively admissible);[11] and

4) raising the possibility that prior inconsistent statements not admissible for truth under Rule 801(d)(1)(A) will still be found admissible for truth under the residual exception anyway.[12]

B. State Variations

1. Rejection of Congressional limitation in Rule 801(d)(1)(B):

Many of the states did not adopt the Congressional limitation on substantive admissibility of prior inconsistent statements. In at least the following states, prior inconsistent statements are admissible for their truth:

Alaska
Arizona
California
Colorado
Delaware
Georgia
Montana
Nevada
Rhode Island
South Carolina
Wisconsin

[11] *See, e.g., United States v. Ince,* 21 F.3d 576, 579 (4th Cir. 1994) (government's impeachment of its witness with a prior inconsistent statement was improper where "the only apparent purpose" for the impeachment "was to circumvent the hearsay rule and to expose the jury to otherwise inadmissible evidence). *Compare United States v. Kane,* 944 F.2d 1406 (7th Cir. 1991)(impeachment with a prior inconsistent statement was improper where the prosecution had no reason to think that the witness would be hostile or would create the need to impeach her). *See also People v. Fitzpatrick,* 40 N.Y.2d 44, 49-50, 386 N.Y.S.2d 28 (1976) (noting the concern that "the prosecution might misuse impeachment techniques to get before a jury material which could not otherwise be put in evidence because of its extrajudicial nature"; also noting that "a number of authorities have pointed out that the potential for prejudice in the out-of-court statements may be exaggerated in cases where the person making the statement is in court and available for cross-examination").

[12] *See, e.g., United States v. Valdez-Soto,* 31 F.3d 1467, 1470 (9th Cir. 1994) (finding a prior inconsistent statement not under oath to be properly admitted as substantive evidence under the residual exception, noting that "the degree of reliability necessary for admission is greatly reduced where, as here, the declarant is testifying and is available for cross-examination, thereby satisfying the central concern of the hearsay rule.").

Of course, if the Committee decides to proceed with a possible amendment to the existing rule on prior inconsistent statements of witnesses, it will be useful to investigate how open admissibility of prior inconsistent statements has affected the practice in those jurisdictions. Experts from some of these states could be invited to the proposed Fall, 2015 Symposium.

2. Variations short of outright rejection of the Congressional limitation.

Arkansas requires prior oath at a formal proceeding for civil cases only.

Connecticut addresses the concern about whether the statement was ever made with a narrower limitation. The exception covers:

"A prior inconsistent statement of a witness, provided (A) the statement is in writing or otherwise recorded by audiotape, videotape, or some other equally reliable medium, (B) the writing or recording is duly authenticated as that of the witness, and (C) the witness has personal knowledge of the contents of the statement.

Requirements (B) and (C) are surplusage because they are covered by other rules. But the Connecticut version does suggest a compromise approach that might be employed --- which would expand the exception so long as there is assurance that the prior inconsistent statement was actually made. Again, whether it was made is not a hearsay problem, but a provision requiring that the statement be recorded, signed, etc., would satisfy those whose concern is about witnesses (such as police officers) cooking up prior inconsistent statements of other witnesses.

Hawaii, similar to Connecticut, expands the exception beyond the Congressional limitation, but addresses concerns that the statement was never made. Besides statements under oath at a prior proceeding, Hawaii provides substantive admissibility for prior inconsistent statements when they are "reduced to writing and signed or otherwise adopted by the declarant" and also when they are "recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement."

Illinois, similar to Connecticut, addresses the concern that the statement was never made. Prior inconsistent statements are admissible substantively if properly recorded, but Illinois also includes as a ground for admissibility that "the declarant acknowledged under oath the making of the statement either in the declarant's testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought or at a trial, hearing, or other proceeding, or in a deposition."

Louisiana does not permit substantive use of prior inconsistent statements in a civil case. Prior inconsistent statements are admissible substantively in a criminal case, "provided that the proponent has first fairly directed the witness' attention to the statement and the witness has been given the opportunity to admit the fact and where there exists any additional evidence to corroborate the matter asserted by the prior inconsistent statement."

Maryland has a provision similar to Connecticut, allowing substantive use of a prior inconsistent statement if there is assurance that it was actually made. Such statements are admissible if they have been "reduced to writing and * * * signed by the declarant" or "recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement."

Missouri lifts the Congressional bar, but only in criminal prosecutions for sex offenses or offenses against family members.

New Jersey provides for substantive admissibility of all prior inconsistent statements of a witness called by an opposing party. However, if the witness is called by the proponent, safeguards must be met. The proponent must show that the statement "(A) is contained in a sound recording or in a writing made or signed by the witness in circumstances establishing its reliability or (B) was given under oath subject to the penalty of perjury at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition." It is unclear why, assuming there are risks of reliability and questions about whether the statement was ever made, those risks are only raised when the proponent calls the witness.

North Dakota applies the Congressional limitation in Rule 801(d)(1)(A) in criminal cases only.

Pennsylvania, like Connecticut, expands beyond the Congressional limitation but requires a showing that the prior inconsistent statement was actually made:

(1) Prior Inconsistent Statement of Declarant-Witness. A prior statement by a declarant-witness that is inconsistent with the declarant-witness's testimony and:

(A) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;

(B) is a writing signed and adopted by the declarant; or

(C) is a verbatim contemporaneous electronic, audiotaped, or videotaped recording of an oral statement.

Utah rejects the congressional limitation and also treats prior statements as not hearsay when the witness denies or has forgotten the statement. So there appears to be no concern at all in Utah about whether the prior inconsistent statement was ever made:

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony or the declarant denies having made the statement or has forgotten, or * * *

Wyoming applies the Congressional limitation only in criminal cases.

III. Prior Consistent Statements

A. A Short History of Rule 801(d)(1)(B), Ending With the 2014 Amendment

The Advisory Committee's proposed rule creating a hearsay exemption for certain prior consistent statements turned out to be far less controversial in Congress than its proposal to admit all prior inconsistent statements. Part of the reason for the different treatment is that the distinction between substantive and impeachment use of prior inconsistent statements can be important --- treating inconsistent statements as substantive evidence can provide enough for the party with the burden of proof to withstand motions to dismiss for lack of evidence. In contrast, the difference between substantive and credibility-based use of prior consistent statements is evanescent – the witness has already testified, thus providing substantive evidence; the additional fact that the witness made a prior consistent statement will usually make little or no substantive difference. So there was not much to get worked up about when it came to consistent statements. As Judge Friendly stated: "It is not entirely clear why the Advisory Committee felt it necessary to provide for admissibility of certain prior consistent statements as affirmative evidence" because the difference between substantive and rehabilitative use is ephemeral. *United States v. Rubin,* 609 F.2d 51, 70, n.4 (2nd Cir. 1979) (concurring).

But the Advisory Committee did carve out certain consistent statements for substantive use. The Committee Note explaining the provision is terse: "The prior consistent statement is consistent with the testimony given on the stand and, if the opposite party wishes to open the door for its admission in evidence [by attacking the credibility of the witness-declarant] then no sound reason is apparent why it should not be received generally."

The problem with the original Rule 801(d)(1)(B) was that it provided for substantive admissibility of only some, and not all, consistent statements that are properly admitted to rehabilitate a witness. Other consistent statements can rehabilitate, and the same justification for substantive admissibility can be made: the party has opened the door by attacking the witness, and the consistent statement rebuts the attack. The Advisory Committee Note to the 2014 amendment explains the problem, as well as the solution that the current Advisory Committee provided. The Committee Note explains as follows:

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and

rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

* * * The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

So, Rule 801(d)(1)(B), as amended in 2014, provides as follows:

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

The intended effect of the amendment is to do away with the need to provide an unhelpful limiting instruction for all prior consistent statements that are admissible to rehabilitate the witness's credibility. No longer need an instruction be given, for example, that "the statement that the witness made can be used only insofar as it explains his inconsistent statement, and not for the truth of any assertion in the consistent statement." These limiting instructions were considered not worth the candle due to their inherent difficulty and the lack of a practical distinction between substantive and credibility use of prior consistent statements.

It should be emphasized, as the Committee Note does, that the amendment does not broaden admissibility of prior consistent statements. Prior consistent statements that were inadmissible before the amendment are inadmissible after it. The Rule simply affects *how prior consistent statements can be used* after it has been determined that the consistent statement is admissible to rehabilitate a witness.

The recency of the amendment to Rule 801(d)(1)(B) necessarily has an effect on what the Committee can do with respect to admissibility of prior consistent statements. Certainly any *limiting* of the scope of substantive admissibility under Rule 801(d)(1)(B) should not be undertaken in light of a so-recent expansion. But it would seem at least possible to consider *expanding* the admissibility of prior consistent statements in ways that are different from the path chosen by the Advisory Committee in the 2014 amendment.

One possibility would be to untether substantive admissibility from admissibility to rehabilitate. That would be the upshot of an amendment that would treat all prior witness statements as not covered by the hearsay rule. As stated above, however, tying admissibility of prior consistent statements to rehabilitation of credibility has the virtue of avoiding the problem of parties trying to manufacture consistent statements for trial. (That would be impermissible bolstering in credibility lingo.) And the current tie to rehabilitation has the further virtue of being grounded in the policy of "opening the door" --- admissibility is dependent on an attack on the witness's credibility. If substantive admissibility were untethered from rehabilitation, then the opponent would lose the control over admissibility that the original Advisory Committee found to be important.

B. State Variations

It is safe to say that *every* state varies from Federal Rule 801(d)(1)(B) after the 2014 amendment. Some states, such as Arizona and Texas, have a process for considering new Federal Evidence Rules amendments promptly after they are promulgated. But to my knowledge no jurisdiction has yet adopted the amendment to Rule 801(d)(1)(B).

There are a couple of notable state versions however:

Oregon specifically provides that prior consistent statements are admissible substantively when "offered to rebut an inconsistent statement."

Pennsylvania refers to all three forms of rehabilitation: rebutting a charge of bad motive, rebutting an inconsistency, and rebutting a charge of bad memory. But the rule is specifically limited to rehabilitation. There is no substantive admissibility for prior consistent statements simply because they are admissible to rehabilitate. This is the kind of rule that the Committee could not justifiably adopt given the recency of the 2014 amendment.

IV. Prior Statements of Identification

A. History and Current Practice

The Advisory Committee Note explains the reason for carving out an exception for prior statements of identification: the prior identification is more reliable than the in-court identification, because it was made "earlier in time under less suggestive conditions." To this explanation can be added the fact that cross-examination of the identifying witness can be quite useful because the witness can be asked about not only the process of identification, but also the basis that the witness had for making the identification in the first place (how far away he was from the robbery, whether he was wearing his glasses, etc.).

Interestingly, the Senate initially rejected the proposed Rule 801(d)(1)(C); the House acquiesced in order to ensure passage of the Rules of Evidence.[13] The Senate had deleted the provision because of strenuous objection by Senator Ervin. He was concerned that a conviction could be based solely on unsworn hearsay.[14]

But Congress then amended Rule 801(d)(1) in 1975 to add the Advisory Committee's proposal.[15] The report from the Senate Judiciary Committee found that Senator Ervin's concerns were "misdirected." The report makes four points: 1) the rule is addressed to admissibility, not sufficiency; 2) most of the hearsay exceptions allow statements into evidence that were not made under oath; 3) the declarant is testifying subject to cross-examination, assuring that "if any discrepancy occurs between the witness's in-court and out-of-court testimony, the opportunity is available to probe, with the witness under oath, the reasons for that discrepancy so that the trier of fact might determine which statement is to be believed; and 4) the identification must pass constitutional muster under *Wade-Gilbert, Stovall v. Denno,* etc., thus guaranteeing some reliability.[16]

In practice, Rule 801(d)(1)(C) has proved relatively uncontroversial. Perhaps the most contested point was resolved by the Court in *United States v. Owens,* 484 U.S. 554 (1988), which allows admission of a prior identification even though the witness had no memory about the reasons for making that identification. The witness without memory was found "subject to cross-examination" within the meaning of the rule. There appears to be no groundswell for reconsidering *Owens* by way of amendment to the Evidence Rules. Nor should there be, as a faulty memory can well be the target for effective cross-examination, and it would be difficult if not impossible to craft a rule that would set forth criteria for when faulty memory is or is not a viable target in an individual case.

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[13] Statement of Rep. Hungate, Cong. Rec. H. 9653 (Oct. 6, 1975).

[14] Cong. Rec. H. 9654 (Oct. 6, 1975).

[15] P.L. 94-113 (1975).

[16] Report of the Committee on the Judiciary, Senate, 94th Cong., 1st Sess., No. 94-199 (1975).

Insofar as prior statements of identification are concerned, the only possibility of amendment that would appear to be on the table would be the broad approach, discussed above, of making *all* prior statements of testifying witnesses substantively admissible. Short of that, it would appear that the existing Rule 801(d)(1)(C) is working well and should be retained.

B. State Variations

Only a few state variations on rule 801(d)(1)(C) are worthy of note:

Alabama has no provision for substantive admissibility of statements of prior identification.

Connecticut adds that the identification must be "reliable." But that language adds a difficult layer to the Constitutional law that already exists. Is there an intent that the term "reliable" provide a stronger protection than that provided by the Supreme Court's due process jurisprudence? Arguably the language has some teeth because the Supreme Court has held that unreliability is only a problem if the identification was caused by the police. *See Perry v. New Hampshire*, 132 S.Ct. 716 (2012). But given the fact that the hearsay problem is satisfied in this instance not by reliable circumstances but by the fact that the identifying witness is subject to cross-examination, a fuzzy reference to "reliability" seems to be problematic.

V. A Preliminary Attempt at Drafting Alternatives

The provisional conclusion of this memo is that there are three ways to expand the substantive admissibility of prior statements of witnesses (assuming, of course, that the Committee is interested in investigating this topic at all). The first is the broad approach that would lift the hearsay ban from all prior statements of witnesses. The second is to lift the Congressional ban on prior inconsistent statements set forth in Rule 801(d)(1)(A). And the third is to narrow the ban in Rule 801(d)(1)(A) to situations in which there is some guarantee provided (short of oath at a formal proceeding) that the inconsistent statement was actually made. This section provides drafting alternatives for each of these approaches.

A. Lifting the Hearsay Ban on Prior Statements of Witnesses

There appear to be two possible ways to lift the hearsay ban on prior statements of witnesses. The first is to change the hearsay definition; the second is to provide an exception.

1. Changing the Hearsay Definition

Changing the hearsay definition might be tricky, but something like this might work:

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying --- unless subject to cross-examination about it --- at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

(2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Reporter's Notes:

1. If you agree with Morgan's arguments, then taking prior witness statements out of the definition of hearsay seems analytically correct. It's not hearsay because the solution to hearsay is cross-examination and that can be done at trial. On the other hand, a prior statement of a testifying witness, when offered for its truth, *does* fit the classic definition of hearsay: it is a statement made out of court that is offered for its truth. Further, the fix of adding the language in the middle of the hearsay rule seems awkward; it's like dropping a rock into an otherwise quiet pool. So maybe it is better to think about a hearsay exception, as the jurisdictions that admit all prior witness statements substantively have done. See the Kansas and Puerto Rico exceptions, supra.

2. The other problem with changing the definition and not making an exception is that you leave a gaping hole where Rule 801(d)(1) used to be. This is not fatal, but it does look a bit odd.

3. If Rule 801(d)(1) *is* abrogated, this does not mean that Rule 801(d)(2) should be moved up. That would create havoc for electronic searches and settled expectations. The protocol for evidence rulemaking is that if a rule is abrogated or moved, the former number is left open. See the gap between Rule 804(b)(4) and 804(b)(6), which was caused when Rule 804(b)(5) was sent over to Rule 807 as part of a combined residual exception.

2. A Hearsay Exception for All Prior Witness Statements

A hearsay exception for prior witness statements is probably best placed in Rule 801(d) itself:

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a the prior statement, provided the statement would be admissible if made by the declarant while testifying as a witness., and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered:
(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

* * *

Reporter's Notes:

1. I am not sure that the proviso – i.e., that the statement would be admissible if she testified that way at trial, is necessary. If it wouldn't be admissible if the defendant testified to it --- for example, if the declarant lacked personal knowledge, or it was unduly prejudicial, or privileged --- then it would be excluded for independent reasons. The other sources of exclusion are fully applicable to hearsay admitted under an exception. So the language may be superfluous. That language is used in both the Kansas and Puerto Rico rules, though, so it is food for thought.

2. Some might object that amending Rule 801(d)(1) would be unsatisfactory because it would continue the pernicious category of "not hearsay" hearsay. That is, if you are going to make it an exception, it is better conceptually to call it an exception to the hearsay rule rather than to call something "not hearsay" when it actually fits the definition of hearsay. In 2010, the Advisory Committee considered a proposal from a law professor to move the Rule 801(d) "not hearsay" categories into real hearsay exceptions. The Advisory Committee rejected the proposal, on the grounds that lawyers and courts have become familiar with "not hearsay" hearsay; that it was a question of nomenclature only, because there is no practical difference between hearsay

admissible for its truth as "not hearsay" and hearsay admissible for its truth as "hearsay subject to an exception"; and that moving the categories out of Rule 801(d) would impose costs of upsetting electronic searches and settled expectations, with no corresponding practical benefit. For all these reasons, any broad hearsay exception for prior statements of witnesses should be placed in Rule 801(d)(1), thus expanding and substituting for the current exemption.

B. Lifting the Congressional Limitation on Prior Inconsistent Statements:

That would be easy rulemaking:

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

*** * ***

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered:
(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

* * *

C. Narrowing the Limitation on Prior Inconsistent Statements to Address Concerns About Whether the Statement was Ever Made:

This drafting alternative borrows from the states that already have such a provision.

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

*** * ***

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was:

(i) given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(ii) written, adopted, or prepared electronically by the declarant; or

(iii) a verbatim contemporaneous stenographic or electronic recording of the declarant's oral statement; or

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

Reporter's Note

1. It would be possible to craft language that would delete the Congressional provision and yet cover it by describing all the conditions in which there would be sufficient assurance that the statement was made. But the Congressional language has been in place for 40 years and there is case law on it. The better approach seems to be to retain the language and then provide other grounds that provide assurance that the statement was made. That process is similar to the one chosen in the 2014 amendment to Rule 801(d)(1)(B): the original language was retained and new grounds for admissibility were added.

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III. Appendix 3 --- Professor Broun's memo on the effect of the substantive limitations on prior inconsistent statements on litigation results.

To: Advisory Committee on Evidence Rules
From: Ken Broun
Re: Cases in which the existences of the limitations in Rule 801(d)(1)(A) made a difference.
Date: July 22, 2015

I looked through the federal and state cases in which the existence of the limitations in Rule 801(d)(1)(A) (that the statement be given "under penalty of perjury at a trial, hearing, or other proceeding or in a deposition") made a difference in the ultimate result in the case. There are examples of such cases among reported cases both in the federal courts and in states that adopted the federal rule language verbatim. Obviously, it is difficult to tell how many unreported cases there are, or cases in which a prosecution has been dropped because of the inadmissibility of such evidence. But the reported cases make it clear that a change in the rule would likely make a difference in some cases. Following are some examples of the cases. No attempt has been made to list every case reaching this result, but only to provide sufficient examples to support the point that the rule can and does make a difference.

Federal cases

United States v. Day, 789 F.2d 1217 (6th Cir. 1986). The government introduced a witness's recorded interview to IRS agents for substantive purposes. The interview was characterized by the prosecution as a "sworn statement." The government failed to show that the person administering the oath had the legal authority to invoke a penalty of perjury or that the interview qualified as an "other proceeding" within the meaning of the rule. The court found admission of the statement as substantive evidence to be reversible error on some of the counts of which the defendant was convicted. Conviction on some other counts was affirmed where there was other evidence was sufficient to support the verdict.

United States v. Livingston, 661 F.2d 239 (D.C. Cir. 1981). An inconsistent statement made to postal inspectors was found improperly admitted for substantive purposes. The postal inspector went to the witness's residence, took notes on her responses, wrote a statement based on those responses, and asked her to read and sign the statement. The statement was held not to be a statement within the language of Rule 801(d)(1)(A). The error in admitting the statement for substantive purposes was found not harmless.

United States v. Tafollow-Cardenas, 897 F.2d 976 (9th Cir. 1990). A witness's inconsistent statements were admitted, but they were not made under oath. The trial court failed to instruct that the jury could only use the statements for impeachment purposes. The court found the error to be not harmless and reversed the conviction.

> Without Contreras' statements, the evidence showed that she smuggled heroin into the United States, was apprehended by agents and agreed to cooperate with them. The most damaging piece of evidence against Cardenas, the tape recording, revealed that

> Contreras called him, told him she had not been searched and still had the drugs. He replied that they would talk later and he would pick her up immediately. However, her [inconsistent statement] was by far the strongest evidence against Cardenas and the government relied on the statements as substantive evidence.

United States v. Ragghianti, 560 F.2d 1376 (9th Cir. 1977). A prior inconsistent statement was admitted without an instruction that the statements could be considered only as bearing on credibility. The prior statement was not made under oath subject to penalty of perjury at a trial or other proceeding; the court found this to be harmful error. The *Ragghianti* case was decided shortly after the enactment of the Federal Rules of Evidence. The court's opinion is informative of its thinking about the significance of the distinction between statements introduced for impeachment and those having substantive effect (560 F.2d at 1380):

> There is a crucial distinction between the use of a prior inconsistent statement of a witness only to impeach the credibility of the witness and its use to prove as a fact what is contained in the statement. As this court has previously stated, Kuhn v. United States, 24 F.2d 910, 913 (9th Cir.), modified on other grounds on rehearing, 26 F.2d 463, cert. denied sub nom. Ice v. United States, 278 U.S. 605, 49 S.Ct. 11, 73 L.Ed. 533 (1928), and as Judge Friendly for the Second Circuit has recently reiterated, United States v. Cunningham, supra, 446 F.2d at 197, "the maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer by which the party is surprised." It has been suggested that to point out this distinction to a jury may be fruitless since conjecture takes over. Even in the face of curative instructions, the jury may decide that what the witness says at the trial is not the truth, but that what he said before is. Although the difference in the use of a prior statement for impeachment but not as substantive evidence may be subtle, it has been held that proper implementation of the rule requires "an explicit admonition to the jury by the court at the time a prior inconsistent statement is admitted, and also an instruction at the close of the trial, that the statement may be considered only as bearing on credibility." Bartley v. United States, 115 U.S.App.D.C. 316, 318, 319 F.2d 717, 719 (1963). And where in that case, as here, neither was done, the *Bartley* court held it to be plain error under Rule 52(b) requiring a new trial despite the lack of objection to the admission of the prior inconsistent statement or any request by counsel for the defense thereafter to caution or instruct the jury with respect to the limited role of the statement. See also, United States v. Lipscomb, 425 F.2d 226, 227 (6th Cir. 1970).

United States v. Castro-Ayon, 537 F.2d 1055 (9th Cir. 1976). Prior inconsistent statements made at immigration interrogations were held to qualify as statements made at "other proceedings" within the meaning of Rule 801(d)(1)(A). Even though this case is not an example of a case in which the limitation on the type of statements admissible for substantive purposes made a difference, the case has significance in another way. Virtually every other federal case dealing with the issue has found that law enforcement interviews do not qualify as "other proceedings." The court in *Castro-Ayon* struggles to equate the immigration interview with a grand-jury proceeding. Rightly or wrongly, the court believed in the probative value of the

statement and was willing to stretch the language of the Rule. *Castro-Ayons* was distinguished on its facts in *United States v. Day,* 789 F.2ds 217 (6th Cir. 1986).

Santos v. Murdock, 243 F.3d 681 (2d Cir. 2001). A witness's inconsistent statement in an affidavit prepared by an attorney did not constitute a statement made in "other proceedings" within the meaning of rule 801(d)(1)(A). The court held that the statement could not be used to support the party's case at the summary judgment stage.

Grancio v. DeVecchio, 572 F.Supp.2d 299 (E.D.N.Y. 2008). Prior statements not under oath could not be used to defeat summary judgment.

State cases

There are surprisingly few cases dealing with this issue in states adopting the language of Federal Rule 801(d)(1)(A). But there are some instances in which the limitations on the kind of statement that can be used have made a difference. Following are some examples:

Robinson v. State, 455 So. 2d 481 (Fla. App. 1984). Inconsistent statements made in police interrogation could not be introduced for substantive purposes. Reversible error.

State v. Sua, 60 P.3d 1234 (Wash. App. 2003). Statements were not substantive evidence where not given under oath subject to penalty of perjury. Reversible error.

State v. Nieto, 79 P.3d 473 (Wash. App. 2003). Statements not made at an "other proceeding" where the declarant realized that the statement was made under penalty of perjury. Reversible error.

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Appendix 4 --- Memorandum by Professor Broun on sufficiency of evidence issues when a conviction is based only on a prior inconsistent statement.

MEMORANDUM

To: Advisory Committee on Federal Rules of Evidence
From: Ken Broun, Consultant
Date: Aug. 26, 2015

Subject: Sufficiency of evidence where a conviction is based only on prior inconsistent statement

The Committee is considering the possibility of amending Rule 801(d)(1)(A) to eliminate its limitations on substantive admissibility. Although any amended rule would deal with admissibility rather than the sufficiency of evidence, it may be useful for the Committee to consider whether the admission of statements introduced under a broadened rule 801(d)(1)(A) would be sufficient to justify conviction in a criminal case.

The short answer, based on the experience under the current rule and similar state rules, is that such a conviction would be possible but very rare. Eliminating the limitations on the types of statements admissible under the rule would, of course, increase the likelihood that such statements would be admissible and therefore the likelihood that they might form the sole base for a conviction. But the chances of such a conviction would likely increase only slightly. The circumstances under which the prior statement was made could be a factor in determining the sufficiency of the evidence to justify a conviction.

Comments on current Rule 801(d)(1)(a)

The adoption of the original Rule 801(d)(1)(A), providing for the substantive admissibility of some prior inconsistent statements, gave rise to concerns that a criminal conviction might be based solely on such a statement. *See,.e.g.,* Blakey, *Substantive Use of Prior Inconsistent Statements under the Federal Rules of Evidence,* 64 Ky. L. J. 425 (1974); Goldman, *Guilt by Intuition – The Insufficiency of Prior Inconsistent Statements to Convict,* 65 N.C. L. Rev. 1 (1986).

In adopting the rule, Congress itself expressed concern about the issue of sufficiency of a conviction based solely on an inconsistent statement:

> It would appear that some of the opposition to this Rule is based on a concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the question of the sufficiency of evidence to send a case to the jury, but merely as to its admissibility. Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate.

S. Rep. No. 93-1277. 93rd Cong., 2d Sess., reprinted in 1974 U.S.Code Cong. & Admin.News, 7051, 7063 n. 21.

In his original treatise, Judge Weinstein comments:

> Rule 801(d)(1)(A)(admitting prior inconsistent statements as substantive evidence) will theoretically enable a party to make out a prima facie case even if his only evidence is a previous inconsistent statement of this type. Under the orthodox rule, "if the only evidence of some essential fact is such a previous statement, the party's case falls." It is doubtful, however, that in any but the most unusual case, a prior inconsistent statement alone will suffice to support a conviction since it is unlikely that a reasonable juror could be convinced beyond a reasonable doubt by such evidence alone.

4 Weinstein's Evidence 801-74.

Constitutional considerations

Jackson v. Virginia, 443 U.S. 307 (1979) recognizes that the Due Process clause protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (citing *In re Winship,* 397 U.S. 358 (1970)). The court recognized that "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction." (443 U.S. at 317). The Court went on to hold:

> We hold that in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254—if the settled procedural prerequisites for such a claim have otherwise been satisfied—the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. (443 U.S. at 324)

Any conviction in state or federal court would be judged by this standard. The court would look at a conviction based only on a prior inconsistent statement to determine whether a rational trier of fact could have found this evidence to be proof of guilt beyond a reasonable doubt.

See also the discussion in Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U.L.Rev. 979 (1993) where the author, Judge Jon O Newman of the Second Circuit, argues for a more robust analysis of the sufficiency of evidence to convict.

Federal cases

There are only a few cases that have discussed the sufficiency of evidence based only on a prior statement. The most complete discussion is in *United States v. Orrico,* 599 F.2d 113 (6th Cir. 1979). The court in *Orrico* held that statements properly admitted under both Rule 801(d)(1)(A) and as past recollection recorded under Rule 803(5) were not sufficient to justify

conviction. The court noted that, in an unusual case, a prior inconsistent statement may be sufficient to establish a technical element of a crime -- e.g., the worth of stolen property. But such a statement could not provide the only source of support for the central allegations of the charge. The court's analysis of the impact of *California v. Green,* 399 U.S. 149 (1970), holding that the admission of prior statements of a witness now subject to cross-examination did not violate the Confrontation Clause, is instructive:

> *California v. Green* . . . established that the use of a prior inconsistent statement as substantive evidence does not necessarily violate the Confrontation Clause, so long as the witness who had made the statement is present and available for questioning at trial. . . . . The opinion in *California v. Green* ended with a strong hint that such statements, though constitutionally admissible, nevertheless may not be sufficient, by themselves, to sustain a conviction. We conclude, under the circumstances of this case, that they are not. Assuming that such statements may be admissible in a criminal case, we believe that they may supply valuable evidence for the prosecution. They may be used to corroborate evidence which otherwise would be inconclusive, may fill in gaps in the Government's reconstruction of events, or may provide valuable detail which would otherwise have been lost through lapse of memory. But the Government having offered such statements as the sole evidence of a central element of the crime charged, we hold that the Government has failed to sustain its burden of proving guilt beyond a reasonable doubt.

599 F.2d 118-19.

Also instructive is *United States v. Bahe,* 40 F.Supp. 2d 1302 (D.N.M. 1998). In *Bahe,* the defendant was charged with sexual abuse of an 11-year-old. The alleged victim had recanted her testimony. In addition to the child's original statement, the other evidence was the defendant's own statements – which merely established the opportunity for him to commit the acts alleged; the testimony of a social service worker that abused children frequently recant their accusations; and evidence of prior, uncharged, acts of sexual abuse with another niece. The court noted that it reviewed over 100 cases challenging the sufficiency of evidence in child sexual abuse cases and could find no case in which a conviction was sustained with as little evidence as in this trial. The court said that it found only a single case in which a conviction for child sexual abuse was based solely on an out-of-court statement, *Ramsey v. State,* 448 S.E.2d 790 (Ga. App. 1994). However, the court noted that in *Ramsey* there was also testimony of six siblings or cousins who had previously been sexually abused by the defendant, the testimony of the complaining witness's brother who heard the defendant make lewd comments about the complaining witness and saw the defendant enter the bathroom to bathe the complaining witness. The Georgia Court of Appeals found the evidence sufficient to sustain the conviction. The Court in *Bahe* granted the motion for judgment of acquittal.

Ticey v. Peters, 8 F.3d 498 (7th Cir. 1993) seems to be an outlier on the sufficiency of evidence based primarily on a prior inconsistent statement. *Ticey* was a habeas petition based on the constitutionality of Ticey's conviction in a bench trial because of insufficient evidence. The victim, Ticey's sister, while in the hospital after the assault, identified defendant as the person who raped her. She based the identification on his voice, body height and weight. The victim

again identified the defendant three days later, but after a confrontation with her mother, claimed she could not to be sure. The victim then wrote to the prosecutor that she was no longer sure of who was her attacker but that she thought she saw the person at a store. She said she had called out her brother's name because she was looking for help from him. The court found that the victim's earlier identification was sufficient to support a conviction, even though not corroborated by other evidence. The earlier hospital statement was reliable and was corroborated by the identification three days later.

The court goes on to say:

> The fact finder must resolve the problem posed by conflicting hypotheses. Here, the government offered a hypothesis that Johnson was pressured into changing her story. Ticey offered a hypothesis that if Johnson was raped, he did not commit the crime, and Johnson was confused when she said he did. The trial court judge resolved the conflicting hypotheses after observing the witnesses and hearing all the facts. The court's decision that the government hypothesis was correct was reasonable. (8 F.3d at 504)

There was a strong dissent in *Ticey* by Judge Cudahy. The dissent stated that the issue was not whether the victim was more credible at the hospital than at trial, but whether a "rational trier of fact could find Ticey guilty beyond a reasonable doubt based simply on Johnson's untranscribed, uncorroborated and unsworn prior inconsistent statements." The dissent refers to an earlier Seventh Circuit, *Vogel v. Percy,* 691 F.2d 843, 946-47 (7th Cir. 1982), where the court adopted five guidelines for determining whether the use of a prior inconsistent statement comports with due process: "whether 1) the declarant was available for cross-examination; 2) the statement was made shortly after the events related and was transcribed promptly; 3) the declarant knowingly and voluntarily waived the right to remain silent; 4) the declarant admitted making the statement; and 5) there was some corroboration of the statement's reliability. "

The dissent would have found the evidence insufficient. The only corroboration was the victim's own statement.

In *United States v. Gerard*, 2012 WL 6604615 (3d Cir. 2012), the evidence was found sufficient, although based largely on grand jury testimony inconsistent with a witness's trial testimony,. Other evidence in *Gerard* showed that the defendant was involved in an altercation with the victim before the murder. The recanting witness also testified that she saw the defendant retrieve a handgun and walk back to the area where the victim was later found dead. Other witnesses saw defendant leaving the scene of the criminal immediately after hearing shots fired. The defendant was injured following the shooting and acted evasively while speaking with police. So the statement was important to the prosecution's case, this was not a case in which the inconsistent statement alone was found sufficient for a conviction.

State court cases

Despite the fact that more than 40 years have passed since state rules based on Fed. R. Evid. 801(d)(1)(A) began to be enacted, I could find very few cases with any significant discussion of the sufficiency of a conviction based entirely on a prior inconsistent statement. The answer is almost certainly that there are in fact few cases that meet that description – there will almost always be some corroborating evidence. In addition to *Ramsey v. State,* a Georgia case discussed above in connection with the federal district court case, *United States v. Bahe,* a couple of California cases are of interest.

In *People v. Gould,* 354 P.2d 865 (Cal. Sup. Ct. 1960), the court dealt with an extra-judicial identification that was not confirmed at the trial. The court held that the identification was insufficient to sustain a conviction in the absence of other evidence tending to connect the defendant to the crime. (So the case does not involve a prior inconsistent statement, but does deal with the question of whether a conviction can stand solely on hearsay from a witness that does not confirm the hearsay at trial). In reaching its decision, the court stated:

> An extra-judicial identification that cannot be confirmed by an identification at the trial is insufficient to sustain a conviction in the absence of other evidence tending to connect the defendant with the crime. . . . Moreover, the probative value of an identification depends on the circumstances under which it was made. Mrs. Fenwick merely selected one of a small group of photographs. The small size of the group increased the danger of suggestion. . . . . Identification from a still photograph is substantially less reliable than identification of an individual seen in person. It becomes particularly suspect when, as in the present case, the witness subsequently fails to identify the subject of the photograph when seen in person and there is no other evidence tending to identify him. (354 P.2d at 870)

The court's analysis in the *Gould* case is significant in that it indicates that the circumstances of the prior statement may enter into the assessment of the sufficiency of such a statement to sustain a conviction, even if they do not affect the statement's admissibility.

See also, In re Miguel L., 649 P.2d 703 (Cal. Sup. Ct. 1982), a wardship adjudication of a juvenile. In *Miguel,* the only evidence connecting the defendant with the charged offense were repudiated extrajudicial statements of a self-declared accomplice. Relying on *People v. Gould,* the court found the statements to be insufficient to sustain the conviction. Again, the court considered the nature of the statements (coming from an accomplice) in considering sufficiency.

Conclusion

Based on these cases, it is possible, but not likely, that a conviction could be based solely on a prior inconsistent statement and that such a conviction would be sustained under *Jackson v. Virginia*. The expansion of the kinds of statements admitted for substantive purposes would increase the likelihood that such a case would arise. Language in the Committee Note indicating the rarity of such a conviction might be useful. It also might be useful to spell out the fact that the circumstances under which the prior statement was made might factor into its sufficiency, even though they would not affect that statement's admissibility.

Appendix 5 --- Memorandum by Professor Broun on practices in certain states with rules that differ (or have differed) from Federal Rule 801(d)(1)(A).

1. STATES FOLLOWING THE ORTHODOX RULE --- Impeachment Use Only ---- AT LEAST WITH REGARD TO PRIOR INCONSISTENT STATEMENTS

NORTH CAROLINA

In 1984, North Carolina adopted rules that closely tracked the Federal Rules of Evidence, with a few notable exceptions. Among the exceptions was the failure to adopt Fed.R.Evid. 801(d)(1), which deals with prior statements of a witness. See Commentary to N.C. R.Evid 801. At the time of the enactment of the new rules, North Carolina followed the orthodox rule that a witness's prior inconsistent statements, prior consistent statements and prior statements of identification were hearsay, admissible only as they affected the witness's credibility. The orthodox rule is still in effect in North Carolina.

Prior inconsistent statements

North Carolina's treatment of prior inconsistent statements closely follows the orthodox practice – the statements are admissible for purposes of impeachment only. No distinction is made between statements made under oath and those not under oath. *State v. Williams*, 459 S.E.2d 208 (N.C. 1995) (jury properly instructed that statement limited to credibility of witnesses; better to give instruction at the time statement is introduced, but not prejudicial so long as jury so instructed in final charge); *State v. Miller*, 408 S.E.2d 846 (N.C. 1991) (prior inconsistent statement admissible only for impeachment; prejudicial error not to so instruct jury where defendant had requested instruction); *State v. Hall*, 653 S.E.2d 200 (N. C. App. 2007) (prior inconsistent statement not admissible as substantive evidence; no objection made at trial, but instruction with regard to limited effect of such evidence given; no error). *See generally*, Brandis & Broun, North Carolina Evidence § 159 (7th ed. 2011).

Prior consistent statements

North Carolina liberally admits prior consistent statements, but for purposes of corroboration only. The liberality with which such statements are admitted is probably unique among the states. The precedent is very old. *See, e.g.*, J*ones v. Jones*, 80 N.C. 246 (1879) (the theory rests upon the "obvious principle that, as conflicting statements impair, so uniform and consistent statements sustain and strengthen his credit before the jury"); *See also* Brandis & Broun, North Carolina Evidence § 165 (7th ed. 2011). Virtually all consistent statements are admissible, whether or not the witness's credibility has been impeached. *State v. Taylor*, 473 S.E.2d 596 (N.C. 1996) (notes that North Carolina courts are liberal in admitting statements consistent with a witness's testimony; officer's notes of conversations with witnesses properly admitted to corroborate testimony of witnesses; no limiting instruction need be given unless requested by opposing party); *State v. Chandler*, 376 S.E. 2d 728 (N.C. 1989) (no instruction as

to limited effect of corroborative evidence need be given in the absence of a request by defendant).

Prior identifications

I could find no North Carolina case dealing specifically with prior identifications by a testifying witness. Practitioners familiar with North Carolina criminal cases relate that such statements are admissible just as any other consistent statement – for purposes of corroboration only. The jury should be so instructed, but only if requested by the defendant. Most practitioners say that they often don't even bother to request an instruction. Theoretically, the same rules should apply to identifications inconsistent with the witness's testimony at trial – the earlier identification is admissible only as it affects the credibility of the witness.

TENNESSEE

Prior consistent and inconsistent statements

In adopting the Federal Rules of Evidence, Tennessee omitted Rule 801(d). Admissions are covered as an exception to the hearsay rule under Rule 803. Prior statements are neither excluded nor excepted from the hearsay rule. Prior inconsistent statements are admissible for impeachment only. The opposing party must object to the statement's introduction as substantive evidence and request a limiting instruction. *See, e.g., State v. Smith,* 24 S.W.2d 274 (Tenn. 2000). Prior consistent statements, if admissible, are admissible only for purposes of affecting the credibility of the witness. Such statements are admissible only if a witness is impeached by a prior inconsistent statement or there is some insinuation of recent fabrication or deliberate falsehood. The consistent statement must precede the inconsistent statement or the time that the imputed motive to fabricate arose. *See, e.g., Farmer v. State,* 296 S.W.2d 879 (Tenn. 1956); *State v. Stephens,* 1998 WL 603144 (Tenn. Crim. App. 1998).

Prior identifications

Tenn. R. Evid. 803(1.1) excepts from the hearsay rule a "statement of identification of person after perceiving the person if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement."

The exception has been applied to statements of an accomplice identifying the defendant as the perpetrator of the crime. *See State v. Stout,* 46 S.W.3d 689 (Tenn. 2001).

VIRGINIA

Prior consistent and inconsistent statements

Virginia follows the orthodox rule with regard to prior inconsistent and consistent statements by a witness; the statements are admissible only as they may be relevant to the credibility of the witness and not for substantive purposes. Until 2015, this result was dictated by case law – the Virginia rules of evidence did not deal with the issue. With regard to inconsistent statements, *see, e.g., Hall v. Com.*, 355 S.E.2d 591 (Va. 1987) (prior inconsistent statement admissible only for impeachment; opposing party entitled, upon request to a cautionary instruction advising the jury that the statement is to be considered only insofar as it may affect the credibility of the witness and not for its truth); *Groggins v. Com.*, 537 S.E.2d 605 (Va. App. 2000) (witness's prior inconsistent statement is admissible to impeach his trial testimony but is not admissible to prove the truth of the matter asserted; statement of a party admissible as an admission).

With regard to prior consistent statements, *see, e.g., Faison v. Hudson*, 417 S.E.2d 305 (Va. 1992) (prior consistent statements admissible to corroborate a witness's testimony if offered to rebut a charge of bias or corruption, recent fabrication, motive to testify falsely or a prior inconsistent statement); *Mitchell v. Com.*, 486 S.E.2d 305 (Va. 1997) (same; prior statement improperly admitted where there had been no impeachment of the witness). *See generally*, Bellin, The Virginia and Federal Rules of Evidence (2015).

The Virginia case law on this subject was codified in 2015(effective, July 2015):

Va. R.Evid. 801

* * *

(d) Prior Statements. When a party or non-party witness testifies either live or by deposition, a prior statement (whether under oath or not) is hearsay if offered in evidence to prove the truth of the matters it asserts, but may be received in evidence for all purposes if the statement is admissible under any hearsay exception provided in Rules 2-803 or 2-804. In addition, if not excluded under another Rule of Evidence or a statute, a prior hearsay statement may also be admitted as follows:

(1) *Prior Inconsistent Statements.* A prior statement that is inconsistent with the hearing testimony of the witness is admissible for impeachment of the witness' credibility when offered in compliance with Rule 2-613.

(2) *Prior Consistent Statements.* A prior statement that is consistent with the hearing testimony of the witness is admissible for purposes of rehabilitating the witness' credibility, but only if

(A) the witness has been impeached using a prior inconsistent statement as provided in Rule 2-607, rule 2-613 and/or subpart (d)(1) of this Rule 801, or

(B)(i) the witness has been impeached based on alleged improper influence, or a motive to falsify testimony, such as bias, interest, corruption or

relationship to a party or a cause, or by an express or implied charge that the in-court testimony is a recent fabrication; and

(ii) the proponent of the prior statement shows that it was made before any litigation motive arose for the witness to make a false statement.

Prior identifications

The Virginia law dealing with a witness's prior identifications closely follows the federal practice, although the rule is in a different form. Instead of an exclusion from the hearsay rule under Rule 801, Virginia makes prior identifications by a witness admissible as exceptions to the hearsay rule:

Va.R.Evid. 803(22)

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person.

The Virginia rule omits the phrase contained in Fed. R.Evid. 801(d)1)(C) "after perceiving the person." There does not seem to be any significance in this omission. *See* Bellin, The Virginia and Federal Rules of Evidence (2015).

The Virginia rule is consistent with the state's case law. *See, e.g., Niblett v. Com.,* 225 S.E.2d 391 (1976) (testimony by a police officer that a witness had previously identified the defendant properly admitted as an exception to the hearsay rule); *Ellis v. Com.,* 444 S.E.2d 12 (Va. App. 1994) (same).

STATES PREVIOUSLY FOLLOWING ORTHODOX RULE NOW FOLLOWING THE FEDERAL RULE

ALABAMA

Alabama was one of the states listed in Goldman, *Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements to Convict*, 65 N.C.L.Rev. 1 (1986). as following the orthodox rule that prior statements were admissible only as going to the credibility of the witness. However, Alabama has now adopted the language of Rule 801(d)(1), putting it in line with the Federal Rule.

DISTRICT OF COLUMBIA

The District of Columbia was one of the jurisdictions listed in *Goldman, supra,* as following the orthodox rule that prior statements were admissible only as going to the credibility of the witness. However, the District of Columbia has now adopted a rule making its law on the subject the same as Federal Rule 801(d)(1). See D.C. Code, § 14-102.

MISSISSIPPI

Mississippi was listed as a state following the orthodox rule in the Goldman article, *supra*. *See also Moffett v. State*, 456 So.2d 1984. In 1989, Mississippi adopted parts (a) and (b) of Fed. R. Evid. 801(D)(1) as Mississippi Rule Evidence 801(D)(1)(a) and (b). Part (c) of the Federal Rule was adopted in 2009.

STATES PREVIOUSLY FOLLOWING THE ORTHDOX RULE NOW HAVING VARIATIONS ON THE FEDERAL RULE

LOUISIANA

Louisiana is listed by Goldman, *supra*, as following the orthodox rule that prior inconsistent statements are admissible only on the issue of credibility and not as substantive evidence. *See also State v. Ray*, 249 So. 2d 540 (La. 1971). However, since the Goldman article, Louisiana has had two rule revisions dealing with the issue. By a rule in force prior to 2004, in a criminal case, inconsistent statements made under oath subject to penalty of perjury at the accused's preliminary examination or the accused's prior trial where the witness was subject to cross-examination by the accused, were admissible as nonhearsay. That rule was amended in 2004 to read;

Louisiana Practice Act 801

D. Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness.The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

(a) In a criminal case, inconsistent with his testimony, provided that the proponent has first fairly directed the witness' attention to the statement and the witness has been given the opportunity to admit the fact and where there exists any additional evidence to corroborate the matter asserted by the prior inconsistent statement;

This provision has been applied in several cases by the Louisiana appellate courts. Although defense counsel has frequently raised the issue of corroboration, the courts have consistently found corroboration to exist based either on the circumstances in which the prior statement was made or other evidence in the case. *See, e.g., State v. Harper*, 970 So.2d 592 (La. App. 2007) (witnesses were confronted with prior statements and remembered signing them although they testified that they did not write them); *State v.Rankin*, 965 So.2d 946 (La. App. 2007) (domestic violence case; law appears to be intended to address use in domestic violence cases; corroboration by other evidence); *State v. Updite*, 87 So.3d 257 (La. App. 2012) (domestic violence case; sufficient corroboration based on other witness's statements, visible bruises and internal consistencies in the statement); *State v. Collins*, 2009 WL 2461288 (La. App. 2009) (handwritten statements by witness; corroborated by police officers who arrived at the scene shortly after shooting). *But see State v. Davis*, 930 So.2d 1099 (La. App. 2006) (error

to admit earlier statements where witness claimed Fifth Amendment and was therefore not subject to cross-examination at trial).

Louisiana's rules with regard to prior consistent statements and statements of identification are based on the federal rule. Rule 801(D)(1) provides that a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement and the statement is

> (b) Consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive;
>
> (c) One of identification of a person made after perceiving the person; or

Louisiana also adds a provision to the language of Rule 801 (D)(1) exempting from the hearsay rule a statement made by a witness at trial if it is "consistent with the declarant's testimony and is one of initial complaint of sexually assaultive behavior." Rule 801(D)(1)(d).

MARYLAND

Maryland was listed by Goldman, *supra*, as a state following the orthodox rule. *See also Hall v. State*, 441 A. 2d 708 (Md. App. 1982). In 1994, Maryland adopted a rule resembling Fed.R.Evid. 801(D)(1), with some significant variations with regard to prior inconsistent statements:

> Md. Rule 5-802.1
>
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement;
>
> (b) A statement that is consistent with the declarant's testimony, if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive;
>
> (c) A statement that is one of identification of a person made after perceiving the person;

Maryland adds two other provisions to its rule dealing with prior statements of witnesses:

> (d) A statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony; or
>
> (e) A statement that is in the form of a memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, if the statement was made or adopted by the witness when the matter was fresh in the witness's memory and reflects that knowledge correctly. If admitted, the statement may be read into evidence but the

memorandum or record may not itself be received as an exhibit unless offered by an adverse party.

Part (e) corresponds to Fed.R.Evid. 803(5).

MISSOURI

Missouri was another state listed by Goldman as following the orthodox rule. *See also Powell v. Norman Lines, Inc.,* 674 S.W.2d 191, 197 (Mo. App. 1984). However, in 1985, Missouri enacted V.A.M.S. 491.074:

> Notwithstanding any other provision of law to the contrary, a prior inconsistent statement of any witness testifying in the trial of a criminal offense shall be received as substantive evidence, and the party offering the prior inconsistent statement may argue the truth of such statement.

The orthodox rule appears to still be in effect for prior consistent statements. *See State v. Mueller,* 872 S.W.2d 559 (Mo. App. 1994) (prior consistent statement admissible to rehabilitate witness who has been impeached by a prior inconsistent statement; the use of the prior statement should be limited to the extent necessary to counter the subject on which the witness was impeached; no limiting instruction requested in this case so no error).

The law with regard to prior identifications is somewhat unclear. Both the witness himself or herself and a third person (including a police officer) may testify to the statement. *See State v. Harris,* 711 S.W.2d 881 (Mo. En banc 1986); *State v. hicks,* 456 S.W. 3d 426 (2015). In neither case is it clear whether the statement is being offered solely for corroborative purposes or whether it is substantive evidence. No request for a limiting instruction was made so the issue did not arise.

RHODE ISLAND

Rhode Island was listed in Goldman as a state following the orthodox rule. *See also State v. Quattrocchi,* 235 A.2d 99 (R.I. 1967). However, Rhode Island Evidence Rule 801(d)(1) now provides:

> (1) *Prior Statement by Witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after the declarant perceived the person being identified . . . .

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposal to Eliminate Rule 803(16) --- public comment
Date: September 10, 2015

At its last meeting, the Evidence Rules Committee unanimously approved an amendment that would eliminate Rule 803(16), the ancient documents exception to the hearsay rule. The Committee's proposal was unanimously approved by the Standing Committee, and as a result the proposal (and the Committee Note explaining it) was released for public comment in August.

The public comment period effectively lasts through February, 2016. Typically, most public comments are not submitted until February. So it is not surprising that, as of the date of this memo, only three comments have been received on the proposal to abrogate Rule 803(16).

This memo addresses the comments that have been received thus far.

Comment of Erin Campbell, Esq. --- EV-2015-0003-0004:

Ms. Campbell is a trial attorney; the bulk of her work is focused on representing qui tam relators in federal False Claims Act actions. She is "concerned" about the elimination of Rule 803(16), because in cases with lengthy factual backgrounds, the only evidence available may be contemporaneous writings. She argues that the proponent should be able to admit this evidence and that "[l]imiting instructions can be used" to regulate any reliability problems. She notes that while the residual exception might be used for these old writings, the elimination of the "long-standing exception" for ancient documents may suggest to trial judges "that ancient documents should never be admitted under the residual exception." She concludes: "Unless you intend to leave trial court judges with no discretion to admit ancient documents, I request that if you still intend to delete Rule 803(16), you advise that ancient documents remain admissible if Rule 807 is satisfied."

Reporter's Comment:

It will not be surprising if the Committee receives more comments from lawyers who have used the ancient documents exception and who will complain that its elimination will make their work harder. To which the response might be: harder, but not at all impossible. As Ms. Campbell recognizes, if the ancient hearsay is reliable, it is a good candidate to be admissible as residual hearsay.

Ms. Campbell's major concern is that trial judges will take the amendment as a signal that ancient documents should never be admissible --- not even if they fit the admissibility requirements of residual hearsay. This seems a far-fetched proposition. But just in case there is such a risk, it must be emphasized that the Committee Note to the proposal addresses it. **The Committee Note provides as follows:**

> The ancient documents exception to the rule against hearsay has been abrogated. The exception was based on the flawed premise that the contents of a document are reliable merely because the document is old. While it is appropriate to conclude that a document is genuine when it is old and located in a place where it would likely be — see Rule 901(b)(8) — it simply does not follow that the contents of such a document are truthful.
>
> The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. ***The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to be available and will likely satisfy a reliability-based hearsay exception – such as Rule 807 or Rule 803(6). Thus the ancient documents exception is not necessary to qualify dated information that is reliable.*** And abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible, and would be admissible under the exception simply because it has been preserved electronically for 20 years. (emphasis added)

Ms. Campbell suggests that the Committee advise that ancient documents remain admissible if Rule 807 is satisfied. That seems to be exactly what the Committee has done in the Committee Note. That said, the sentences highlighted above are in the context of electronic evidence, and an ungenerous reader might think that the Committee is saying that Rule 807 is open only if the old information is electronic. To guard against that, the Committee Note can be amended slightly to provide as follows:

> * * * The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is

likely to be available and will likely satisfy a reliability-based hearsay exception – such as Rule 807 or Rule 803(6). ~~Thus t~~The ancient documents exception is not necessary to qualify dated information that is reliable---whether that information is electronic or hardcopy, other hearsay exceptions remain in play. And abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible, and would be admissible under the exception simply because it has been preserved electronically for 20 years.

It is for the Committee to determine whether the above change, or something like it, is necessary in order to emphasize that other hearsay exceptions are available to cover old hearsay that is reliable.

Comment of David Hird, Esq. --- EV-2015-0003-0003

Mr. Hird is an environmental litigator and strongly urges the Committee to retain the ancient documents exception in environmental cases. Here is his explanation:

> The elimination of the Ancient Document Exception in Rule 803(16) could have a substantial negative effect in environmental cases by excluding significant evidence that is only available from older documents, As an environmental litigator for more than 35 years, I have frequently relied on ancient documents which showed a company's manufacturing processes, purchases of chemicals, and disposal of waste, These documents are essential to establishing the pollution history of a facility. Unlike other types of ancient documents, these types of records are not likely to be stored electronically, These documents are found in odd locations, such as old file cabinets in a forgotten store room at a plant, or in the files of some third party. Often, there is no one with contemporary knowledge to authenticate them, and there may be no document custodian because the party against whom they are being used either threw its copy out years ago or did not know that the information was in these file cabinets. As a young lawyer with the Justice Department in the 1980's, I used mimeographed copies of 1930's documents to show the polluting activities of the defendant. Currently, I am relying on documents from the 1970's and 1980's to establish the opposing party's responsibility for pollution at a specific facility. One key 1977 document appears on the opposing party's letterhead, but our copy does not come from the opposing party's files. Without an Ancient Document Exception, the document could be excluded.

Reporter's Comment:

Again it is to be anticipated that there will be complaints from certain parts of the bar that elimination of the ancient documents exception will make life more difficult for them. The question is whether the extra burden in a narrow band of cases is outweighed by the benefit of

promoting reliability and preventing Rule 803(16) from being used as a dumping ground for terabytes of unreliable ESI.

What's notable about the examples provided by Mr. Hird is that the hurdles he raises are all about *authenticity*. He seems to overlook the fact the rule on authenticating ancient documents is not going to be changed --- and that is because the authentication rule makes sense. An item that is old and where it is supposed to be probably does satisfy the low standard of authenticity. It does not follow, though, that the contents are reliable.

As a hearsay matter, the documents Mr. Hird describes seem to be good candidates for admissibility under other exceptions. For example, the key document on the opposing party's letterhead is likely to be admissible as a statement of a party opponent. And records about polluting are likely to be found admissible as business records or under the residual exception. In sum, Mr. Hird's comments do not appear to make the case that the hearsay exception for ancient documents should be retained, either for environmental cases or for any other.

Comment of Nathan Schachtman, Esq. --- EV-2015-0003-0005

Mr. Schachtman, a lawyer with a science background, supports the proposal to abrogate Rule 803(16). He notes that old documents may be especially unreliable given scientific and technical developments. His statement explains as follows:

> The fact that a document is old may perhaps add to its authenticity, but in many technical, scientific, and medical contexts, the "ancient" provenance actually makes the content unlikely to be true. As such, the rule as now in effect is capable of much mischief and undermines accurate fact finding. The pace of change of technical and scientific opinion and understanding is too fast to indulge this exception that permits out-dated, false statements of doubtful validity to confuse the finder of fact. With respect to statements or claims to scientific knowledge, the Federal Rules of Evidence has evolved towards a system of evidence-based opinion, and away from naked opinion based upon the apparent authority or prestige of the speaker. Similarly, the age of the speaker or of the document provides no warrant for the truth of the document's content. Of course, the statements in authenticated ancient documents remain relevant to the declarant's state of mind, and nothing in the proposed amendment would affect this use of the document. As for the contested truth of the document's content, there will usually be better, more recent, and sounder scientific evidence to support the ancient document's statements if those statements are indeed correct. In the unlikely instance that more recent, more exacting evidence is unavailable, and the trustworthiness of the ancient document's statements can be otherwise established, then the statements would probably be admissible pursuant to other exceptions to the rule against hearsay, as noted by the Committee. The proposed abrogation of this exception to the rule against hearsay is welcomed and overdue.

Reporter's Comment:

Mr. Schachtman is a very smart and perceptive guy.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposal to add Rule 902(13) and (14) --- public comment
Date: September 10, 2015

At its last meeting, the Evidence Rules Committee unanimously approved amendments that would add two new paragraphs --- (13) and (14) --- to Rule 902, the rule on self-authentication. Rule 902(13) would allow a qualified person to authenticate electronic data by way of a certificate rather than in-court testimony. Rule 902(14) would provide the same method of authentication for copies of electronic data. The Committee's proposal was unanimously approved by the Standing Committee, and as a result the proposed amendments to Rule 902 (and the Committee Note explaining them) were released for public comment in August.

The public comment period effectively lasts through February, 2016. Typically, most public comments are not submitted until February. So it is not surprising that, as of the date of this memo, only one comment has been received on the proposal to amend Rule 902.

This memo addresses the comment that has been received thus far. It should be noted, though, that based on email exchanges with some law professors, the Committee should expect commentary that will question whether the certifications permitted by proposed Rules 902(13) and (14) are consistent with the Confrontation Clause in criminal cases.

(As previously discussed, lower court cases have uniformly found that a certification under 902(11) does not violate the Confrontation Clause; and the Supreme Court in *Melendez-Diaz* stated that a certificate that does no more than authenticate another document is not testimonial. Moreover, Rules 902(13) and (14) are even less likely to raise a constitutional issue than Rule 902(11); that is because the new rules do nothing more than provide a means of authentication, whereas the certificate under Rule 902(11) also serves as a means of providing a foundation for the business records exception. However, at least one law professor --- Richard Friedman --- thinks that the language in *Melendez-Diaz* is narrower and the lower courts are

wrong. But simply saying the lower courts are wrong is not much reason for forestalling the amendment.)

Comment of James Lundeen --- EV-2015-0003-0002

Mr. Lundeen takes the position that the proposed amendments exceed rulemaking authority insofar as they cover foreign records. Here is the entirety of his comment:

> U.S. Const. art. IV, section 1 provides that Congress may enact statutes which shall govern the proof and effect of foreign evidence. Such codifications include 28 USCS 1738, 1739, 1963, inter alia. Mills v. Duryee, 11 U.S. 481, 3 L. Ed. 411 (1813) is the authority on the demands of authentication of record evidence. Any proposed change in 902 which is repugnant to these authorities must not be adopted.

Reporter's Comment:

There is nothing in Rules 902(13) and (14) that is "repugnant" to anything in any of the statutes cited by Mr. Lundeen. The *Mills* case deals with a statute governing authentication in *state* courts and full faith and credit. It is not about admissibility. There is nothing in it that can remotely be considered a limitation on rulemaking authority with respect to foreign evidence offered in a federal court. Moreover, Rule 902(12), which specifically deals with foreign records, was promulgated through the rulemaking process and thus far no court has even thought to question its foundation --- the same can be said about Rules 902(3) and Civil Rule 44(a)(2), both of which govern admissibility of foreign records. In sum, Mr. Lundeen's position appears to be without merit.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible amendment to notice provisions
Date: September 10, 2015

At the last meeting, the Advisory Committee considered a proposal to provide more uniformity in the notice requirements in the Federal Rules of Evidence. The Committee decided not to propose uniformity-based amendments to all of the notice rules. There were a number of rationales for deciding not to take on the project of amending all of the notice rules to promote uniformity. The minutes of the Spring 2015 meeting reflect the Committee's thinking:

> The Committee determined that rules should not be changed simply for the purposes of uniformity, if substantive changes must be made to do so. Rather, the Committee should proceed rule by rule and determine whether the substantive requirements in any particular rule make sense and are working. * * *
>
> The DOJ representative stated that the Department is opposed to any attempt to provide uniformity in the notice provisions. She suggested that Congress might be concerned about changes to the Rules that it enacted directly --- i.e., Rules 413-415 --- and that any changes to those rules would not be worth the cost because they are so seldom used. She noted that local rules provide notice requirements and that there would be transaction costs if the national rules are changed. And she stated that any change to the notice rules could come with other unintended consequences.
>
> * * *
>
> In the end, the Committee agreed that amendments that would make the notice provisions more uniform raised a number of difficult questions that required further consideration. The Committee did determine, however, that any further consideration of uniformity in the notice provisions should not involve changes to Rules 412-15. These rules could be justifiably excluded from changes pursuant to a uniformity project because they were all congressionally-enacted, are rarely used, and raise policy questions on what procedural requirements should apply in cases involving sexual assaults.

The Committee did agree, however, to consider two amendments to individual rules:

1) An amendment to Rule 404(b) that would abrogate the "triggering" requirement, i.e., to delete the language that conditions notice on a request by the criminal defendant. Here is the description in the minutes of the prior determination:

> Committee members were in agreement that the request requirement in Rule 404(b) --- that the criminal defendant must request notice before the government is obligated to give it --- was an unnecessary requirement that serves as a trap for the unwary. The DOJ representative noted that most local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. In many cases, notice is inevitably provided anyway when the government moves in limine for an advance ruling on admissibility of Rule 404(b) evidence. In other cases the request is little more than a boilerplate addition to a Rule 16 request. Committee members therefore determined that there was no compelling reason to retain the Rule 404(b) request requirement --- and that an amendment to Rule 404(b) to eliminate that requirement should be considered even independently of any effort to provide uniformity to the notice provisions.

2) An amendment to Rule 807 that would allow for pretrial notice to be excused for good cause. Here is the description in the minutes of the prior determination:

> The absence of a good cause exception in Rule 807 was found problematic as it had led to a dispute in the courts about whether that exception should be read into the rule. The Committee found that a good cause exception is particularly necessary in Rule 807 for cases where a witness becomes unavailable after the trial starts and the proponent then may need to introduce a hearsay statement from that witness. And it is particularly important to allow for good cause when it is a criminal defendant who fails to provide pretrial notice. On the merits, Committee members approved in principle the suggestion that a provision excusing pretrial notice for good cause should be added to Rule 807, with or without any attempt to provide uniformity to the notice provisions.

The Committee also agreed to consider two further notice-related proposals:

● Either adding a written notice requirement to Rules 404(b) and 807, or deleting the written notice requirement in Rules 609(b) and 902(11); and

● Amending Rules 609(b) and 902(11) to provide that notice must be provided before trial, but that pretrial notice can be excused for good cause --- i.e., to follow the same approach currently taken in Rule 404(b).[1]

This memo is divided into four parts.

Part One sets forth a proposed amendment to delete the triggering requirement of Rule 404(b).

Part Two considers Rule 807, and provides discussion and suggested language for *two* possible amendments to that Rule, only one of which was discussed at the last meeting. The first proposal is to add some kind of good cause exception to the pretrial notice requirement. The second proposal is to add clarification that the proponent must give notice *of an intent to invoke Rule 807*.

Part Three discusses a proposal for uniformity regarding the writing requirement for Rules 404(b), 609(b), 807 and 902(11).

Part Four discusses amending Rules 609(b) and 902(11) to provide that notice must be provided before trial, but that pretrial notice can be excused for good cause --- i.e., to follow the same approach currently taken in Rule 404(b).

It should be noted that nothing in this memo necessarily presents an action item at this time. Under the rulemaking schedule, even if the proposals below were approved by this Committee, they would not be issued for public comment until August 2016. So it would be prudent practice to refine the proposals for a final review at the Spring 2016 Committee meeting, and then recommend any approved proposal to the Standing Committee for consideration at that Committee's Spring 2016 meeting.

It should also be noted that if the Committee ends up proposing an amendment to only one rule --- as opposed to a package --- the prudent practice would probably be to hold up that proposal until it can be packaged with other amendments.

[1] Finally, the Committee expressed interest, during the discussion on notice provisions, in considering an amendment that is not related to notice --- one that might result in a broader use of the residual exception, Rule 807. That proposal is not considered in this memo. This Fall's symposium on hearsay reform will consider the merits of an expanded residual exception in detail.

I. Eliminating the Rule 404(b) Requirement of a Request Before Notice Must Be Provided

Committee members were in agreement that the request requirement in Rule 404(b) should be abrogated as an unnecessary burden that serves as a trap for the unwary. The requirement is unexplained in the legislative history and is not found in any other notice rule. The practice has boiled down to competent lawyers including boilerplate language in discovery requests, with the occasional incompetent lawyer failing to make the request and thus subjecting his client to unfair surprise. *See, e.g., United States v. Begay*, 673 F.3d 1038 (9th Cir. 2012) (because the defendant did not make a request, there was no error in admitting Rule 404(b) evidence even though the defendant was not made aware of the prosecution's intent to use it until the opening statement).

As discussed last meeting, the textual change to accomplish the abrogation is straightforward.

Here is the proposed amendment to Rule 404(b):

Rule 404. Character Evidence; Crimes or Other Acts

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(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in~~ In a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

Here is the proposed Committee Note:

The requirement of a request before notice must be provided has been eliminated. That requirement is not found in any other notice provision in the Federal Rules of Evidence, and it has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, the benefit to the government of the requirement is minimal, because many local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is inevitably provided anyway when the government moves *in limine* for an advance ruling on admissibility of Rule 404(b) evidence. The request requirement has thus become a technicality that has outlived any usefulness it may once have had.

II. Rule 807

A. Adding a Good Cause Exception to the Pretrial Notice Provision

At the last meeting, the Committee was convinced that the case had been made for adding a good cause exception to the pretrial notice requirement of Rule 807. And no wonder. Rule 807 is the only Evidence Rule with an "absolute" notice requirement. And it is easy to find cases in which *some* exception to a pretrial notice requirement is justified and necessary. Examples include; 1) statements from declarants that, despite diligent efforts, are only discovered once trial has begun; and 2) hearsay statements of people who are scheduled to be called as witnesses but who without warning become unavailable at the time of trial.

Because some exceptions to pretrial notice seem justified, it is probably little surprise that most courts have simply read a "good cause" exception into Rule 807. See, e.g., *Furtado v. Bishop*, 604 F.2d 80, 92 (1st Cir. 1979) ("Most courts have interpreted the pretrial notice requirement somewhat flexibly, in light of its express policy of providing a party with a fair opportunity to meet the proffered evidence. Thus, the failure to give pretrial notice has been excused if the proffering party was not at fault (because he could not have anticipated the need to use the evidence) and if the adverse party was deemed to have had sufficient opportunity to prepare for and contest the use of the evidence (for example, because he was offered a continuance, did not request a continuance, or had the statement in advance)."); *United States v. Bailey*, 581 F.2d 341, 348 (3d Cir. 1978) ("We believe that the purpose of the rules and the requirement of fairness to an adversary contained in the advance notice requirement * * * are satisfied when, as here, the proponent of the evidence is without fault in failing to notify his adversary prior to trial and the trial judge has offered sufficient time, by means of granting a continuance, for the party against whom the evidence is to be offered to prepare to meet and contest its admission."); *United States v. Mandel*, 591 F.2d 1347, 1385 (4th Cir. 1979) (most courts "have dispensed with strict compliance when the defendant could not show that he had been prejudiced"); *United States v. Bachsian*, 4 F.3d 796, 799 (9th Cir. 1993) ("This court has held, however, that failure to give pretrial notice will be excused if the adverse party had an opportunity to attack the trustworthiness of the evidence."); *United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984) ("This Circuit holds that a failure to comply with the notice requirement is not controlling if defendant is not harmed and had a fair opportunity to meet the statements.").

Yet because the language of the notice requirement is absolute, some courts have understandably applied it the way it was written. The leading proponent of a strict reading of the notice requirement is the Second Circuit, as indicated in the leading case of *United States v. Ruffin*, 575 F.2d 346, 358-59 (2d Cir.1978), in which the court concluded that the residual exception is to be strictly construed and that the failure of the proponent of the evidence to provide pretrial notice cannot be cured by giving the opponent a continuance. *See also United States v. Oates,* 560 F.2d 45, 72 n.30 (2d Cir. 1977) ("There is absolutely no doubt that Congress intended that the requirement of advance notice be rigidly enforced." Therefore there must be "undeviating adherence to the requirement that notice be given in advance of trial."); *United*

States v. LaGrua, 182 F.3d 901 (2d Cir. 1999) ("The holding in *Ruffin*, which this Court has never overturned, was faithfully applied by the district court in the present case, and we thus see no error in the exclusion of the [residual hearsay].").

Thus, any amendment to the notice provisions to add something in the nature of a good cause exception will have the added benefit of resolving a conflict in the courts --- traditionally that is a reason that the Committee has found sufficient to justify an amendment.

Assuming, then, that there should be an amendment to Rule 807 to add an exception to the rigid requirement of pretrial notice, the question remains: what form should that exception take? If the Committee is going to propose a change to the notice provision of Rule 404(b) (i.e., eliminating the request requirement), it surely would make sense to track the Rule 404(b) good cause provision. There seems to be no reason to have a package of two rules governing notice where the rules do not track --- unless there is some real justification for the difference. And there would appear to be no difference in kind between Rule 404(b) evidence and residual hearsay to warrant any difference in good cause language --- the possibility that the need to invoke the rule might not arise until trial in some cases seems to be the same (perhaps even greater, because Rule 807 is more witness-dependent that Rule 404(b), creating a greater need for a good cause exception when a witness becomes unavailable).

It must be noted, though, that there is case law under Rule 807 that allows notice to be excused but not necessarily in compliance with a good cause test. "Good cause" focuses on the proponent and whether there is a good excuse for noncompliance. Some of the Rule 807 cases appear to focus only on whether the opponent was prejudiced by noncompliance. Two cases present the contrasting approaches. In *United States v. Benavente Gomez*, 921 F.2d 378, 384 (1st Cir. 1990), the court looks at culpability: "Although this court has adopted a flexible approach to pretrial notice, we have expressly noted that the approach, at least in criminal cases, is warranted only when pretrial notice is wholly impractical. Moreover, even under a flexible approach, evidence should be admitted only when the *proponent is not responsible for the delay* and the adverse party has an adequate opportunity to examine and response to the evidence." In contrast is *United States v. Bachsian*, 4 F.3d 796, 799 (9th Cir. 1993), where the court held that "failure to give pretrial notice will be excused if the adverse party had an opportunity to attack the trustworthiness of the evidence."[2]

Presumably, adding "good cause" language to the rule would require some showing that the proponent had some good excuse for failing to meet the notice requirement. The Rule 404(b) cases focus on whether the government had a good excuse for failing to comply. *See, e.g., United*

[2] In *Bachsian*, the prosecution did not provide pretrial notice because it only decided at the time of trial to try the residual exception (which doesn't seem to be a good cause excuse). But the defendant had notice of the documents two months prior to trial. In *United States v. Brown*, 770 F.2d 768 (9th Cir. 1985), the government had no excuse at all for failing to give notice, but the court saw no problem because the defendants had "ample opportunity" to challenge the trustworthiness of the evidence.

States v. Smith, 383 F.3d 700 (8th Cir. 2004) (government did not become aware of the evidence until the trial had begun); *United States v. Kravchuk*, 335 F.3d 1147 (10th Cir. 2003) (same).

Perhaps in the end, there may be little practical difference between a test that focuses in the first instance on the culpability of the proponent and a test that focuses solely on prejudice to the opponent. Assuming that the proponent has no good excuse for failing to give notice, an appellate court is likely to find the failure harmless error if there is no prejudice; and at the trial level, a court may well decide that granting a continuance or other remedy is a preferable alternative to excluding evidence for failure to provide timely notice, even if there is no excuse for tardiness. But nonetheless, adding good cause language does have a signaling effect that it is important in all cases to provide timely notice --- and that the proponent assumes the risk if there is no excuse. Therefore, it would appear that a provision requiring good cause will not only resolve a conflict in the courts under Rule 807, but also would provide the proper approach for any excuse of pretrial notice; and by tracking Rule 404(b)'s focus on culpability in the first instance, it would provide for uniformity within the package of amendments.

As discussed at the last meeting, the alternative to a good cause requirement would be the more flexible "in enough time for the opponent to have a reasonable opportunity to challenge the evidence." The funny thing is that the "reasonable opportunity" language is already included in Rule 807, but not in a way as to excuse notice given after the trial has begun. Again, the requirement is that the proponent provide "*before the trial or hearing*" reasonable notice "so that the party has a fair opportunity to meet it." The only way to work this language to permit notification during the trial would be to cut out the phrase "before the trial or hearing."

But that option would require a lot of explaining, for no real purpose. Here are some of the explanations that would have to be made, as it would look, on first glance, that the amendment is simply saying the notice before trial is no longer required. The Committee Note would have to explain that: 1) the Committee wants to preserve the requirement for pretrial notice but allow some admissibility where there is late notice; 2) late notice might be sufficient to provide a fair opportunity when coupled with a continuance, or with the opponent's prior access to the evidence; 3) the Committee chose not to add good cause language because the concept of good cause should be considered as a factor in the "fair opportunity" standard; and 4) there is some justification for proposing amendments to two notice provisions that have different language. That is a lot of heavy lifting for no good reason. And it would fail to promote uniformity in text that would be crucial with a package with Rule 404(b).

There is a good way to add a good cause requirement to the rule and yet continue to include the concept of a fair opportunity to meet the evidence. The following change might be made:

(b) Notice. The statement is admissible only if, ~~before the trial or hearing~~, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it. The notice must be provided before trial --- or during trial if the court, for good cause, excuses lack of pretrial notice.

This change lifts the good cause language from Rule 404(b), but retains the concept that *in any event* the opponent should be given a fair opportunity to meet the evidence. Taking the "fair opportunity" language out of the rule would provide a bad signal, and would be unjustified as it is useful: 1) to govern the manner and timing of notice provided *before* trial; and 2) it tends to assure that the trial judge will grant a continuance where necessary when notice is given at trial.

The above proposal for adding a good cause exception will be taken up again after considering whether the Rule 807 notice provision should clarify that the proponent must give notice of the intent to invoke the residual exception. We turn now to that topic.

B. Adding a Requirement of Intent to Invoke the Residual Exception

The notice requirement of Rule 807 requires the proponent to disclose "the intent to offer the statement and its particulars" --- but it does not specifically require the proponent to disclose the intent to offer the statement *under the residual exception.* The courts are divided on whether specific disclosure of intent to offer the statement as residual hearsay is required. *See, e.g., Limone v. United States,* 497 F. Supp. 2d 143, 163 (D. Mass 2007) (noting that authorities are split on the issue, and concluding that "parties are entitled only to notice that evidence will be offered; they do not need to be told all of the possible theories that the evidence may be admitted under"); *United States v. Munoz,* 16 F.3d 1116, 1122 (11th Cir. 1994) (defendants knew about the statements, but not that they would be offered under the residual exception; admission was not error: "There is no particular form of notice required under the rule. As long as the party against whom the document is offered has notice of its existence and the proponent's intention to introduce it – and thus has an opportunity to counter it and protect himself against surprise --- the rule's notice requirement is satisfied."). *Compare United States v. Ruffin,* 575 F.2d 346, 358 (2d Cir. 1978) (Rule 807 "can be utilized only if notice of an intention to rely upon it is given in advance of trial."); *Kirk v. Raymark Indus., Inc.,* 61 F.3d 147, 167 (3rd Cir. 1995) ("[W]e note that the plain language of the rule requires the proponent of the hearsay statement to put the adverse party on notice that the proponent intends to introduce the statement into evidence. We have interpreted this to mean that the proponent must give notice of the hearsay statement itself

as well as the proponent's intention specifically to rely on the rule as a grounds for admissibility of the hearsay statement.").

Assuming that the Committee decides to proceed with an amendment to the Rule 807 notice provision, there is much to be said for resolving the conflict in the case law over whether notice must be given of the intent to invoke the residual exception. Whether notice of that intent must be given can have important consequences not only at trial but on appeal. One consequence of the more specific notice requirement is that an appellate court may be unable to admit a statement retroactively as residual hearsay if it was wrongly admitted under a different exception at trial. If the trial court admits a hearsay statement under the wrong exception, the appellate court ordinarily can still affirm the judgment so long as the statement could have been admitted at trial under a different exception. For example, if a hearsay statement is erroneously admitted as an excited utterance, the court will affirm if the statement could have been admitted as a statement of a party-opponent under Rule 801(d)(2)(A). The reasoning is that the non-offering party is not prejudiced because the evidence could have been admitted anyway. However, there is an exception to this rule where the retroactive use of a theory would deprive the opponent of some argument or protection that could have been used if the theory had been presented below. Such may be the case with the residual exception and its notice requirement. Pretrial notice that would meet the rule may not have been given if the statement was not offered at trial as residual hearsay. Importantly, the chances of retroactive admission under the residual exception are heightened if the court's view of the notice requirement is simply that the opponent receive notice only of the evidence itself before trial. On the other hand, if the rule requires notice of intent to invoke the residual exception, then by definition the appellate court will be unable to use the residual exception on appeal. See, e.g., *United States v. Pellulo*, 964 F.2d 193 (3rd Cir. 1992) (records erroneously admitted as business records at trial; because the government never gave notice of intent to invoke the residual exception at trial, Rule 807 could not be satisfied retroactively).

Arguably, there are several reasons to require a party to specifically notify the opponent of the intent to invoke the residual exception. First, limiting retroactive use of the residual exception on appeal appears to be consistent with Congress's requirement of a careful approach to the residual exception; Congress did not appear to intend the residual exception to be a "bail-out" but rather to be an exception that would apply only upon careful consideration and in limited circumstances. Second, requiring a specific invocation will also limit the cavalier treatment that might occur when, at trial, a party invokes standard exceptions and when rebuffed simply falls back on the residual exception. Third, and perhaps most important, the need for the opponent to prepare for residual hearsay is arguably unique, and was the reason for the notice requirement in the first place. Statements potentially admissible as residual hearsay run the gamut, and the arguments for admitting or excluding a statement offered under Rule 807 will be case-by-case; to make such an argument, the opponent surely needs time to prepare. But it would seem much more difficult for a proponent to prepare if it is unclear whether the residual exception is even in play. While it is surely true that an experienced counsel will have a hunch that certain statements are possibly candidates for the residual exception, the problem is that counsel doesn't know whether the proponent will invoke that exception. The result could be unfair surprise on the one hand, and costly over-preparation on the other.

It should be noted that suggestions have been made to expand the use of the residual exception --- indeed this is a major topic for discussion at the Symposium on Hearsay Reform at the Fall 2015 meeting. Assuming that the residual exception is broadened, would it become less important that the proponent provide notice to invoke? The argument can be made that requiring notice to invoke, even if perhaps

consistent with the original congressional approach to the residual exception, would run counter to the view that the new view that the residual exception should be expanded to allow more flexibility and judicial discretion. But the opposite argument can be made as well --- from the perspective of the opponent's interest in and need for advance preparation. Arguably the need for disclosure of intent to invoke becomes even greater as the scope of the exception is expanded. Expanding the exception puts more statements in play. It gives more room for arguments that must be prepared in advance (because these will be case-dependent arguments directed to a broadened discretion).

It is true that requiring a notice of intent to invoke the residual exception imposes an extra burden on the proponent; and it will prevent proponents from adjusting on-the-fly at trial and on appeal. It should be remembered, however, that adding a good cause exception will ameliorate some of the pain of a more specific notice requirement, and will allow some flexibility. Moreover, a number of circuits, as discussed above, already require the proponent to disclose an intent to invoke the exception; it does not appear, at least from the reported cases, that such a requirement has been particularly disruptive in those courts. It could be said that the end result is simply that proponents will be better prepared by focusing in advance on the possibility of using the residual exception; that opponents will be better prepared to meet the evidence; and that better preparation on both sides is a good thing.

One problem with the intent to invoke requirement is that it is not found in Rule 404(b). As discussed above, it would seem that any disuniformity in notice provisions in the same package of amendments would require an explanation. Why add an intent to invoke requirement in one notice provision but not in another in the same package of amendments? In this case, the differences in Rules 404(b) and 807 might justify a difference in whether a notice to invoke would be required. Rule 404(b) is a rule of inclusion, used in almost every criminal case. In contrast, Rule 807 is a rule that by intent is to be rarely invoked and only in unusual circumstances. In a criminal case, defense counsel can pretty much assume that Rule 404(b) will be in play, so knowledge of the government's intent to invoke it is a given with respect to evidence of uncharged misconduct; but that assumption cannot be made in any case with respect to Rule 807. Moreover, and perhaps more importantly, the kind of evidence that is covered by Rule 404(b) will, by and large, have a "404(b)" neon sign on it; when the government notifies the defendant of the intent to use an uncharged bad act, it is hardly a mystery as to what Rule is likely to be invoked. In contrast, Rule 807 involves hearsay statements, which could be made by anyone (indeed any non-party on earth), under any kind of particular circumstance. So the difference can be articulated that an intent-to-invoke requirement is much more useful and appropriate in Rule 807 than it is in Rule 404(b).

Assuming the Committee is favorably disposed toward adding an intent-to-invoke requirement in Rule 807, how would it be implemented? Language for an amendment and a Committee Note is suggested at the end of this section---after a discussion of other drafting matters that might be considered in amending the Rule 807 notice requirement.

C. The Difference in the Information That Must Be Disclosed in Rules 404(b) and Rule 807

Again assuming that the notice provisions of Rules 404(b) and 807 would be proposed as a package, there is a further difference between the two that should be reviewed. The information

required to be provided by the proponent is more particularized in Rule 807 than it is in Rule 404(b). Rule 404(b) requires the prosecution to disclose "the general nature" of the evidence the prosecutor intends to offer. Rule 807 requires the proponent to disclose the "particulars" of the statement, "including the declarant's name and address."

The inclusion of "name and address" in Rule 807 and not in Rule 404(b) can be explained by the fact that the evidence covered by the two provisions is different. Rule 807 covers assertive statements only. For every piece of evidence under Rule 807, there will be a statement with certain details, made by a declarant --- so specifically requiring disclosure about that declarant is understandable. In contrast, Rule 404(b) evidence covers many more sources of information. It might be a judgment of conviction, it might be testimony from a victim or a police officer, or a surveillance photo, or the defendant's own statement --- or it might be hearsay admissible under some exception. The point is, it can be difficult to describe "particulars" when it comes to Rule 404(b) evidence, and it would be positively incorrect to import the "name and address" requirement of Rule 807 into Rule 404(b).

That said, on a more general level, the difference in tone between "general nature" (Rule 404(b)) and "particulars" (Rule 807) seems more difficult to explain. That difficulty is illustrated by a case such as *United States v. Watson*, 409 F.3d 458 (D.C.Cir. 2005), where the prosecution gave pretrial notice that it would offer the testimony of a cooperating witness, but did not provide the name of the witness, nor the facts and circumstances of the proposed testimony. The court found that this notice was sufficient because it provided the "general nature" of the testimony. It clearly would not have been sufficient under Rule 807. Other examples of vague notice found sufficient under the Rule 404(b) "general nature" language include *United States v. Kern*, 12 F.3d 122, 124 (8th Cir.1993) (holding that the government's statement that it "might use evidence from some local robberies" was sufficient to describe the general nature of the acts under Rule 404(b)); *United States v. Schoeneman*, 893 F.Supp. 820, 823 (N.D.Ill.1995) (rejecting the defendant's motion that the government provide notice of the dates, times, places and persons involved in the acts it plans to admit under Rule 404(b)).

So there is something to be said for adding some "particularity" into the Rule 404(b) notice requirement --- both as a means of avoiding surprise and for purposes of maintaining some consistency with the other notice provision in the same package. Simply replacing "general nature" with "particulars" would not seem very helpful, though; it would surely be better to provide some examples to assist courts in determining what "particulars" are.

Luckily, there is already language in the Federal Rules that might be used to amplify somewhat the concept of what "particulars" should be specified when the government seeks to use evidence of uncharged misconduct. That language is found in Rules 413-15 --- a good place to crib from, because those Rules, like Rule 404(b), involve evidence of uncharged misconduct. At the last meeting, the Committee determined that those Rules should not be messed with

because they were directly enacted by Congress. But it surely is a good thing, not a bad thing, to apply language *from* those rules so that other notice provisions will be consistent with them.[3]

Therefore, if the Committee does decide to require more particularity in a Rule 404(b) disclosure --- because that is a good idea on the merits and also promotes uniformity --- then the following language might be used:

The prosecutor must

(A) provide reasonable notice of the ~~general nature~~ particulars of any such evidence ---including witnesses' statements or a summary of the expected testimony --- that the prosecutor intends to offer at trial;

The Committee Note accompanying an amendment to add "particulars" to Rule 404(b) could read as follows:

The notice provision has been amended to add a "particularity" requirement. *See* Rules 413-415, 807. The burden of providing some particulars about the evidence the prosecutor seeks to admit is not an onerous one, and providing such particulars can guard against the risk of unfair surprise that is the basis of the notice requirement.

The language above, and the excerpt for the Committee Note, will be added to the Rule 404(b) template at the end of this memo.

[3] The Committee has often borrowed language from existing Rules --- the advantages are to provide uniformity across the Rules, and also to assist interpretation by having an existing body of case law to rely upon. See, e.g., Rule 502(a), which borrows from Rule 106 (and cites to Rule 106 in the Committee Note).

D. Rule 807--- Disclosure of Declarant's Address

The Reporter's memorandum on the notice provisions for the last meeting contained this paragraph:

> The Committee may wish to consider whether the provision [in Rule 807] requiring disclosure of a declarant's address should be reconsidered. In the typical case in which residual hearsay is offered, the declarant is *unavailable*. This is because if the declarant is available, the hearsay is unlikely to satisfy the residual exception requirement that it be "more probative" than the declarant's testimony. *See, e.g., Larez v. City of Los Angeles*, 946 F,2d 630 (9th Cir. 1991) (newspaper accounts were improperly admitted as residual hearsay where reporters who provided those accounts were available to testify --- the newspaper accounts were not "more probative" than the testimony that the reporters could have provided). It is difficult to see the value of producing the address of a declarant who is unavailable – and the requirement is just an absurdity when the declarant is dead. Moreover, disclosing the address of a declarant is in tension with the e-Government rules, which require redaction of the home address of an individual in any court filing. See Fed.R. Crim.P. 49.1. ("Tension" and not "conflict" is the correct word because a Rule 807 notice is not necessarily going to be in a court filing.) Thus, the Committee may wish to consider --- as part of a uniformity project and on the merits --- deleting the reference to the declarant's address in Rule 807.

This matter was briefly discussed at the last meeting and appeared to get little or no traction. However, no actual vote was taken on the suggestion to delete name and address from the Rule 807 notice provision. The matter is raised again here, should the Committee think it worthy of discussion.

E. Text of a possible amendment to Rule 807 and Committee Note.

What follows is possible text and Committee Note for an amendment to the Rule 807 notice provision, that would accomplish the following: 1) add a good cause exception along the lines of the exception set forth in Rule 404(b); and 2) add the specific requirement that the proponent give notice of the intent to invoke Rule 807. There is an additional bracketed addition to the Committee Note explaining a deletion of the requirement that the declarant's address be disclosed, in case the Committee is interested in making such a proposal. (The textual change would be easy --- just deleting "and address" from the Rule).

Amendment to Text: [And thanks to Joe Kimble for the style suggestions.]

Rule 807. Residual Exception

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(b) Notice. The statement is admissible only if~~, before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of the intent to offer the statement under this exception, ~~and its particulars, including the declarant's name [and address],~~ so that the party has a fair opportunity to meet it. The notice must:

(1) describe the statement's particulars, including the declarant's name and address; and

(2) be provided before trial --- or during trial if the court, for good cause, excuses lack of pretrial notice.

COMMITTEE NOTE

The pretrial notice provision has been amended to provide for a good cause exception --- the same exception found in Rule 404(b). Most courts have applied a good cause exception even though it was not specifically provided in the original Rule, while some courts have not. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent must then resort to residual hearsay.

The Rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent has time to prepare for the particularized kind of argument that is necessary to counter hearsay offered under the residual exception.

The amendment also clarifies that the proponent must provide notice not only of intent to use the evidence, but of intent to invoke the residual exception. Many courts have required such a notice under the original rule, though some have not. The Committee has determined that notice of intent to invoke Rule 807 is necessary, because the Rule requires a case-specific analysis for which advance preparation is critical. Mere notice of intent to offer an out-of-court statement may well fail to prepare the opponent for an argument about the applicability of Rule 807, because the Rule could potentially cover any kind of statement made under varying sets of circumstances. Without notice of intent to invoke the residual exception, an opponent on the one hand may be unfairly surprised, and on the other hand may spend unnecessary time preparing for an argument that the proponent never intends to make. Moreover, notice of intent to invoke encourages a careful and considered use of the residual exception, in accordance with Congress's original intent that the exception be cautiously applied.

[Finally, the requirement of disclosing a declarant's address is deleted because in most cases of proffered residual hearsay, the declarant must be unavailable in order for the "more probative" requirement of the rule to be met. Disclosing the address of an unavailable declarant would seem to be an unnecessary requirement; and more broadly, the disclosure requirement is also inconsistent with the other notice provisions in the Evidence Rules.]

III. Written Notice Requirement

As noted above, Rules 609(b) and 902(11) require that notice be in writing, while Rule 404(b) and 807 do not. At the last meeting the Committee resolved to give further consideration to a uniform approach to the written notice requirement, as applied to these four rules. That would involve either adding a written notice requirement to Rules 404(b) and 807, or deleting the written notice requirement in Rules 609(b) and 902(11). The Reporter's memorandum for the last meeting provided this discussion of written notice requirements:

> Rules 609(b) and 902(11) require "written" notice, but as is seen above, in the only reported case on the subject, the court excused the written notice requirement when it was clear that the opponent was actually notified. So query the value of the requirement. Moreover, the term "written" is somewhat problematic in light of electronic case filing, service, etc. --- although the problem is not insurmountable because Rule 101(b)(6) provides that any reference to written material includes electronically stored information.
>
> A strong argument can be made that these references to written notice should be deleted in favor of uniformity. First, there is no particular reason why written notice should be required under these two rules and not any others. That is, the writing requirement should be applied either uniformly or not at all. And "not at all" sounds appropriate in light of the fact that the failure to provide written notice is likely to be excused so long as the opponent has a fair opportunity to meet the evidence. So adding the requirement just becomes another procedural detail for the parties to argue about, usually for no real effect. Of course it is for the Committee to determine, as a policy matter, whether a writing requirement is important enough to be included in a rule. But if it is found important enough, it should be included in all the notice rules.

Despite the Reporter's apparent enthusiasm for deleting the requirement for written notice, the discussion at the last meeting indicated that some Committee members had reservations. The minutes describe the discussion:

> A few Committee members objected to the proposal that the requirement of written notice should be deleted from the two rules that impose that requirement --- Rules 609(b) and 902(11). They noted that the requirement of a writing was a way of avoiding disputes as to whether notice was actually given. The Reporter responded that in those cases in which the opponent received actual notice but not written notice, the courts have excused the writing requirement anyway, so it is questionable whether having a requirement of written notice in a rule does anything more than impose litigation costs and a trap for the unwary. In any case, the Committee determined that the question that should be considered is whether written notice should be required in all the notice rules or none, and that this was a difficult question that required further consideration.

Given the fact that the Committee has abandoned any attempt at uniformity across *all* of the notice provisions, the question is whether it makes any sense to make the rules on written notice uniform across only four rules --- 404(b), 609(b), 807 and 902(11). Because Rules 609(b) and 902(11) are used so infrequently, query whether it is worth the effort at this juncture to be

concerned about uniformity on this one point of a writing requirement, especially when disuniformity will still exist within these four rules as to other matters.

Assuming that it is still worth it to promote uniformity on the writing requirement in the four rules, the question then is which rule to choose. Do you add the writing requirement to Rules 404(b) and 807? Or do you delete it from Rules 609(b) and 902(11)?

There appears to be no clamor for adding a writing requirement to Rules 404(b) and Rule 807: nothing in the case law, no problem found in any cases on whether notice was provided or not, and no suggestions in the literature that a writing requirement is necessary for these Rules. One possible advantage of an amendment, though, is that the changes would be made to rules that would already be the subject of an amendment. So it wouldn't be a situation of imposing the costs of amendment solely to add a provision that seems relatively unimportant. On the other hand, what do you say in the Committee Note? That the change promotes uniformity with two other rules, but not any of the others? That a writing is a good way to avoid disputes about whether notice is actually given (which, if that is so, why not add it to every one of the notice provisions)? The Committee Note would be a challenge if the writing requirement is extended to Rules 404(b) and 807.

The alternative of deleting the writing requirement from Rule 609(b) and 902(11) has costs and benefits as well. One benefit of deleting the writing requirement is that there actually *would* be uniformity across *all* the rules with respect to written notice --- no writing would be required in any of the notice rules. For another, the writing requirement *has* presented a problematic technicality in at least one case involving Rule 902(11). *See United States v. Komasa*, 767 F.3d 151 (2d Cir. 2014) (trial court did not abuse discretion in admitting the records based on a finding that the defendants had *actual* notice and a full opportunity to challenge the authenticating certificates; the court noted, however, "that parties fail to comply with the Rule 902(11)'s written notice requirements at their own risk" and observed that "a single sentence added to the cover letter forwarding the certifications and documents [to the defendants] would have complied with the rule.").

Textual implementation of an amendment to the writing requirement is easy. Extending it to Rules 404(b) and 807 simply requires adding "written" before notice. So, for 807, the rule would read:

> The statement is admissible only if~~, before the trial or hearing,~~ the proponent gives an adverse party reasonable written notice of the intent to offer the statement * * *

And Rule 404(b) would read:

> ~~On request by a defendant in~~ In a criminal case, the prosecutor must:
>
> (A) provide reasonable written notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and * * *

As stated above, however, the Committee Note to explain and justify this change would be challenging.

Similarly, deleting the requirement of written notice in Rules 609(b) and 902(11) would be textually easy --- simply delete the word "written":

For Rule 609(b):

> (2) the proponent gives an adverse party reasonable ~~written~~ notice of the intent to use it so that the party has a fair opportunity to contest its use.

For Rule 902(11):

> **(11)** ***Certified Domestic Records of a Regularly Conducted Activity.*** The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)–(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable ~~written~~ notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

The Committee Note for an amendment deleting the writing requirements in Rules 609(b) and 902(11) could read as follows:

> The requirement of a written notice has been deleted. Experience has indicated that parties ordinarily provide written notice for rules that do not require it. See, e.g., Rule 404(b). Moreover, the textual requirement of a writing creates the risk of a technical violation in cases where the opponent clearly has actual notice --- often leading the court to dispense with the technicality in any case.

IV. Amending Rules 609(b) and 902(11) to provide for a good cause exception.

The last question to be considered on the notice provisions is whether to promote four-rule uniformity by amending Rules 609(b) and 902(11) to provide that notice must be provided before trial, but that pretrial notice can be excused for good cause --- i.e., to follow the same approach currently taken in Rule 404(b) (and Rule 807 under the proposal discussed above). The reason the focus is on these two rules only is that at the last meeting the Committee determined that the other rules with notice provisions (Rules 412-15) should be off limits for any uniformity project---Rule 412 because it requires a unique procedure, and Rules 413-15 because they were directly enacted by Congress.

It can be argued that the benefits of uniformity over only four of the eight notice rules are attenuated. And as with the writing requirement discussed above, it can be argued that Rules 609(b) and 902(11) are so rarely invoked that it is just best to leave well enough alone. Moreover, once again, the Committee Note would be hard to draft, because the notice provisions in those two rules (with the exception of the writing requirement) seem to be working fine. On the other hand, adding good cause requirements *would* provide uniformity --- even with Rules 412-15, because those rules each contain a good cause requirement.

If the Committee wishes to change the structure of the notice provisions in Rules 609(b) and 902(11) to follow the Rule 404(b) template, then the changes would look like this (with, in addition, the requirement of written notice deleted):

Rule 609. Impeachment by Evidence of a Criminal Conviction

*** * ***

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable ~~written~~ notice of the intent to ~~use~~ offer the evidence ~~it~~ so that the party has a fair opportunity to ~~contest its use~~ meet it. The proponent must provide notice before trial --- or during trial if the court, for good cause, excuses lack of pretrial notice.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

*** * ***

(11) ***Certified Domestic Records of a Regularly Conducted Activity.*** The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)–(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. ~~Before the trial or hearing, t~~ The proponent must give an adverse party reasonable ~~written~~ notice of the intent to offer the record—and must make the record and certification available for inspection~~—s~~o that the party has a fair opportunity to challenge them. The proponent must provide notice before trial --- or during trial if the court, for good cause, excuses lack of pretrial notice.

The Committee Note for this change could look like this:

The rule has been amended to add a good cause exception, providing uniformity with other notice rules. See, e.g., Rule 404(b).

V. Reprise: Text and Committee Notes to Rules 404(b) and 807

For ease of reference, what follows is possible language for amendments to the Rule 404(b) and 807 notice provisions, which were set forth in earlier parts of this memo.

The Rule 404(b) amendments are: 1) deleting the requirement of a defendant-request; and 2) adding a "particulars" requirement, along with examples of particulars provided in Rules 413-415.

The Rule 807 amendments are: 1) adding a good cause exception; 2) adding a requirement that the proponent provide notice of intent to invoke the exception; and 3) possibly deleting the requirement of disclosure of a declarant's address.

Obviously, the Committee can pick and choose here. Each of the additions are free-standing.

A. Rule 404(b):

Rule 404. Character Evidence; Crimes or Other Acts

*** * ***

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in~~ In a criminal case, the prosecutor must:

(A) provide reasonable notice of the ~~general nature~~ particulars of any such evidence ---including witnesses' statements or a summary of the expected testimony --- that the prosecutor intends to offer at trial; and

(B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

Committee Note

The requirement of a request before notice must be provided has been dropped. That requirement is not found in any other notice provision in the Federal Rules of Evidence, and it has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, the benefit to the government of the requirement is minimal, because many local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is inevitably provided anyway when the government moves *in limine* for an advance ruling on admissibility of Rule 404(b) evidence. The request requirement has thus become a technicality that has outlived any usefulness it may once have had.

The notice provision has also been amended to add a "particularity" requirement. *See* Rules 413-415, 807. The burden of providing some particulars about the evidence the prosecutor seeks to admit is not an onerous one, and providing such particulars can guard against the risk of unfair surprise that is the basis of the notice requirement.

B. Rule 807

Rule 807. Residual Exception

*** * ***

(b) Notice. The statement is admissible only if~~, before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of the intent to offer the statement under this exception, ~~and its particulars, including the declarant's name [and address],~~ so that the party has a fair opportunity to meet it. The notice must:

(1) describe the statement's particulars, including the declarant's name and address; and

(2) be provided before trial --- or during trial if the court, for good cause, excuses lack of pretrial notice.

COMMITTEE NOTE

The pretrial notice provision has been amended to provide for a good cause exception --- the same exception found in Rule 404(b). Most courts have applied a good cause exception even though it was not specifically provided in the original Rule, while some courts have not. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent must then resort to residual hearsay.

The Rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent has time to prepare for the particularized kind of argument that is necessary to counter hearsay offered under the residual exception.

The amendment also clarifies that the proponent must provide notice not only of intent to use the evidence, but of intent to invoke the residual exception. Many courts have required such a notice under the original rule, though some have not. The Committee has determined that notice of intent to invoke Rule 807 is necessary, because the Rule requires a case-specific analysis for which advance preparation is critical. Mere notice of intent to offer an out-of-court statement may well fail to prepare the opponent for an argument about the applicability of Rule 807, because the Rule could potentially cover any kind of statement made under varying sets of circumstances. Without notice of intent to invoke the residual exception, an opponent on the one hand may be unfairly surprised, and on the other hand may spend unnecessary time preparing for an argument that the proponent never intends to make. Moreover, notice of intent to invoke encourages a careful and considered use of the residual exception, in accordance with Congress's original intent that the exception be cautiously applied.

[Finally, the requirement of disclosing a declarant's address is deleted because in most cases of proffered residual hearsay, the declarant must be unavailable in order for the "more probative" requirement of the rule to be met. Disclosing the address of an unavailable declarant would seem to be an unnecessary requirement; and more broadly, the disclosure requirement is also inconsistent with the other notice provisions in the Evidence Rules.]

TAB 6

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Daniel J. Capra Phone: 212-636-6855

Philip Reed Professor of Law e-mail: dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Best Practices Manual for Authentication on Electronic Evidence
Date: September 10, 2015

The Committee has determined that it will not at this time proceed with a project to propose amendments to Rules 901 and 902 to govern authentication of all forms of electronic evidence. The Committee reasoned that providing amendments particularized to electronic communications would create a problematic overlap with the existing rules under which such information is currently authenticated. The Committee also noted that any attempt to provide detailed authenticity provisions in a rule could end up with the rule becoming outmoded by technological developments.

But while the Committee decided not to propose amendments, it unanimously supported a project that would end with the publication of a "best practices" manual on authenticating electronic evidence.

This is a long-term project. The goal is to finish one or two best practices provisions for each Evidence Rules Committee meeting. Each chapter will cover a particular type of electronic communication. There will also be a separate chapter on judicial notice, and an Introduction that will set forth the general standards provided by Evidence Rules 104(a) and (b).

At this meeting, we provide for the Committee's review a draft of the best practices for authenticating social media evidence. We also include revised drafts of the previously distributed best practices for authenticating emails and texts. We welcome comments and suggestions.

I want to acknowledge the work of Rahul Hari, my research assistant, who did the first draft of these best practices chapters. He did a great job.

SOCIAL MEDIA AUTHENTICATION

I. Relevant Rules

Rule 901(b)(1) – *Testimony of a Witness with Knowledge*

Testimony that an item is what it is claimed to be.

Rule 901(b)(3) – *Comparison by an Expert Witness or the Trier of Fact*

A comparison with an authenticated specimen by an expert witness or the trier of fact.

Rule 901(b)(4) – *Distinctive Characteristics and the Like*

The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

Rule 901(b)(9) – *Evidence About a Process or System*

Evidence describing a process or system and showing that it produces an accurate result.

Rule 902(12) – *Certified Foreign Records of a Regularly Conducted Activity*

In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Rule 104(a)-(b) – *Preliminary Questions*

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

Rule 201 – *Judicial Notice of Adjudicative Facts*[1]

(a) *Scope*. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) *Kinds of Facts That May Be Judicially Noticed*. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) *Timing*. The court may take judicial notice at any stage of the proceeding.

(e) *Opportunity to Be Heard*. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) *Instructing the Jury*. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

---

[1] See, *infra*, "JUDICIAL NOTICE OF ELECTRONIC EVIDENCE."

II. Illustrations

Rule 901(b)(1) – Witness with Personal Knowledge

1) The author of the post/message in question testifies to its authenticity.

Cf. *Anderson v. United States*, 2014 U.S. Dist. LEXIS 166799 (N.D. Ga. Dec, 2, 2014).

> Defendant-witness acknowledged that the documents in question contained emails he sent to an undercover agent, and the emails were sent from his email address. This was sufficient authentication.

Cf. *Citizens Bank & Trust v. LPS Nat'l Flood, LLC*, 2014 U.S. Dist. LEXIS 134933 (N.D. Ala. Sept. 25, 2014).

> Witness's personal knowledge of email contents and her affidavit authenticating emails as the ones she sent were sufficient for admissibility.

2) A witness testifies that s/he saw the post/message in question being authored by the declarant.

Smith v. State, 136 So. 3d 424 (Miss. 2014) (interpreting Miss. R. Evid. 901[2]).

> Although the court ultimately ruled that three Facebook messages (two sent from the defendant and one received by the defendant) had not been properly authenticated, the court did offer examples of what evidence would have been sufficient to authenticate the pieces of evidence. Among them was whether any witnesses had seen the purported author drafting the posts or messages in question.

United States v. Fluker, 698 F.3d 988 (7th Cir. 2012).

> The court, in outlining the variety of manners in which an email could be authenticated, stated that testimony from a witness who purports to have seen the declarant create the email in question was sufficient for authenticity under Rule 901(b)(1). Because such a witness was unavailable, the court turned to

[2] Any reference to state rules of authentication, hereafter, are facially identical to Fed. R. Evid. 901 unless otherwise indicated.

circumstantial evidence under Rule 901(b)(4).

Rule 901(b)(3) – Authentication by Jury Comparison

1) The authenticity of a post/message can be determined by the trier of fact by comparing the post/message in question with messages already authenticated and in evidence.

Cf. *United States v. Safavian*, 435 F. Supp. 2d 36 (D.D.C. 2006).
"Those emails that are not clearly identifiable on their own can be authenticated under Rule 901(b)(3), which states that evidence may be authenticated by the trier of fact with 'specimens which have been authenticated' – in this case those emails that have been independently authenticated . . ." Id. at 40 (internal citations omitted).

Rule 901(b)(4) – Circumstantial Evidence to Determine Authenticity

As described in the chapters on emails and texts, *supra*, Rule 901(b)(4), because of its versatility, is the rule employed most often in the authentication of electronic data.[3] Outlined are factors that can, alone or in conjunction (depending on the case), establish authenticity.

Circumstantial Evidence Authenticating a Text Message Purportedly Sent by a Particular Person[4]

1) The inclusion of some or all of the following in a social media message or post can be sufficient to identify the author of the message or post in question:

   a) the declarant's known social media profile or account;
   b) the declarant's name;
   c) the declarant's nickname;
   d) the declarant's initials;
   e) the declarant's screen name.

United States v. Brinson, 772 F.3d 1314 (10th Cir. 2014).

Facebook messages sent from the account of "Twinchee Vanto" were deemed properly authenticated and tied to the defendant, Tarran Brinson, where the account was linked to the email tarranb@yahoo.com, "Twinchee Vanto" identified himself as "Tarran," and two witnesses identified "Twinchee Vanto" as

[3] *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 546 (D. Md. 2007).

[4] *See generally*, Honorable Paul W. Grimm, *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 433 (2013).

the defendant's online persona.

United States v. Tank, 200 F.3d 627 (9th Cir. 2000).[5]

A chat room log entered into evidence identified one of the participants by the screen name "Cessna." The identification by co-conspirators of the defendant as "Cessna" and the defendant's presence at a meeting arranged with "Cessna" was considered sufficient foundation to admit the chat logs into evidence.

Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012) (interpreting Tex. Evid. R. 901).

The reviewing court held that there was sufficient evidence to authenticate a defendant's MySpace posts. Relevant circumstances included the facts that the MySpace accounts were linked either to the defendant's name or his moniker, "SMILEY," and photographs associated with the accounts were of the defendant. The court stated that any proposed alternate scenario where the defendant was the victim of an ongoing conspiracy to create MySpace accounts in his name was a matter that went to weight.

Sublet v. State, 442 Md. 632 (2015) (interpreting Md. R. 5-901).

Because the prosecutors presented evidence, *inter alia*, that the defendant's name appeared on a Twitter account, the court believed there was sufficient evidence to admit tweets from that account under the understanding they had been authored by the defendant. In coming to its ruling, the court also considered the content of the posts in question and photographs that had been shared by the account.

2) The content of the social media post/message may be sufficient to establish authenticity, either independently or in addition to other circumstances. Relevant content-related factors for content include the following:

   a) A writing style similar or identical to the purported author's manner of writing.

Campbell v. State, 382 S.W.3d 545 (Tex. App. 2012) (interpreting Tex. Evid. R. 901).

The court held a Facebook message properly authenticated when, *inter alia*, the writing pattern in the message matched the speaking pattern of the appellant, a native of Jamaica.

Judge v. Randell, 2014 Cal. App. LEXIS 4767 (Cal. Ct. App. July 7, 2014).

Plaintiff Judge brought suit against Defendant Randell for defamatory statements made on online review and social media sites. Despite the fact that the online persona of the reviewer bore a different name than the defendant, the court found that the posts had been properly authenticated. The reviewer's complaints were

[5] *See also United States v. Simpson*, 152 F.3d 1241 (10th Cir. 1998) (chatroom log where user "Stavron" identified himself as Defendant and shared his email address was used to authenticate subsequent emails from said email address).

similar in content and tone to complaints made by the defendant in emails bearing her name. The judge additionally considered statements made by the defendant that the posts had come from her home IP address (despite her denial of having written them).

The court also determined whether the authenticity of an email purportedly authored by the defendant had been established. Where the email in question included the phrase "Trust me on this one" and emails independently authenticated as having been authored by the defendant included the phrase "Trust me on this one," the court found sufficient circumstantial evidence of authenticity.

b) Reference to facts only the purported author or a small subset of individuals including the purported author would know.

Tienda, supra 358 S.W.3d at 645.

The defendant was charged with assault with a deadly weapon. During his trial, prosecutors offered MySpace private messages where an individual using the defendant's account plotted the assault with a co-conspirator. The court ruled that the messages were sufficiently authenticated where the contents of the message made references to the defendant's street gang by name, reference to an ankle monitor the defendant wore for a year, and mention of the funeral of the defendant's friend (including the music played at the funeral).

Campbell, supra, 382 S.W.3d at 550-51.

In Facebook messages sent from an account bearing the defendant's name, the poster explicitly referenced the pending charges against the defendant, something the court believed few individuals knew at the time the messages were sent. Combined with the messages' consistency with the defendant's manner of speaking and writing, the court found that the evidence was sufficiently identified as having been authored by the defendant.

c) Reference to facts uniquely tied to the purported author – *e.g.*, contact information for relatives or loved ones; photos of declarant or items of importance to declarant (car, pet); declarant's personal information.

Cf. United States v. Benford, 2015 U.S. Dist. LEXIS 17046 (W.D. Okla. Feb. 12, 2015).

Text messages identifying contact information for the purported author's brother and girlfriend were used to identify the author of the messages.

d) A witness testifies that the purported author told him to expect a message prior to its arrival.

People v. Harris, 2014 Cal. App. LEXIS 7086 (Cal. Ct. App. Oct. 1, 2014).

Upon questioning the defendant's girlfriend regarding the origin of several electronic messages purported to be sent by the defendant, she admitted that, prior to her receipt of the messages, she was told by the defendant to expect messages from him via his account. These circumstances were held sufficient for authentication. Id. at 35-36.

Circumstantial Evidence Authenticating a Text Message Purportedly Received by a Particular Person

1) A reply to the post/message was received by the sender from the account of the purported recipient.

Cf. State v. Womack, 2014 Wash. App. LEXIS 2566 (Wash. Ct. App. Oct. 21, 2014) (interpreting Wash. ER 901).

To determine whether the Defendant received a series of emails the court considered the author's testimony that she had sent the emails in question to the Defendant's email address.

2) The subsequent conduct of the recipient reflects his or her knowledge of the contents of the sent message.

Cf. People v. Allen, 2014 Cal. App.. LEXIS 7776 (Cal. Ct. App. Oct. 29, 2014).

The defendant challenged the trial court's admission of text messages received on a phone that indisputably belonged to him. The court decided that the text message had been properly admitted because when questioned about the messages received on the phone, rather than deny having received or read them, the defendant attempted to explain the meaning of the contents.

3) Subsequent communications from the recipient reflects his or her knowledge of the contents of the sent post/messages.

4) The post/message was received and accessed on a device in the possession and control of the alleged recipient

Smith, supra, at 136 So. 3d 433.

When finding three Facebook messages to be insufficiently authenticated, the court offered examples of what factors would provide sufficient authentication. Among them was whether the messages had been sent or received on the defendant's cellular

device "under circumstances in which it is reasonable to believe" that only the purported sender or recipient had access to the device.

Rule 901(b)(9) – Process or System Evidence

1) Certification by the custodians of websites revealing the manner in which posts are stored and their insusceptibility to alteration may be used to authenticate social media posts or messages.

United States v. Hassan, 742 F.3d 104 (4th Cir. 2014).

The certification by custodians of Facebook and YouTube stating that postings and pages are retained soon after users create them was deemed sufficient for authentication.

Rule 902(11)/(12) – Certifications of Business Records

1) A social media message or post meeting the foundational requirements of a business record under Fed. R. Evid. 803(6) may be self-authenticating under 902(11).

Hassan, supra 742 F.3d at 1134.

"The government presented the certifications of records custodians of Facebook and Google, verifying that the Facebook pages and YouTube videos had been maintained as business records in the course of regularly conducted business activities. According to those certifications, Facebook and Google create and retain such pages and videos when (or soon after) their users post them through use of the Facebook or Google servers."

The court held that the trial court did not err in finding that the Facebook pages and YouTube videos were self-authenticated under Rule 902(11).

EMAIL AUTHENTICATION

I. Relevant Rules

Rule 901(b)(1) – *Testimony of a Witness with Knowledge*

Testimony that an item is what it is claimed to be.

Rule 901(b)(3) – *Comparison by an Expert Witness or the Trier of Fact*

A comparison with an authenticated specimen by an expert witness or the trier of fact.

Rule 901(b)(4) – *Distinctive Characteristics and the Like*

The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

Rule 902(7) – *Trade Inscriptions and the Like*

An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

Rule 902(11) – *Certified Domestic Records of a Regularly Conducted Activity*

The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record – and must make the record and certification available for inspection – so that the party has a fair opportunity to challenge them.

Rule 902(12) – *Certified Foreign Records of a Regularly Conducted Activity*

In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Rule 104(a)-(b) – *Preliminary Questions*

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

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1) The author of the email in question testifies to its authenticity.

Anderson v. United States, 2014 U.S. Dist. LEXIS 166799 (N.D. Ga. Dec, 2, 2014).

> Defendant-witness acknowledged that the documents in question contained emails he sent to an undercover agent, and the emails were sent from his email address. This was sufficient authentication.

Cf. *Citizens Bank & Trust v. LPS Nat'l Flood, LLC*, 2014 U.S. Dist. LEXIS 134933 (N.D. Ala. Sept. 25, 2014).

> Witness's personal knowledge of email contents and her affidavit authenticating emails as the ones she sent were sufficient for admissibility.

State v. Womack, 2014 Wash. App. LEXIS 2566 (Wash. Ct. App. Oct. 21, 2014) (interpreting Wash. ER 901[6]).

> Witness identified an email as one she sent to Defendant Womack's email address. The court found that "AW [Witness] sufficiently authenticated [her] emails . . . ." Id. at 50.

2) A witness testifies that s/he saw the email in question being authored by the declarant.

United States v. Fluker, 698 F.3d 988 (7th Cir. 2012).

> The court, in outlining the variety of manners in which an email could be authenticated, stated that testimony from a witness who purports to have seen the declarant create the email in question was sufficient for authenticity under Rule 901(b)(1). Because such a witness was unavailable, the court turned to circumstantial evidence under Rule 901(b)(4).

3) The custodian of records of a regularly conducted activity certifies, in accordance with Fed. R. Evid. 902(11) or (12), that an email satisfies the criteria of Fed. R. Evid. 803(6).

[6] Any reference to state rules of authentication, hereafter, are facially identical to Fed. R. Evid. 901 unless otherwise indicated.

Rule 901(b)(3) – Authentication by Jury Comparison

1) The authenticity of an email can be determined by the trier of fact by comparing the email in question with emails already authenticated and in evidence.

United States v. Safavian, 435 F. Supp.2d 36, 40 (D.D.C. 2006).

> "Those emails that are not clearly identifiable on their own can be authenticated under Rule 901(b)(3), which states that evidence may be authenticated by the trier of fact with 'specimens which have been authenticated' – in this case those emails that have been independently authenticated . . ." (internal citations omitted).

Rule 901(b)(4) – Circumstantial Evidence to Determine Authenticity

Applying Rule 901(b)(4) requires consideration of the "totality of circumstantial evidence."[7] While any one factor *may* be insufficient to determine admissibility, when weighed together, authenticity may be established. "This rule is one of the most frequently used to authenticate e-mail and other electronic records."[8] Outlined are factors that can, alone or in conjunction (depending on the case), establish authenticity.

Circumstantial Evidence Authenticating An Email Purportedly Sent by a Particular Person

1) The inclusion of some or all of the following in an email can be sufficient to authenticate the email as having been sent by a particular person:
   a) the declarant's known email address,
   b) the declarant's electronic signature,
   c) the declarant's name,
   d) the declarant's nickname,
   e) the declarant's screen name,
   f) the declarant's initials,
   g) the declarant's customary use of emoji or emoticons,
   h) the declarant's use of the same email address elsewhere.

United States v. Siddiqui, 235 F.3d 1318 (11th Cir. 2000).

> An email identified as originating from the defendant's email address and that automatically included the defendant's address when the reply function was selected

[7] *United States v. Henry*, 164 F.3d 1304, 1305 (10th Cir. 1999).

[8] *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 546 (D. Md. 2007).

was considered sufficiently authenticated.

United States v. Tank, 200 F.3d 627 (9th Cir. 2000).[9]

A chat room log entered into evidence identified one of the participants by the screen name "Cessna." The identification by co-conspirators of the defendant as "Cessna" and the defendant's presence at a meeting arranged with "Cessna" was considered sufficient foundation to admit the chat logs into evidence.

United States v. Fluker, 698 F.3d 988, 999-1000 (7th Cir. 2012).

The court found emails sent from a "More Than Enough, LLC" (MTE) email address were sufficiently authenticated when the purported author was a MTE board member and "[i]t would be reasonable for one to assume that an MTE Board member would possess an email address bearing the MTE acronym." Id. 999-1000.

Culp v. State, 2014 Ala. Crim. App. LEXIS 102 (Ala. Crim. App. Nov. 21, 2014).

"Hand [the recipient] testified that Culp [the sender] had sent the e-mails to her and that she had assisted him in setting up the e-mail account from which the e-mails had been sent. Hand said each e-mail sent from Culp's account contained his photograph and a screen name that he used. Many of the e-mails concluded with 'rnc,' which are Culp's initials."

2) The content of the email suggests the purported author created the document, including, but not limited to:

a) A writing style similar or identical to the purported author's manner of writing.

Judge v. Randell, 2014 Cal. App. LEXIS 4767 (Cal. Ct. App. July 7, 2014).

Where the email in question included the phrase "Trust me on this one" and emails independently authenticated as from the defendant included the phrase "Trust me on this one," the court found sufficient circumstantial evidence for admissibility.

Womack, supra, 2014 Wash. App. LEXIS 2566, at *50.

A witness identified the contents of an email as "consistent with [the defendant's] writing style. . . ." The court found the foundational requirements for the email

[9] *See also United States v. Simpson*, 152 F.3d 1241 (10th Cir. 1998) (chatroom log where user "Stavron" identified himself as Defendant and shared his email address was used to authenticate subsequent emails from that email address); *Safavian*, 435 F. Supp. 2d 36 (email messages held properly authenticated when containing distinctive characteristics, including email addresses and name of the person connected to the address).

were satisfied.

b) Reference to facts only the purported author or a small subset of individuals including the purported author would know

Pavlovich v. State, 6 N.E.3d 969 (Ind. Ct. App. 2014) (interpreting Ind. R. Evid. 901).[10]

The court held that emails were sufficiently authenticated as written by the defendant where they included detailed knowledge of previous in-person conversations with the victim about family, age, and her escorting business only discussed between the two.

In the Interest of F.P., 2005 PA Super 220, 878 A.2d 91.

When the threats and accusations made by the defendant in a series of instant messages mirrored those he had made to the victim in person, there was sufficient evidence that the he had sent the messages.

c) Reference to facts uniquely tied to declarant — *e.g.*, contact information for relatives or loved ones; photos of declarant or items of importance to declarant (car, pet); declarant's personal information, such as declarant's cell phone number

Commonwealth v. Amaral, 78 Mass. App. Ct. 671, 674-75, 941 N.E.2d 1143, 1147 (2011).

"In other e-mails, Jeremy provided his telephone number and photograph. When the trooper called that number, the defendant immediately answered his telephone, and the photograph was a picture of the defendant. These actions served to confirm that the author of the e-mails and the defendant were one and the same."

Cf. United States v. Ellis, 2013 WL 2285457 (E.D. Mich. May 23, 2013) (text messages tied to declarant because they contain monikers that sufficiently identified the defendant)

3) A witness testifies that the author told him to expect an email prior to its arrival.

People v. Harris, 2014 Cal. App. LEXIS 7086 (Cal. Ct. App. Oct. 1, 2014).

[10] *See also Siddiqui, supra,* 235 F.3d at 1322 (messages that referred to facts only the defendant was familiar with were found properly authenticated).

Upon questioning the defendant's girlfriend regarding the origin of several electronic messages purported to be sent by the defendant, she admitted that, prior to her receipt of those messages, she was told by the defendant to expect messages from him via his account. These circumstances were held sufficient for authentication. Id. at 35-36.

State v. Ruiz, 2014 Mich. App. LEXIS 855 (Mich. Ct. App. May 15, 2014).

A witness testified to knowing the defendant authored an email because the defendant told him to expect an email relating to arson – the contents of the received document. This was sufficient to authenticate the email.

4) The purported sender acts in accordance with, and in response to, an email exchange with the witness:

Cook v. State, 2015 Tex. App. LEXIS 2649 (Tex. Ct. App. Mar. 20, 2015).

A witness testified that she sent to, and received from, the defendant text messages to arrange a meeting and a drug buy; that she sent texts asking him when and where to meet; that she received responsive text messages stating his location; and that she met the defendant at that location. This sufficiently authenticated the texts.

5) An email's hash values may be used to authenticate.

A hash value is "[a] unique numerical identifier that can be assigned to a file, a group of files, or a portion of a file, based on a standard mathematical algorithm applied to the characteristics of the data set. The most commonly used algorithms, known as MD5 and SHA, will generate numerical values so distinctive that the chance that any two data sets will have the same hash value, no matter how similar they appear, is less than one in one billion. 'Hashing' is used to guarantee the authenticity of an original data set and can be used as a digital equivalent of the Bates stamp used in paper document production."[11]

Lorraine v. Markel American Ins. Co, 241 F.R.D. 534, 547 (D.Md. 2007).

The court explained that "[h]ash values can be inserted into original electronic documents when they are created to provide them with distinctive characteristics that will permit their authentication under Rule 901(b)(4)."

[11] Federal Judicial Center, Managing Discovery of Electronic Information: A Pocket Guide for Judges, Federal Judicial Center, 2007 at 24.

6) A forensic witness testifies that an email issued from a particular device at a particular time.

> "Metadata, commonly described as data about data is defined as information describing the history, tracking, or management of an electronic document."[12]

Lorraine, supra, 241 F.R.D. at 547-48:

> Since an electronic message's metadata (including an email's metadata) can reveal when, where, and by whom the message was authored, the court found it could be used to successfully authenticate a document under 901(b)(4).

Donati v. State, 215 Md. App. 686, 688 (Md. Ct. Spec. App. 2014).

> "Circumstantial evidence that has been used to authenticate e-mail messages includes forensic evidence connecting a computer to an internet address for the computer from which the e-mails were sent."

United States v. Gal, 2015 U.S. App. LEXIS 4999 (9th Cir. Mar. 27, 2015).

> Custodian of records from email service (Gmail) certified that emails were sent from or received by three email addresses, coupled with (i)testimony from recipients that they received the emails in question and (ii) the fact that the name of purported sender was reflected on each of the emails, was sufficient for authentication.

7) The declarant orally repeats the contents soon after the email is sent.

> *Donati v. State, supra,* 215 Md.App. at 689:
>
> "Circumstantial evidence that has been used to authenticate e-mail messages includes ... [that] the defendant called soon after the receipt of the e-mail, making the same requests that were made in the e-mail."

8) The declarant discusses the contents of the email with a third party.

> *Donati v. State, supra,* 215 MD.App. at 689 (author elsewhere uses same email address, repeats the content, or discusses the contents of the email with a third party)
>
> *Meyer v. Callery Conway Mars HV, Inc.*, 2015 U.S. Dist. LEXIS 937 (W.D. Pa. Jan. 5, 2015) (author discusses the contents of the email with a third party)

[12] Williams v. Sprint/United Mgmt. Comp., 230 F.R.D. 640, 646 (D. Kan. 2005) (internal cite omitted).

9) The declarant leaves a voicemail with substantially the same content.

> *Commonwealth v. Czubinski*, 2015 Mass. App. Unpub. LEXIS 191 (Mass. Ct. App. Mar. 16, 2015) (author leaves voicemail with substantially the same content)

10) The declarant produces in discovery an email purportedly authored by the declarant and the email is offered against the declarant.

> *AT Engine Controls Ltd. v. Goodrich Pump & Engine Control Sys., Inc.*, 2014 U.S. Dist. LEXIS 174535 (D. Conn. Dec. 18, 2014) (authentication by production in discovery; collecting cases).
>
> *Nola Fine Art, Inc. v. Ducks Unlimited, Inc.*, 2015 U.S. Dist. LEXIS 17450 (E.D. La. Feb. 12, 2015) ("[Defendant] produced the email to plaintiffs in discovery and therefore cannot seriously dispute the email's authenticity.").
>
> *Wells v. Xpedx*, 2007 U.S. Dist. LEXIS 67000 (M.D. Fla. Sept. 11, 2007) ("Documents produced during discovery are deemed authentic when offered by a party opponent").
>
> *Sklar v. Clough*, 2007 U.S. Dist. LEXIS 49248 (N.D. Ga. July 6, 2007) ("The e-mails in question were produced by Defendants during the discovery process. Such documents are deemed authentic when offered by a party opponent").

11) An adversary produces in discovery a third party's email received by the producing party in the ordinary course of business and the email is offered against the adversary.

> *Broadspring, Inc. v. Congoo, LLC*, 2014 U.S. Dist. LEXIS 177838 (S.D.N.Y. Dec. 29, 2014))
>
> > Third party emails sent to a party in the ordinary course of business and produced by the party in litigation were sufficiently authenticated by the act of production when offered by an opponent, but hearsay and other admissibility objections as to the third parties' statements must separately be satisfied.

Circumstantial Evidence Authenticating An Email Purportedly Received by a Particular Person

1) A reply to the email was received by the sender from the email address of the purported recipient.

Womack, supra, 2014 Wash. App. LEXIS 2566 at *49.

> To determine whether the defendant received a series of emails the court considered the author's testimony that she had sent the emails in question to the defendant's email address.

2) The subsequent conduct of the recipient reflects his or her knowledge of the contents of the sent email.

Commonwealth v. Amaral, 78 Mass. App. Ct. 671, 674-75, 941 N.E.2d 1143, 1147 (2011).

> "The actions of the defendant himself served to authenticate the e-mails. One e-mail indicated that Jeremy would be at a certain place at a certain time and the defendant appeared at that place and time."

3) Subsequent communications from the recipient reflects his or her knowledge of the contents of the sent email.

Womack, supra, 2014 Wash. App. LEXIS 2566 at *49.

> In determining the defendant's reception of the emails, the court considered, in addition to the author's testimony that she had sent the defendant the emails, his replies (authenticated using evidence described *supra*) referencing the contents of the received emails.

4) The email was received and accessed on a device in the possession and control of the alleged recipient.

People v. Allen, 2014 Cal. App. LEXIS 7776 (Cal. Ct. App. Oct. 29, 2014).

> The court found text messages sufficiently authenticated when it was undisputed that the phone searched by the police belonged to the defendant and the text messages in question were received on his cell-phone. The court also considered additional evidence supporting authenticity, including the fact that the defendant attempted to explain away the contents of the text messages when questioned by officers.

Rule 902(7) – Authentication by Trade Inscriptions

1) The name of a server from which a business email originates, if included in the address, can constitute a self-authenticating trade inscription.

5-901 Weinstein's Federal Evidence § 901.08.

> "If the computer system uses a trade inscription to identify itself in the place of 'employername' in the e-mail address, the entire message may be self-authenticating under Rule 902(7). Indeed, the 'employername' portion of the e-mail address is usually a trade inscription for purposes of Rule 902(7)."

Donati v. State, 2014 Md. App. 215 Md. App. 686, 690 (2014).

> When outlining the general practices of authenticating emails, the court stated: "Under Rule 902(7), labels or tags affixed in the course of business require no authentication. Business e-mails often contain information showing the origin of the transmission and identifying the employer-company. The identification marker alone may be sufficient to authenticate an e-mail under Rule 902(7)." (internal citation omitted).

Rule 902(11)/(12) – Certifications of Business Records

An email meeting the foundational requirements to qualify as a business record under Fed. R. Evid. 803(6) may be self-authenticating under 902(11).

Safavian, supra, 435 F. Supp. 2d at 39.[13]

> The court recognized that emails could be authenticated if they met the foundational requirements of Rule 803(6). The court added, however, that 902(11) could *only* be used as a means to authenticate if the emails in question are being offered under the business records hearsay exception. The government argued at trial that the emails were admissible under separate hearsay exceptions or, alternatively, for non-hearsay purposes.

Indiaweekly.com, LLC v. Nehaflix.com, Inc., 2011 U.S. Dist. LEXIS 60457, at *5 (D. Conn. June 6, 2011).

[13] *See also Rambus, Inc. v. Infineon Techs. AG,* 348 F. Supp. 2d 698, 701 (E.D. Va. 2004) (emails that qualify as business records may be self-authenticating under 902(11)), *rev'd on other grounds*, 523 F.3d 1374; *Lorraine*, 241 F.R.D. 534 (citing *Rambus* for the proposition that emails may self-authenticated).

In outlining when an email could be entered into evidence under the business records exception, the court stated the defendant must establish the foundational predicates "by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11) [or] Rule 902(12) . . . ." (quoting Fed. R. Evid. 803(6)).

TEXT MESSAGE AUTHENTICATION

I. Relevant Rules

Rule 901(b)(1) – *Testimony of a Witness with Knowledge*

Testimony that an item is what it is claimed to be.

Rule 901(b)(3) – *Comparison by an Expert Witness or the Trier of Fact*

A comparison with an authenticated specimen by an expert witness or the trier of fact.

Rule 901(b)(4) – *Distinctive Characteristics and the Like*

The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

Rule 901(b)(9) – *Evidence About a Process or System*

Evidence describing a process or system and showing that it produces an accurate result.

Rule 104(a)-(b) – *Preliminary Questions*

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

II. Illustrations

Rule 901(b)(1) – Witness with Personal Knowledge

1) The author of the text message in question testifies to its authenticity.

Greco v. Velvet Cactus, LLC, 2014 U.S. Dist. LEXIS 87778 (E.D. La. June 27, 2014).

The court found text messages and a witness's email copy of those text messages sufficiently authenticated for the purpose offered because he had either received the relevant messages, or authored them himself.
.

Rule 901(b)(4) – Circumstantial Evidence to Determine Authenticity

As described in EMAIL AUTHENTICATION, *supra*, Rule 901(b)(4) is the rule most frequently used to authenticate electronic records.[14] Outlined are factors that can, alone or in conjunction (depending on the case), establish authenticity.

Circumstantial Evidence Authenticating a Text Message Purportedly Sent by a Particular Person[15]

1) The inclusion of some or all of the following in a text message can be sufficient to authenticate the text message as having been sent by a particular person.

a) the declarant's ownership of the phone or other device from which the text was sent;

b) the declarant's possession of the phone;

c) the declarant's known phone number;

d) the declarant's name;

e) the declarant's nickname;

f) the declarant's initials;

g) the declarant's name as stored on the recipient's phone;

[14] *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 546 (D. Md. 2007).

[15] *See generally*, Honorable Paul W. Grimm, *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 433 (2013).

h) the declarant's customary use of emoji or emoticons;

i) the declarant's use of the same phone number on other occasions

State v. Koch, 334 P.3d 280 (Idaho 2014).

> In conjunction with evidence meeting some of the criteria described below, the court considered the fact that the text message the prosecution was seeking to authenticate originated from a number known to belong to the Defendant, Koch. Id. at 289. The court cautioned that this fact *alone* would have been insufficient to establish admissibility. Id.

United States v. Kilpatrick, 2012 U.S. Dist. LEXIS 110166 (E.D. Mich. Aug. 7, 2012).

> The court outlined a number of distinctive characteristics that sufficiently authenticated the pager and cellphone text messages. Among these factors were the defendants' use of their names (Kilpatrick) and nicknames ("Zeke" or "Zizwe") to sign the messages they sent.

People v. Sissac, 2015 Cal. App. LEXIS 1504 (Cal. Ct. App. Mar. 3, 2015).

> The purported sender possessed the phone before and after the texts were sent; a witness texted that phone number; the witness's cell tied the number to the sender's name; the sender acted consistently with earlier texts; the witness called the number six hours after the texts the purported sender answered. Texts were sufficiently authenticated as from the purported sender.

Jones v. State, 2015 Tex. App. LEXIS 3139 (Tex. Ct. App. Mar. 31, 2015).

> The phone from which the texts were sent was in the defendant's possession on arrest; he answered it while detained and referred to it as his; the name of the third party he claimed owned the phone was named in the contact list while the defendant was listed as "me"; and the phone contains photos of him. Texts were sufficiently authenticates as being sent by the defendant..

Cf. *United States v. Tank*, 200 F.3d 627 (9th Cir. 2000).[16]

> A chatroom log entered into evidence identified a participant by the screen name "Cessna." Other evidence (such as the identification by the charged co-conspirators of the defendant as "Cessna" and the defendant's presence at a meeting arranged with "Cessna") established that "Cessna" was a nickname for the defendant. This was

[16] *See also United States v. Simpson*, 152 F.3d 1241 (10th Cir. 1998) (chatroom log where user "Stavron" identified himself as Defendant and shared his email address was used to authenticate subsequent emails from said email address), *Safavian*, 435 F. Supp. 2d 36 (email messages held properly authenticated when containing distinctive characteristics, including email addresses and name of the person connected to the address).

deemed sufficient for authentication of the chat logs.

3) The content of the text message suggests that the purported declarant authored the text message, including, but not limited to:

a) A writing style similar or identical to the purported author's manner of writing.

Kilpatrick, supra, 2012 U.S. Dist. LEXIS 110166 at *11-12.

> The prosecution sought to authenticate messages from defendants Kwame and Bernard Kilpatrick. Among the circumstantial evidence used to establish authenticity were the distinctive writing style of the two defendants. For example, Defendant Bernard Kilpatrick's messages were authenticated by his regular use of the signature "DON'T SWEAT THE SMALL STUFF AND REMEMBER . . . IT'S ALL SMALL STUFF" and Defendant Kwame Kilpatrick's messages were authenticated by his regular use of the expression "COOL!" and his grammatical and typographical errors.

Grimm, *supra, Authentication of Social Media Evidence,* 36 Am. J. Trial Advoc. 433, 470 (2013).

> In listing circumstantial evidence that would sufficiently authenticate electronic evidence, including text messages, the authors include a declarant's customary use of emoticons. In other words, where an electronic message that includes emoticons consistent with the defendant's known manner of messaging, admissibility may be met. Id. at 470.

b) Reference to facts only the purported author or a small subset of individuals including the purported author would know.

Harsley v. State, 2015 Ind. App. LEXIS 169 (Ind. Ct. App. Feb. 18, 2015):

> Texts authenticated as sent by the purported sender, by testimony from the recipient that she recognized the phone number as that of the sender and that the messages contained information only the two of them knew.

Cf. In the Interest of F.P., 878 A.2d 91 (Pa. Super. 2005).

> When the threats and accusations made in a series of instant messages to the victim mirrored those the defendant had made to the victim in person, the court found there was sufficient evidence that the defendant was the sender of the messages.

c) Reference to facts uniquely tied to the declarant – *e.g.*, contact information for relatives or loved ones; photos of declarant or items of importance to declarant (car, pet); declarant's personal information, such as contact information; receipt of messages addressed to the declarant by name or reference.

United States v. Benford, 2015 U.S. Dist. LEXIS 17046 (W.D. Okla. Feb. 12, 2015).

In establishing that text messages from a device were authored by the defendant, the court relied on evidence that contact information for the defendant's brother and girlfriend were saved on the phone and that incoming messages addressed the defendant by name. .

People v. Lehmann, 2014 Cal. App. LEXIS 6654, at *32-33 (Cal. Ct. App. Sept. 17, 2014).

The defendant appealed homicide convictions on the basis that the trial court had erred by admitting text messages purportedly authored by the defendant. In holding that the text messages had been properly authenticated, the reviewing court stated "the text message referred to information that would unlikely to be known by someone other than the defendant" – namely the schedule of the defendant's parenting classes and his known whereabouts on the day in question. Id. at 32-33.

United States v. Ellis, 2013 U.S. Dist. LEXIS 73031, 3-4 (E.D. Mich. May 23, 2013).

The defendant's possession of a cellphone that received messages addressed to him by name or moniker was, among other circumstantial evidence (such as his possession of the device), sufficient to establish that he was the author of outgoing text messages from that phone.

4) A witness testifies that the author told him to expect a text message prior to its arrival.

People v. Harris, 2014 Cal. App.. LEXIS 7086 (Cal. App. Oct. 1, 2014).

Authentication was supported by the fact that the defendant's girlfriend, when asked about text messages purportedly sent by the defendant, acknowledged that, prior to her receipt of the messages, she was told by the defendant over landline to expect the messages from his cellphone.

Cf. State v. Ruiz, 2014 Mich. App. LEXIS 855 (Mich. Ct. App. May 15, 2014) (interpreting MRE 901).

A witness testified to knowing the defendant authored the emails the prosecution was seeking to admit because he had been told by the defendant to expect an email

relating to arson – the subject matter of the received email. The emails were found sufficiently authenticated.

5) The declarant (purported sender) acts in accordance with a text exchange

Cook v. State, 2015 Tex. App. LEXIS 2649 (Tex. Ct. App. Mar. 20, 2015).

The recipient testified that she sent and received text messages from the declarant to set up a drug buy on a particular date; while she was waiting at the agreed locations for the declarant, she sent text messages to him and asked where he was and when he was going to be there; she received a text telling her where the declarant was; she walked over and met him. Cumulatively, this circumstantial evidence authenticated the texts as coming from the declarant.

People v. Sissac, 2015 Cal. App. Unpub. LEXIS 1504 (Cal. Ct. App. Mar. 3, 2015).

The purported sender possessed a phone before and after the texts from the phone were sent; a witness texted that phone number; the witness's cell tied the number to the sender's name; the sender acted consistently with earlier texts; the witness called the number six hours after the texts the purported sender answered. Under these circumstances the texts were authenticated as the purported sender's.

United States v. Mebrtatu, 543 F. App'x 137, 140-41 (3d Cir. 2013).

The phone was in the purported sender's possession; the phone contained texts sent to and signed with her first name, including texts from her boyfriend professing love and other texts whose content links them to her. The text were found sufficiently authenticated as hers.

6) The declarant orally repeats the contents soon after the text message is sent or discusses the contents with a third party.

Cf. United States v. Siddiqui, 235 F.3d 1318 (11th Cir. 2000).

The author of a set of emails was identified after evidence revealed that the requests for signed letters made in the emails were made by the defendant over the phone to one witness and in person to two other witnesses.

7) The declarant produces in discovery a text message purportedly authored by the declarant and the text message is offered against the declarant.

Circumstantial Evidence Authenticating a Text Message Purportedly Received by a Particular Person

1) A reply to the text message was received by the sender from the purported recipient's phone number.

Greco v. Velvet Cactus, LLC, 2014 U.S. Dist. LEXIS 87778 (E.D. La. June 27, 2014).

A text message conversation – with messages sent and received by the defendant – was authenticated not only by the other participant in the conversation, but also by the defendant's replies.

2) The subsequent conduct of the recipient reflects his or her knowledge of the sent message's contents.

People v. Allen, 2014 Cal. App. LEXIS 7776 (Cal. Ct. App. Oct. 29, 2014).

The defendant, on appeal, challenged the trial court's admission of text messages received on a phone that indisputably belonged to Allen. The court found that the text message had been properly admitted because when questioned about the messages received on the phone, rather than deny having received or read them, the defendant attempted to explain the meaning of the contents.

3) Subsequent communications from the recipient reflects his or her knowledge of the contents of the sent text message.

4) The text message was received and accessed on a device in the possession and control of the alleged recipient.

Allen, supra, 2014 Cal. App. Unpub. LEXIS 7776, at *17-18.

The court deemed text messages admissible when, in conjunction with the defendant's acknowledgment of the messages, it was undisputed that the messages in question were from a phone belonging to the defendant and found in his possession.

Rubin ex rel. N.L.R.B. v. Vista Del Sol Health Services, Inc., 2015 WL 294101 (C..D.Cal.).

Texts were authenticated by the following: the recipient's affidavit stated that the exhibit submitted for trial was a "true and correct copy of text messages that [she] received from Jeri [Warner] in January 2014"; that the cell phone in the picture belongs to her; and that the phone number listed as sender belongs to the sender.

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Rule 901(b)(9) – Process or System Evidence

United States v. Kilpatrick, 2012 U.S. Dist. LEXIS 110166 (E.D. Mich. Aug. 7, 2012).

The government sought to authenticate text messages sent from two SkyTel pages, each belonging to one of the defendants respectively. For this purpose, the government offered the sworn affidavit of a SkyTel records-custodian. The custodian verified that the text messages the government offered had not been and could not be edited in any way because when the messages are sent from the pagers belonging to the defendants, they are automatically saved on SkyTel's server with no capacity for editing. The court ruled that this evidence met the requirements of Fed. R. Evid. 901(b)(9).

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Research Regarding the Recent Perception (e-Hearsay) Exception
Date: September 10, 2015

The Evidence Rules Committee has decided not to proceed at this point with an amendment that would add a "recent perceptions" exception to Rule 804. The genesis of the proposal was an article by Professor Jeffery Bellin, in which he argued that such an exception was necessary to allow admission of reliable electronic communications --- particularly texts and tweets – that would not be admissible under the traditional hearsay exceptions. The Committee was concerned that the exception would be too broad, allowing admission of texts and tweets based more on crowd-sourcing than personal knowledge. And it also concluded that there was no indication that any problem existed that needed to be addressed --- no showing that reliable texts and tweets are currently being excluded.

The Committee did, however, resolve to monitor developments in the case law on hearsay objections to texts, tweets, and other social media communication. The minutes of the Fall 2014 meeting describe the Committee's determination:

> Ultimately, the Committee decided not to proceed on Professor Bellin's proposal to add a recent perceptions exception to Rule 804. It did not reject a possible reconsideration of a recent perceptions exception, however. The Committee asked the Reporter * * * to monitor both federal * * * case law to see how personal electronic communications are being treated in the courts. Are there reliable statements being excluded? Are such statements being admitted but only through misinterpretation of existing exceptions, or overuse of the residual exception?

This memo provides an update on the federal case law involving electronic communications --- especially texts, tweets and Facebook posts --- in cases where a hearsay objection has been made. The goal of the memo is to determine: 1) whether electronic communications that appear to be reliable are being excluded because they don't fit into existing exceptions; and 2) whether such communications are being admitted as reliable, but only by misapplying existing exceptions (e.g., finding the declarant excited when she was not, overusing the residual exception, etc.).

Outline on Recent Cases Involving Admissibility of Electronic Communications Under the Federal Hearsay Rule and Its Exceptions.

I. Electronic Communications Properly Found to be Not Hearsay

Context: ***United States v. Mathis,*** 767 F.3d 1264 (11th Cir. 2014): In a prosecution for enticing minors, the trial court admitted text exchanges between the defendant and a minor concerning sexual activity. The defendant's side of the text exchange was admitted as statements of a party-opponent; the minor's side of the exchange was admitted as necessary to provide context for the defendant's statements, and the jury was instructed that the minor's statements could not be used for their truth. The court of appeals found no error.

Effect on the listener: ***Meyer v. Callery Conway Mars HV, Inc.***, 2015 U.S. Dist. LEXIS 937 (W.D. Pa. Jan. 5, 2015): In an employment discrimination action, the defendant offered an email about a dangerous condition that the plaintiff was alleged to have created at the plant. That email was admissible over a hearsay objection, because it was not offered to prove that the plaintiff created the condition, but only the state of mind of the supervisor in deciding whether to fire the plaintiff. ***See also United States v. Gonzalez,*** 560 Fed. Appx. 554 (6th Cir. 2014): In a prosecution involving fraud and credit card theft, text messages to the defendant were properly admitted as non-hearsay because they provided him information that made him aware of the fraud.

Verbal acts: ***Turner v. Am. Building Condo. Corp.***, 2014 U.S. Dist. LEXIS 15804 (S.D. Ohio Feb. 7, 2014): Emails were found not hearsay because they were "verbal acts, offered to show what was said when and by whom. The statements themselves are the evidence, not the truthfulness or lack thereof of what the statements purport to express."

Consumer confusion: ***OraLabs, Inc. v. King Group LLC,*** 2015 WL 4538444 (D. Colo. July 28, 2015): In a case under the Lanham Act, consumer tweets indicating confusion about a product were admitted as not hearsay, because the assertions in the tweets were not offered for their truth but rather for the fact that they were untrue. (Other courts admit such statements, electronic or otherwise, under the state of mind exception).

Circumstantial evidence of connection: ***United States v. Edelen,*** 561 Fed.Appx. 225 (4th Cir. 2014): Appellants were charged and found guilty of conspiracy to kidnap. They argued it was error to admit a text that was sent to Edelen's phone the day before the attack, by a contact

named "Puffy." The text informed Edelen of the victim's location. The court found that the text was properly admitted as not hearsay: it formed a link between Edelen and "Puffy" by the fact that it was made, and it supported the inference that Edelen had access to, and likely received, certain information about the victim prior to the commission of the offense.

II. Hearsay found admissible — correctly — under existing exceptions:

Party-opponent statement: *United States v. Brinson,* 772 F.3d 1314 (10th Cir. 2014): A text message from the defendant to a prostitute was properly admitted as the defendant's own statement under Rule 801(d)(2)(A). The prosecution showed by a preponderance of the evidence that the text was sent by the defendant: the account was registered to an email address registered to the defendant; the defendant's first name was used in the text; a witness testified that the defendant had identified himself by a nickname that was in the text; and two witnesses testified that the defendant's Facebook name was that nickname. ***See also United States v. Moore,*** 2015 WL 2263987 (11th Cir. May 15, 2015) (text messages were party-opponent statements); ***Greco v. Velvet Cactus, LLC,*** 2014 U.S. Dist. LEXIS 87778 (E.D. La.) (text messages admitted as party-opponent statements); ***Vaughn v. Target Corp.***, 2015 WL 632255 (W.D. Ky. Feb. 13, 2015) (In a slip and fall case, an entry on the plaintiff's Facebook page indicating her lack of injury was admitted under Rule 801(d)(2)(A)).

Party-opponent statement --- so long as the government can show that the text was from the defendant: *United States v. Benford*, 2015 WL 631089 (W.D. Okla. Feb. 12, 2015): In a felon-firearm prosecution, the defendant challenged text messages that were setting up a gun transaction. The defendant argued that the texts were hearsay but the court stated that "a statement is not hearsay if it is offered against a party and is the party's own statement." The court further noted that "[t]he government, as proponent of the text messages, must show by a preponderance of the evidence that defendant made the statement. *See United States v. Brinson*, 772 F.3d 1314, 1320 (10th Cir.2014)." Thus, while the standard for authentication is enough for a reasonable person to find that the text is from the defendant, the test for satisfying the hearsay standard is higher --- Rule 104(a). On the Rule 104(a) question, the court ruled as follows:

> Here, the government contends the text messages were retrieved from the cellphone found on Defendant's person at the time of his arrest. The government intends to offer evidence that the phone was password protected and that Defendant provided his password to police at the time of his arrest. According to the government, police thereafter obtained a search warrant to search the contents of the phone. Although the text messages at issue contain no identifying information, *i.e.*, no names are referenced in the text messages, the government contends other text messages retrieved from the cellphone include monikers that sufficiently identify Defendant. Moreover, Defendant does not

> offer evidence that the cellphone did not belong to him or that some other person had access to his cellphone. Subject to appropriate identifying information presented by the government to sufficiently demonstrate Defendant authored the text messages, those messages are not inadmissible hearsay.

The court also noted that while the defendant did not challenge the *incoming* texts on hearsay grounds, any such challenge would fail because those statements were admissible for the non-hearsay purpose of providing context for the defendant's own statements. *See United States v. Beckman*, immediately below. **Compare *Linscheid v. Natus Medical Inc.*,** 2015 WL 1470122 (N.D. Ga. Mar. 30, 2015) (Linkedin posting to prove what the plaintiff's job was in an FLSA case: the posting was inadmissible because the defendant made no attempt to show that the posting was made by the plaintiff; the standard of proof for establishing that the party-opponent made the statement is a preponderance of the evidence; there is no indication in the facts that the posting would fit a recent perceptions exception).

Chatroom conversation admissible as party-opponent statement and as non-hearsay context: *United States v. Beckman,* 2015 U.S.App. Lexis 12238 (6th Cir. July 13, 2015): In a child pornography case, a chatroom conversation was properly admitted against the defendant:

> Beckman also claims that the chats with unidentified persons constituted inadmissible hearsay. But Beckman concedes he is jimmyab2010; thus his portion of the chats were admissions of a party opponent, not hearsay. The other parties' portions of the chats were properly admitted to provide context to Beckman's own statements. See United States v. Henderson, 626 F.3d 326, 336-37 (6th Cir. 2010) (observing that statements Henderson made during recorded telephone conversations were non-hearsay admissions under Fed. R. Evid. 801(d)(2)(A), and the statements made by others were not admitted to show the truth of the matter asserted, but to provide context for Henderson's admissions).

See also United States v. Lemons, 792 F.3d 941 (8th Cir. 2015): In a trial involving social security disability fraud, the trial court admitted the defendant's Facebook posts indicating that she had a very active lifestyle. These posts were party-opponent statements. Some people replied to her posts, and, to the extent that the defendant replied back to those posts, the third party reply posts could have been admitted for the non-hearsay purpose of context --- but the trial court erred because it did not provide a limiting instruction to that effect. The court held that the error did not meet the plain error standard.

Party-opponent agent's statement: *United States v. Wilson,* 788 F.3d 1298 (11th Cir. 2015): The defendant was charged with converting to his personal use checks issued as a result of fraudulently filed federal tax returns. He claimed he was a legitimate check casher and didn't know the Treasury checks were obtained by fraud. The defendant's former attorney had engaged in text exchanges with an I.R.S. agent, and the government proffered the attorney's texts at trial. The defendant lodged a hearsay objection but the court admitted the texts. The court of appeals found no error, holding that the text was made by the lawyer acting as the attorney's agent, and concerned a matter within the scope of that agency.

Party-opponent agent's statement: ***United States v. McDonnell,*** 2014 WL 6772480, at *1 (E.D. Va.) (admitting an e-mail by the defendant's employee against the defendant pursuant to Rule 801(d)(2)(D) because the email was about a matter within the scope of the declarant's employment).

Co-conspirator Exemption: ***United States v. Thompson***, 568 Fed. Appx. 812 (8th Cir. 2014): Appellants were found guilty of conspiring to possess and possessing oxycodone with intent to distribute. The government's case against the Thompson twins included text messages between Wadley and the twins discussing a trip from New York to Florida, the specific amount of pills to be purchased from the undercover agent, and elaborate negotiations of the purchase price. One defendant contended that the text messages constituted impermissible hearsay, but the court found them properly admitted as statements between co-conspirators during the course and in furtherance of the conspiracy. ***See also United States v. Moore,*** 2015 WL 2263987 (11th Cir. May 15, 2015) (text messages were statements by a coconspirator during the course and in furtherance of a conspiracy); ***United States v. Arnold,*** 2015 WL 1347186 (W.D. Okla. Mar. 25, 2015) (same); ***United States v. Norwood,*** 2015 WL 2250481 (E.D. Mich. May 13, 2015) (rap videos made by a coconspirator were admissible under the coconspirator exemption; they were made specifically to threaten witnesses who would testify against conspirators).

Declarations against interest: ***Linde v. Arab Bank PLC,*** 2015 WL 1565479 (E.D.N.Y. Apr. 8, 2015): In a civil case against a bank for providing material support to Hamas, the court found that web postings in which Hamas claimed responsibility for terrorist attacks were properly admitted as declarations against interest. The court noted that accepting such responsibility clearly subjected Hamas to a risk of criminal punishment. The fact that Hamas may also have had a "public relations" motive to claim responsibility did not render the statements inadmissible because there is nothing in Rule 804(b)(3) requiring the declarant to have solely a disserving interest. The court also noted that because this was a civil case, the corroborating circumstances requirement of Rule 804(b)(3) was not applicable. (Of course the web postings had to be authenticated, but the court found sufficient authentication given the circumstances of the posting, under Rule 901(b)(4)).

III. Use—or Possible Overuse? --- of the Residual Exception

Facebook Post: ***Ministers and Missionaries Ben. Bd. v. Estate of Flesher,*** 2014 WL 1116846 (S.D.N.Y.): In a weird case involving a dispute about an estate, a major fact question was whether Flesher was domiciled in Colorado at the time of his death. The defendant offered a printout of a post from Flesher's Facebook page, in which Flesher stated that he was in Colorado and intended to stay there. The court found these statements admissible under Rule 807, in light of authentication by a close friend and "corroboration by other documentary evidence." It is difficult to assess whether the court stretched the residual exception and would not have had to do so if a recent perceptions exception had been available. The analysis is terse. But even if the analysis were wrong, a recent perception exception would not have been needed to admit the

Facebook post. The assertions in the post, about intent to stay in Colorado, were surely admissible under the state of mind exception and the *Hillmon* doctrine. If the *Hillmon* doctrine allows hearsay to prove an intent to *go* to Colorado, it clearly allows hearsay to prove an intent to *stay* there.

IV. Hearsay Properly Found Inadmissible --- Would Not Have Been Admissible Under a Recent Perceptions Exception

Email Chain: *Ira Green, Inc. v. Military Sales & Serv. Co.,* 775 F.3d 12 (1st Cir. 2014): the trial court admitted a chain of emails between business people under the business records exception. The court found that this was error because the emails were exchanged in 2012 and described what purportedly occurred in 2011. The court stated that "[t]his lack of contemporaneity puts the exhibit outside the compass of the business records exception." Nor would that time period be "recent" enough to be within any fair conception of the recent perceptions exception.

Emails in Business: *Am. Home Assur. Co. v. Greater Omaha Packing Co.,* 2014 U.S. Dist. LEXIS 51287 (D. Neb.) (emails not admissible as business records because no showing of regularly conducted activity; no indication that these emails could have been considered statements of recent perception).

V. Hearsay Found Inadmissible That Might Be Admissible Under a Statement of Recent Perceptions Exception

Text indicating a payment arrangement held inadmissible hearsay: *United States v. Thomas,* 2015 WL 237337 (D. Conn. Jan. 17, 2015): The defendant was charged with sex trafficking of a minor and sought to exclude a number of text messages he exchanged with the minor. The court found that many of the texts from the minor were admissible for the non-hearsay purposes of context or effect on the listener; others were admissible as adoptions because the defendant, by his responses, indicated assent. But one text, which indicated that the defendant paid for the minor's cross-country trip, was inadmissible hearsay. The defendant did not send a responsive text to the assertion; while courts have in many cases found that silence can be an adoption, that assumption is less sustainable when it comes to texts, because there is no indication that the party ever read or considered the accusation.

The minor's statement about the defendant paying her ticket would probably be admissible under a recent perceptions exception --- the minor was not going to testify at trial, and the statement was relatively close in time to whatever payment arrangement was made.

Facebook instant messages about a teacher's termination: *Matye v. City of New York,* 2015 WL 1476839 (E.D.N.Y. Mar. 31, 2015): In a case involving an alleged retaliatory termination in violation of the FMLA, the plaintiff sought to admit two instant messages with former students about an event that had occurred in the school. The court held, without analysis,

that the messages were inadmissible hearsay. There is not enough in the reported case to determine whether the messages would have been admissible under a recent perceptions exception. For example, there was no discussion of the time lapse between the event and the statement. Moreover, there was no indication that the students would have been unavailable for trial. Nonetheless, it is at least possible that these messages were the kinds of statements that might be covered by a recent perceptions exception.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: September 10, 2015

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the Supreme Court and federal circuit case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The outline begins with a short discussion of the Court=s two latest cases on confrontation, *Ohio v. Clark* and *Williams v. Illinois,* and then summarizes all the post-*Crawford* cases by subject matter heading.

I. Recent Supreme Court Confrontation Cases

A. Ohio v. Clark

The Court's most recent opinion on the Confrontation Clause and hearsay, *Ohio v. Clark,* 135 S.Ct. 2173 (2015), sheds some more light on how to determine whether hearsay is or is not Atestimonial.@ As shown in the outline below, the Court has found a statement to be testimonial when the Aprimary motivation@ behind the statement is that it be used in a criminal prosecution. *Clark* raised three questions about the application of the primary motivation test:

1. Can a statement be primarily motivated for use in a prosecution when it is not made with the involvement of law enforcement? (Or put the other way, is law enforcement involvement a prerequisite for a finding of testimoniality?).

2. If a person is required to report information to law enforcement, does that requirement render them law enforcement personnel for the purpose of the primary motivation test?

3. How does the primary motivation test apply to statements made by children, who are too young to know about use of statements for law enforcement purposes?

In *Clark*, teachers at a preschool saw indications that a 3 year-old boy had been abused, and asked the boy about it. The boy implicated the defendant. The boy's statement was admitted at trial under the Ohio version of the residual exception. The boy was not called to testify --- nor could he have been, because under Ohio law, a child of his age is incompetent to testify at trial. The defendant argued that the boy's statement was testimonial, relying in part on the fact that under Ohio law, teachers are required to report evidence of child abuse law enforcement. The defendant argued that the reporting requirement rendered the teachers agents of law enforcement.

The Supreme Court in C*lark*, in an opinion by Justice Alito for six members of the Court, found that the boy's hearsay statement was not testimonial.[1] It made no categorical statements as to the issues presented, but did make the following points about the primary motive test of testimoniality:

1. Statements of young children are *extremely unlikely* to be testimonial because a young child is not cognizant of the criminal justice system and so will not be making a statement with the primary motive that it be used in a criminal prosecution.

2. A statement made without law enforcement involvement is *extremely unlikely* to be found testimonial because if law enforcement is not involved, there is probably some other motive for making the statement other than use in a criminal prosecution. Moreover, the formality of a statement is a critical component in determining primary motive, and if the statement is not made with law enforcement involved, it is much less likely to be of a formal nature.

3. The fact that the teachers were subject to a reporting requirement was essentially irrelevant, because the teachers would have sought information from the child whether or not there was a reporting requirement --- their primary motivation was to protect the child, and the reporting requirement did nothing to change that motivation. (So there may be room left for a finding of testimoniality if the government sets up mandatory reporting in a situation in which the individual would not otherwise think of, or be interested in, obtaining information).

[1]All nine Justices found that the boy-s statement was not testimonial. Justices Scalia and Ginsburg concurred in the judgment, but challenged some of the language in the majority opinion on the ground that it appeared to be backsliding from the *Crawford* decision. Justice Thomas concurred in the judgment, finding that the statement was not testimonial because it lacked the solemnity required to meet his definition of testimoniality.

B. Williams v. Illinois

In *Williams v. Illinois*, 132 S.Ct. 2221 (2012), the Court brought substantial uncertainty to how courts are supposed to regulate hearsay offered against an accused under the Confrontation Clause. The case involved an expert who used testimonial hearsay as part of the basis for her opinion C the expert relied in part on a Cellmark DNA report to conclude that the DNA found at the crime scene belonged to Williams. The splintered opinions in *Williams* create confusion not only for how and whether experts may use testimonial hearsay, but more broadly about how some of the hearsay exceptions square with the confrontation clause bar on testimonial hearsay.

The question in *Williams* was whether an expert=s testimony violates the Confrontation Clause when the expert relies on hearsay. A plurality of four Justices, in an opinion written by Justice Alito, found no confrontation violation for two independent reasons. 1) First, the hearsay (the report of a DNA analyst) was never admitted for its truth, but was only used as a basis of the expert=s own conclusion of the expert that Williams=s DNA was found at the crime scene. Justice Alito emphasized that the expert witness conducted her own analysis of the data and did not simply parrot the conclusions of the out-of-court analyst. Second, the DNA test that was conducted was not testimonial in any event, because at the time it was conducted the suspect was at large, and so the DNA was not prepared with the intent that it be used against a *targeted individual.*

Justice Kagan, in a dissenting opinion for four Justices, rejected both of the grounds on which Justice Alito relied to affirm Williams=s conviction. She stated that it was a Asubterfuge@ to say that it was only the expert=s opinion (and not the underlying report) that was admitted against Williams. She reasoned that where the expert relies on a report, the expert=s opinion is useful only if the report itself is true. Therefore, according to Justice Kagan, the argument that the Cellmark report was not admitted for its truth rests on an artificial distinction that cannot satisfy the right to confrontation. As to Justice Alito=s Atargeting the individual@ test of testimoniality, Justice Kagan declared that it was not supported by the Court=s prior cases defining testimoniality in terms of primary motive. Her test of Aprimary motive@ is whether the statement was prepared primarily for the purpose of *any* criminal prosecution, which the Cellmark report clearly was. [2]

[2] Justice Breyer wrote a concurring opinion. He argued that rejecting the premise that an expert can rely on testimonial hearsay C as permitted by Fed.R.Evid. 703 C would end up requiring the government to call every person who had anything to do with a forensic test. That was a result he found untenable. He also set forth several possible approaches to permitting/limiting experts= reliance on lab reports, some of which he found Amore compatible with *Crawford* than others@ and some of which Aseem more easily considered by a rules committee@ than the Court.

The problem of course with consideration of these alternatives by a rules committee is that if the Confrontation Clause bars these approaches, the rules committee is just wasting its time. And given the uncertainty of *Williams*, it is fair to state that none of the approaches listed by Justice Breyer are clearly constitutional.

Justice Thomas was the tiebreaker. He essentially agreed completely with Justice Kagan=s critique of Justice Alito=s two grounds for affirming the conviction. But Justice Thomas concurred in the judgment because he had his own reason for affirming the conviction. In his view, the use of the Cellmark report for its truth did not offend the Confrontation Clause because that report was not sufficiently Aformalized.@ He tried to explain that the Cellmark report

> lacks the solemnity of an affidavit of deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. . . . And, although the report was introduced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.

Fallout from Williams:

It must be noted that *eight* members of the Court rejected Justice Thomas=s view that testimoniality is defined by whether a statement is sufficiently formal as to constitute an affidavit or certification. Yet if a court is counting Justices, it appears that it will often be necessary for the government to comply with the rather amorphous standards for Ainformality@ established by Justice Thomas. Thus, if the government offers hearsay that would be testimonial under the Kagan view of Aprimary motive@ but not under the Alito view, then the government may have to satisfy the Thomas requirement that the hearsay is not tantamount to a formal affidavit. Similarly, if the government proffers an expert who relies on testimonial hearsay, but the declarant does not testify, then it seems that the government must establish that the hearsay is not tantamount to a formal affidavit C this is because five members of the court rejected the argument that the Confrontation Clause is satisfied so long as the testimonial hearsay is used only as the basis of the expert=s opinion.

In the end Justice Thomas=s formality requirement may not be much of a bar to the government after *Williams.* As Justice Kagan noted, it is possible that the government could satisfy the Thomas view Awith the right kind of language@ in any forensic or other report. That is, don=t call the report a Acertificate,@ don=t use the word Aaffidavit,@ and use a private lab. Obviously the courts will need to struggle with the Thomas view of Aformality@ in the post-*Williams* landscape.

It should be noted that much of the post-*Crawford* landscape is unaltered by *Williams*. For example, take a case in which a victim has just been shot. He makes a statement to a neighbor AI=ve just been shot by Bill. Call an ambulance.@ Surely that statement C admissible against the accused as an excited utterance C satisfies the Confrontation Clause on the same grounds after *Williams* as it did before. Such a statement is not testimonial because even under the Kagan view, it was not made with the primary motive that it would be used in a criminal prosecution. And *a fortiori* it satisfied the less restrictive Alito view. Thus Justice Thomas=s Aformality@ test is not controlling, but even if it were, such a statement is not tantamount to an affidavit and so Justice Thomas would

find no constitutional problem with its admission. See *Michigan v. Bryant*, 562 U.S. 344 (2011) (Thomas, J., concurring) (excited utterance of shooting victim Abears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.@).

Similarly, there is extensive case law allowing admission of testimonial statements on the ground that they are not offered for their truth C for example a statement is offered to show the background of a police investigation, or offered to show that the statement is in fact false. That case law appears unaffected by *Williams.* As will be discussed further below, while both Justice Thomas and Justice Kagan reject the not-for-truth analysis in the context of expert reliance on hearsay, they both distinguish that use from admitting a statement for a *legitimate* not-for-truth purpose. Moreover, both approve of the language in *Crawford* that the Confrontation Clause Adoes not bar the use of testimonial statements offered for purposes other than establishing the truth of the matter asserted.@ And they both approve of the result in *Tennessee v. Street*, 471 U.S. 409 (1985), in which the Court held that the Confrontation Clause was not violated when an accomplice confession was admitted only to show that it was different from the defendant=s own confession. For the Kagan-Thomas camp, the question will be whether the testimonial statement is offered for a purpose as to which its probative value is not dependent on the statement being true C and that is the test that is essentially applied by the lower courts in determining whether statements ostensibly offered for a not-for-truth purpose are consistent with the Confrontation Clause.

Finally, it should be noted that since *Williams*, the Court has denied certiorari on more than 20 cases that essentially present the question of what *Williams* means. Maybe the Court is hoping that the confusion it caused on how and whether experts can rely on hearsay will somehow just go away.

II. Cases Defining ATestimonial@ Hearsay, Arranged By Subject Matter

AAdmissions@ C Hearsay Statements by the Defendant

Defendant=s own hearsay statement was not testimonial: *United States v. Lopez*, 380 F.3d 538 (1st Cir. 2004): The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford.* The court declared that Afor reasons similar to our conclusion that appellant=s statements were not the product of custodial interrogation, the statements were also not testimonial.@ That is, the statement was spontaneous and not in response to police interrogation.

Note: The *Lopez* court had an easier way to dispose of the case. Both before and after *Crawford*, an accused has no right to confront *himself*. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself. *See United States v. Hansen*, 434 F.3d 92 (1st Cir. 2006) (admission of defendant=s own statements does not violate *Crawford*); *United States v. Orm Hieng*, 679 F.3d 1131 (9th Cir. 2012): Athe Sixth Amendment simply has no application [to the defendant=s own hearsay statements] because a defendant cannot complain that he was denied the opportunity to confront himself.@

Defendant=s own statements, reporting statements of another defendant, are not testimonial under the circumstances: *United States v. Gibson*, 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as a statement by a party-opponent. Gibson also argued that the testimony violated *Crawford.* But the court held that Gibson=s statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

Text messages were properly admitted as coming from the defendant: *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014). In a prosecution for sex trafficking, text messages sent to a prostitute were admitted against the defendant. The defendant argued that admitting the texts violated his right to confrontation, but the court disagreed. The court stated that the texts were properly admitted as statements of a party-opponent, because the government had established by a preponderance of the evidence that the texts were sent by the defendant. They were therefore Anot hearsay@ under Rule 801(d)(2)(A), and A[b]ecause the messages did not constitute >hearsay= their introduction did not violate the Confrontation Clause.@

Note: The court in *Brinson* was right but for the wrong reasons. It is true that if a statement is Anot hearsay@ its admission does not violate the Confrontation Clause. (See the many cases collected under the Anot hearsay@ headnote, infra). But party-opponent statements are only technically Anot hearsay.@ They are in fact hearsay because they are offered for their truth C they are hearsay subject to an exemption. The Evidence Rules= technical categorization in Rule 801(d)(2) cannot determine the scope of the Confrontation Clause. If that were so, then coconspirator statements would automatically satisfy the Confrontation Clause because they, too, are classified as Anot hearsay@ under the Federal Rules. That would have made the Supreme Court=s decision in *Bourjaily v. United States* unnecessary; and the Court in *Crawford* would not have had to discuss the fact that coconspirator statements are ordinarily not testimonial. The real reason that party-opponent statements are not hearsay is that when the defendant makes a hearsay statement, he has no right to confront himself.

Bruton C Testimonial Statements of Co-Defendants

Bruton* line of cases not applicable unless accomplice=s hearsay statement is testimonial:** ***United States v. Figueroa-Cartagena, 612 F.3d 69 (1st Cir. 2010): The defendant=s codefendant had made hearsay statements in a private conversation that was taped by the government. The statements directly implicated both the codefendant and the defendant. At trial the codefendant=s statements were admitted against him, and the defendant argued that the *Bruton* line of cases required severance. But the court found no *Bruton* error, because the hearsay statements were not testimonial in the first place. The statements were from a private conversation so the speaker was not primarily motivated to have the statements used in a criminal prosecution. The court stated that the A*Bruton/Richardson* framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place.@

Bruton* does not apply unless the testimonial hearsay directly implicates the nonconfessing codefendant:** ***United States v. Lung Fong Chen, 393 F.3d 139, 150 (2d Cir. 2004)**:** The court held that a confession of a co-defendant, when offered only against the co-defendant, is regulated by *Bruton*, not *Crawford*: so that the question of a Confrontation violation is dependent on whether the confession is powerfully incriminating against the non-confessing defendant. If the confession does not directly implicate the defendant, then there will be no violation if the judge gives an effective limiting instruction to the jury. *Crawford* does not apply because if the instruction is effective, the co-defendant is not a witness Aagainst@ the defendant within the meaning of the Confrontation Clause.

Bruton* protection limited to testimonial statements:** ***United States v. Berrios, 676 F.3d 118 (3rd Cir. 2012): A[B]ecause *Bruton* is no more than a byproduct of the Confrontation Clause, the Court=s holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements. Any protection provided by *Bruton* is therefore only afforded to the same extent as the Confrontation Clause, which requires that the challenged statement qualify as testimonial. To the extent we have held otherwise, we no longer follow those holdings.@ ***See also United States v. Shavers,*** 693 F.3d 363 (3rd Cir. 2012) (admission of non-testifying co-defendant=s inculpatory statement did not violate *Bruton* because it was made casually to an acquaintance and so was non-testimonial; the statement bore Ano resemblance to the abusive governmental investigation tactics that the Sixth Amendment seeks to prevent@).

Bruton* protection does not apply unless the codefendant=s statements are testimonial:** ***United States v. Dargan, 738 F.3d 643 (4th Cir. 2013): The court held that a statement made to a cellmate in an informal setting was not testimonial C therefore admitting the statement against the nonconfessing codefendant did not violate *Bruton* because the premise of *Bruton* is that the nonconfessing defendant=s confrontation rights are violated when the confessing defendant=s statement is admissible at trial. But after *Crawford* there can be no confrontation violation unless the hearsay statement is testimonial.

The defendant=s own statements are not covered by *Crawford,* but *Bruton* remains in place to protect against admission of testimonial hearsay against a non-confessing co-defendant: *United States v. Ramos-Cardenas,* 524 F.3d 600 (5th Cir. 2008): In a multiple-defendant case, the trial court admitted a post-arrest statement by one of the defendants, which indirectly implicated the others. The court found that the confession could not be admitted against the other defendants, because the confession was testimonial under *Crawford.* But the court found that *Crawford* did not change the analysis with respect to the admissibility of a confession against the confessing defendant; nor did it displace the case law under *Bruton* allowing limiting instructions to protect the non-confessing defendants under certain circumstances. The court elaborated as follows:

> [W]hile *Crawford* certainly prohibits the introduction of a codefendant=s out-of-court testimonial statement against the other defendants in a multiple-defendant trial, it does not signal a departure from the rules governing the admittance of such a statement against the speaker-defendant himself, which continue to be provided by *Bruton, Richardson* and *Gray.*

In this case, the court found no error in admitting the confession against the codefendant who made it. As to the other defendants, the court found that the reference to them in the confession was vague, and therefore a limiting instruction was sufficient to assure that the confession would not be used against them. Thus, the *Bruton* problem was resolved by a limiting instruction.

Codefendant=s testimonial statements were not admitted Aagainst@ the defendant in light of limiting instruction: *United States v. Harper,* 527 F.3d 396 (5th Cir. 2008): Harper=s co-defendant made a confession, but it did not directly implicate Harper. At trial the confession was admitted against the co-defendant and the jury was instructed not to use it against Harper. The court recognized that the confession was testimonial, but held that it did not violate Harper=s right to confrontation because the co-defendant was not a witness Aagainst@ him. The court relied on the post-*Bruton* case of *Richardson v. Marsh*, and held that the limiting instruction was sufficient to protect Harper=s right to confrontation because the co-defendant=s confession did not directly implicate Harper and so was not as Apowerfully incriminating@ as the confession in *Bruton.* The court concluded that because Athe Supreme Court has so far taken a >pragmatic= approach to resolving whether jury instructions preclude a Sixth Amendment violation in various categories of cases, and because *Richardson* has not been expressly overruled, we will apply *Richardson* and its pragmatic approach, as well as the teachings in *Bruton.*@

Bruton* inapplicable to statement made by co-defendant to another prisoner, because that statement was not testimonial: *United States v.Vasquez, , 766 F.3d 373 (5th Cir. 2014): The defendant=s co-defendant made a statement to a jailhouse snitch that implicated the defendant in the crime. The defendant argued that admitting the codefendant=s statement at his trial violated *Bruton*, but the court disagreed. It stated that *Bruton* Ais no longer applicable to a non-testimonial prison yard conversation because *Bruton* is no more than a by-product of the Confrontation

Clause.@ The court further stated that Astatements from one prisoner to another are clearly non-testimonial.@

Bruton* protection does not apply unless codefendant=s statements are testimonial: *United States v. Johnson, 581 F.3d 320 (6th Cir. 2009): The court held that after *Crawford, Bruton* is applicable only when the codefendant=s statement is testimonial.

Bruton* protection does not apply unless codefendant=s statements are testimonial: *United States v. Dale, 614 F.3d 942 (8th Cir. 2010): The court held that after *Crawford, Bruton* is applicable only when the codefendant=s statement is testimonial.

Statement admitted against co-defendant only does not implicate *Crawford: Mason v. Yarborough,* 447 F.3d 693 (9th Cir. 2006): A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant=s name was never mentioned C *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the defendant only by inference and the jury is instructed that the evidence is not admissible against the defendant. For similar reasons, the court found no *Crawford* violation, because the codefendant was not a Awitness against@ the defendant. ABecause Fenton=s words were never admitted into evidence, he could not >bear testimony= against Mason.@

Statement that is non-testimonial cannot raise a *Bruton* problem: *United States v. Patterson,* 713 F.3d 1237 (10th Cir. 2013): The defendant challenged a statement by a non-testifying codefendant on *Bruton* grounds. The court found no error, because the statement was made in furtherance of the conspiracy. Accordingly, it was non-testimonial. That meant there was no *Bruton* problem because *Bruton* does not apply to non-testimonial hearsay. *Bruton* is a confrontation case and the Supreme Court has held that the Confrontation Clause extends only to testimonial hearsay. ***See also United States v. Clark,*** 717 F.3d 790 (10th Cir. 2013) (No *Bruton* violation because the codefendant hearsay was a coconspirator statement made in furtherance of the conspiracy and so was not testimonial); ***United States v. Morgan***, 748 F.3d 1024 (10th Cir. 2014) (statement admissible as a coconspirator statement cannot violate *Bruton* because A*Bruton* applies only to testimonial statements@ and the statements were made between coconspirators dividing up the proceeds of the crime and so Awere not made to be used for investigation or prosecution of crime.@).

Child-Declarants

Statements of young children are extremely unlikely to be testimonial: *Ohio v. Clark,* 135 S.Ct. 2173 (2015): This case is fully discussed in Part I. The case involved a statement from a three-year-old boy to his teachers. It accused the defendant of injuring him. The Court held that a statement from a young child is extremely unlikely to be testimonial because the child is not aware of the possibility of use of statements in criminal prosecutions, and so cannot be speaking with the primary motive that the statement will be so used. The Court refused to adopt a bright-line rule, but it is hard to think of a case in which the statement of a young child will be found testimonial under the primary motivation test.

Co-Conspirator Statements

Co-conspirator statement not testimonial: ***United States v. Felton,*** 417 F.3d 97 (1st Cir. 2005): The court held that a statement by the defendant=s coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford.* **Accord** ***United States v. Sanchez-Berrios,*** 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* Aexplicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial.@). ***See also United States v. Turner,*** 501 F.3d 59 (1st Cir. 2007) (conspirator=s statement made during a private conversation were not testimonial); ***United States v. Ciresi,*** 697 F.3d 19 (1st Cir. 2012) (statements admissible as coconspirator hearsay under Rule 801(d)(2)(E) are Aby their nature@ not testimonial because they are Amade for a purpose other than use in a prosecution.@).

Surreptitiously recorded statements of coconspirators are not testimonial: ***United States v. Hendricks,*** 395 F.3d 173 (3rd Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford* because they were informal statements among coconspirators. **Accord** ***United States v. Bobb,*** 471 F.3d 491 (3rd Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

Statement admissible as coconspirator hearsay is not testimonial: ***United States v. Robinson***, 367 F.3d 278 (5th Cir. 2004): The court affirmed a drug trafficker=s murder convictions and death sentence. It held that coconspirator statements are not Atestimonial@ under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. ***Accord United States v. Delgado,*** 401 F.3d 290 (5th Cir. 2005); ***United States v. Olguin,*** 643 F.3d 384 (5th Cir. 2011); ***United States v. Alaniz,*** 726 F.3d 586 (5th Cir. 2013). ***See also United States v. King,*** 541 F.3d 1143 (5th Cir. 2008) (ABecause the statements at issue here were made by co-conspirators in the furtherance of a conspiracy, they do not fall within the ambit of *Crawford=s* protection@). Note that the court in *King* rejected the defendant=s argument that the co-conspirator statements were testimonial because they were Apresented by the government for their testimonial value.@ Accepting that argument would mean that all hearsay is testimonial. The court observed that A*Crawford=s* emphasis clearly is on whether the statement was >testimonial= at the time it was made.@

Statement by an anonymous coconspirator is not testimonial: ***United States v. Martinez,*** 430 F.3d 317 (6th Cir. 2005). The court held that a letter written by an anonymous coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford* because they were not made with the intent that they would be used in a criminal investigation or prosecution. ***See also United States v. Mooneyham,*** 473 F.3d 280 (6th Cir. 2007) (statements made by coconspirator in furtherance of the conspiracy are not testimonial because the

one making them Ahas no awareness or expectation that his or her statements may later be used at a trial@; the fact that the statements were made to a law enforcement officer was irrelevant because the officer was undercover and the declarant did not know he was speaking to a police officer); ***United States v. Stover,*** 474 F.3d 904 (6th Cir. 2007) (holding that under *Crawford* and *Davis*, Aco-conspirators= statements made in pendency and furtherance of a conspiracy are not testimonial@ and therefore that the defendant=s right to confrontation was not violated when a statement was properly admitted under Rule 801(d)(2)(E)); ***United States v. Damra,*** 621 F.3d 474 (6th Cir. 2010) (statements made by a coconspirator Aby their nature are not testimonial@) ***United States v. Tragas,*** 727 F.3d 610 (6th Cir. 2013) (AAs coconspirator statements were made in furtherance of the conspiracy, they were categorically non-testimonial.@).

Coconspirator statements made to an undercover informant are not testimonial: ***United States v. Hargrove,*** 508 F.3d 445 (7th Cir. 2007): The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. One of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies. The defendant argued that the coconspirator=s statements were testimonial, but the court disagreed. It held that *ACrawford* did not affect the admissibility of coconspirator statements.@ The court specifically rejected the defendant=s argument that *Crawford* somehow undermined *Bourjaily*, noting that in both *Crawford* and *Davis*, Athe Supreme Court specifically cited *Bourjaily* C which as here involved a coconspirator=s statement made to a government informant C to illustrate a category of nontestimonial statements that falls outside the requirements of the Confrontation Clause.@

Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial: ***United States v. Lee,*** 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements must be made during the course and in furtherance of the conspiracy, they are not the kind of formalized, litigation-oriented statements that the Court found testimonial in *Crawford.* The court reached the same result on co-conspirator hearsay in ***United States v. Reyes,*** 362 F.3d 536 (8th Cir. 2004); ***United States v. Singh,*** 494 F.3d 653 (8th Cir. 2007); and ***United States v. Hyles,*** 521 F.3d 946 (8th Cir. 2008) (noting that the statements were not elicited in response to a government investigation and were casual remarks to co-conspirators)**.**

Statements in furtherance of a conspiracy are not testimonial: ***United States v. Allen,*** 425 F.3d 1231 (9th Cir. 2005): The court held that Aco-conspirator statements are not testimonial and therefore beyond the compass of *Crawford*=s holding.@ ***See also United States v. Larson,*** 460 F.3d 1200 (9th Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial); ***United States v. Grasso,*** 724 F.3d 1077 (9th Cir. 2013) (Aco-conspirator statements in furtherance of a conspiracy are not testimonial@); ***United States v. Cazares,*** 788 F.3d 956 (9th Cir. 2015) ("a

conversation between two gang members about the journey of their burned gun is not testimonial").

Statements admissible under the co-conspirator exemption are not testimonial: *United States v. Townley,* 472 F.3d 1267 (10th Cir. 2007): The court rejected the defendant=s argument that hearsay is testimonial under *Crawford* whenever Aconfrontation would have been required at common law as it existed in 1791.@ It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause. ***Accord United States v. Ramirez,*** 479 F.3d 1229 (10th Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*); ***United States v. Patterson,*** 713 F.3d 1237 (10th Cir. 2013) (same); ***United States v. Morgan***, 748 F.3d 1024 (10th Cir. 2014) (statements made between coconspirators dividing up the proceeds of the crime were not testimonial because they Awere not made to be used for investigation or prosecution of crime.@). .

Statements made during the course and in furtherance of the conspiracy are not testimonial: *United States v. Underwood,* 446 F.3d 1340 (11th Cir. 2006): In a drug case, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford*. But the court found no error and affirmed. The court noted that the statements Aclearly were not made under circumstances which would have led [Daryl] reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place.@ The court concluded as follows:

> Although the foregoing discussion would probably support a holding that the evidence challenged here is not "testimonial," two additional aspects of the *Crawford* opinion seal our conclusion that Darryl's statements to the government informant were not "testimonial" evidence. First, the Court stated: "most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy." Also, the Court cited *Bourjaily v. United States*, 483 U.S. 171 (1987) approvingly, indicating that it "hew[ed] closely to the traditional line" of cases that *Crawford* deemed to reflect the correct view of the Confrontation Clause. In approving *Bourjaily*, the *Crawford* opinion expressly noted that it involved statements unwittingly made to an FBI informant. * * * The co-conspirator statement in *Bourjaily* is indistinguishable from the challenged evidence in the instant case.

See also United States v. Lopez, 649 F.3d 1222 (11th Cir. 2011): co-conspirator=s statement, bragging that he and the defendant had drugs to sell after a robbery, was admissible under Rule 801(d)(2)(E) and was not testimonial, because it was merely Abragging to a friend@ and not a formal statement intended for trial.

Cross-Examination

Cross-examination of prior testimony was adequate even though defense counsel was found ineffective on other grounds: *Rolan v. Coleman,* 680 F.3d 311 (3rd Cir. 2012): The habeas petitioner argued that his right to confrontation was violated when he was retried and testimony from the original trial was admitted against him. The prior testimony was obviously testimonial under *Crawford.* The question was whether the witness C who was unavailable for the second trial C was adequately cross-examined at the first trial. The defendant argued that cross-examination could not have been adequate because the court had already found defense counsel to be inadequate at that trial (by failing to investigate a self-defense theory and failing to call two witnesses). The court, however, found the cross-examination to be adequate. The court noted that the state court had found the cross-examination to be adequate C that court found Abaseless@ the defendant=s argument that counsel had failed to explore the witness=s immunity agreement. Because the witness had made statements before that agreement was entered into that were consistent with his in-court testimony, counsel could reasonably conclude that exploring the immunity agreement would do more harm than good. The court of appeals concluded that A[t]here is no Supreme Court precedent to suggest that Goldstein=s cross-examination was inadequate, and the record does not support such a conclusion. Consequently, the Superior Court=s finding was not contrary to, or an unreasonable application of, *Crawford*.@

Attorney=s cross-examination at a prior trial was adequate and therefore admitting the testimony at a later trial did not violate the right to confrontation: *United States v. Richardson,* 781 F. 3d 287 (5th Cir. 2015): The defendant was convicted on drug and gun charges, but the conviction was reversed on appeal. By the time of retrial on mostly the same charges, a prosecution witness had become unavailable, and the trial court admitted the transcript of the witness=s testimony from the prior trial. The court found no violation of the right to confrontation. The court found that *Crawford* did not change the long-standing rule as to the opportunity that must be afforded for cross-examination to satisfy the Confrontation Clause. What is required is an Aadequate opportunity to cross-examine@ the witness: enough to provide the jury with Asufficient information to appraise the bias and the motives of the witness.@ The court noted that while the lawyer=s cross-examination of the witness at the first trial could have been better, it was adequate, as the lawyer explored the witness=s motive to cooperate, his arrests and convictions, his relationship with the defendant, and Athe contours of his trial testimony.@

State court was not unreasonable in finding that cross-examination by defense counsel at the preliminary hearing was sufficient to satisfy the defendant=s right to confrontation: *Williams v. Bauman,* 759 F.3d 630 (9th Cir. 2014): The defendant argued that his right to confrontation was violated when the transcript of the preliminary hearing testimony of an eyewitness was admitted against him at his state trial. The witness was unavailable for trial and the

defense counsel cross-examined him at the preliminary hearing. The court found that the state court was not unreasonable in concluding that the cross-examination was adequate, thus satisfying the right to confrontation. The court noted that AWilliams has failed to identify any Supreme Court precedent supporting his contention that his opportunity to cross-examine Banks at his own preliminary hearing was inadequate to satisfy the rigors of the Confrontation Clause.@ The court noted that Athere is some question whether a preliminary hearing necessarily offers an adequate opportunity to cross-examine for Confrontation Clause purposes@ but concluded that if there is Areasonable room for debate@ on the question, then the state court=s decision to align itself on one side of the argument is beyond the federal court=s power to remedy on habeas review.

Declarations Against Penal Interest (Including Accomplice Statements to Law Enforcement)

Accomplice=s jailhouse statement was admissible as a declaration against interest and accordingly was not testimonial: *United States v. Pelletier,* 666 F.3d 1 (1st Cir. 2011): The defendant=s accomplice made hearsay statements to a jailhouse buddy, indicating among other things that he had smuggled marijuana for the defendant. The court found that the statements were properly admitted as declarations against interest. The court noted specifically that the fact that the accomplice made the statements Ato fellow inmate Hafford, rather than in an attempt to curry favor with police, cuts in favor of admissibility.@ For similar reasons, the hearsay was not testimonial under *Crawford.* The court stated that the statements were made Anot under formal circumstances, but rather to a fellow inmate with a shared history, under circumstances that did not portend their use at trial against Pelletier.@

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Saget,* 377 F.3d 223 (2nd Cir. 2004) (Sotomayor, J.): The defendant=s accomplice spoke to an undercover officer, trying to enlist him in the defendant=s criminal scheme. The accomplice=s statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. After *Williamson v. United States,* hearsay statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3) when they implicate the defendant, because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice=s statement was not barred by *Williamson*, because it was made to an undercover officerCthe accomplice didn=t know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford*Cit was not the kind of formalized statement to law enforcement, prepared for trial, such as a Awitness@ would provide. ***See also United States v. Williams***, 506 F.3d 151 (2d Cir. 2007): Statement of accomplice implicating himself and defendant in a murder was admissible under Rule 804(b)(3) where it was made to a friend in informal circumstances; for the same reason the statement was not testimonial. The defendant=s argument about insufficient indicia of reliability was misplaced because the Confrontation Clause no longer imposes a reliability requirement. ***Accord United States v. Wexler,*** 522 F.3d 194 (2nd Cir. 2008) (inculpatory statement made to friends admissible under Rule 804(b)(3) and not testimonial).

Intercepted conversations were admissible as declarations against penal interest and were not testimonial: *United States v. Berrios,* 676 F.3d 118 (3rd Cir. 2012): Authorities intercepted a conversation between criminal associates in a prison yard. The court held that the statements were non-testimonial, because neither of the declarants Aheld the objective of incriminating any of the defendants at trial when their prison yard conversation was recorded;

there is no indication that they were aware of being overheard; and there is no indication that their conversation consisted of anything but casual remarks to an acquaintance.@ A defendant also lodged a hearsay objection, but the court found that the statements were admissible as declarations against interest. The declarants unequivocally incriminated themselves in acts of carjacking and murder, as well as shooting a security guard, and they mentioned the defendant Aonly to complain that he crashed the getaway car.@

Accomplice statement made to a friend, admitting complicity in a crime, was admissible as a declaration against interest and was not testimonial: *United States v. Jordan,* 509 F.3d 191 (4th Cir. 2007): The defendant was convicted of murder while engaged in a drug-trafficking offense. He contended that the admission of a statement of an accomplice was error under the Confrontation Clause and the hearsay rule. The accomplice confessed her part in the crime in a statement to her roommate. The court found no error in the admission of the accomplice=s statement. It was not testimonial because it was made to a friend, not to law enforcement. The court stated: ATo our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates.@ The court also found the accomplice=s statement properly admitted as a declaration against interest. The court elaborated as follows:

> Here, although Brown=s statements to Adams inculpated Jordan, they also subject *her* to criminal liability for a drug conspiracy and, be extension, for Tabon=s murder. Brown made the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure.

Accomplice=s statements to the victim, in conversations taped by the victim, were not testimonial: *United States v. Udeozor,* 515 F.3d 260 (4th Cir.2008): The defendant was convicted for conspiracy to hold another in involuntary servitude. The evidence showed that the defendant and her husband brought a teenager from Nigeria into the United States and forced her to work without compensation. The victim also testified at trial that the defendant=s husband raped her on a number of occasions. On appeal the defendant argued that the trial court erroneously admitted two taped conversations between the victim and the defendant. The victim taped the conversations surreptitiously in order to refer them to law enforcement. The court found no error in admitting the tapes. The conversations were hearsay, but the husband=s statements were admissible as declarations against penal interest, as they admitted wrongdoing and showed an attempt to evade prosecution. The defendant argued that even if admissible under Rule 804(b)(3), the conversations were testimonial under *Crawford*. He argued that a statement is testimonial if the *government=s* primary motivation is to prepare the statement for use in a criminal prosecution C and that in this case, the victim was essentially acting as a government agent in obtaining statements to be used for trial. But the court found that the conversation was not testimonial because the husband did not know he was talking to anyone affiliated with law enforcement, and the *husband=s* primary motivation was not to prepare a statement for any criminal trial. The court observed that the Aintent of the police officers or investigators is relevant to the determination of whether a statement is

›testimonial= only if it is first the case that a person in the position of the declarant reasonably would have expected that his statements would be used prosecutorially.@

Note: This case was decided before *Michigan v. Bryant, infra,* but it consistent with the holding in *Bryant* that the primary motive test considers the motivation of all the parties to a communication.

Accomplice=s confessions to law enforcement agents were testimonial: *United States v. Harper,* 514 F.3d 456 (5th Cir. 2008): The court held that confessions made by the codefendant to law enforcement were testimonial, even though the codefendant did not mention the defendant as being involved in the crime. The statements were introduced to show that the codefendant owned some of the firearms and narcotics at issue in the case, and these facts implicated the defendant as well. The court did not consider whether the confessions were admissible under a hearsay exception C but they would not have been admissible as a declaration against interest, because *Williamson* bars confessions of cohorts made to law enforcement.

Accomplice=s statements to a friend, implicating both the accomplice and the defendant in the crime, are not testimonial: *Ramirez v. Dretke,* 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated both himself and the defendant. These statements were made to the accomplice=s roommate. The court found that these statements were not testimonial under *Crawford*: AThere is nothing in *Crawford* to suggest that ›testimonial evidence= includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context.@

Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant=s accomplices (Clarke), was speaking to a friend (Wright) some time after the robbery. Wright told Clarke that he looked Astressed out.@ Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke=s hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark=s interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke=s statement was not testimonial under *Crawford:*

> Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke=s statements only as his friend and confidant.

The court distinguished other cases in which an informant=s statement to police officers was found testimonial, on the ground that those other cases involved accomplice statements knowingly made to police officers, so that Athe informant=s statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant.@

See also United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where Athe statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame.@); ***United States v. Johnson,*** 440 F.3d 832 (6th Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn=t know he was speaking to law enforcement, and so a person in his position Awould not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.@).

Statement admissible as a declaration against penal interest is not testimonial: *United States v. Johnson,* 581 F.3d 320 (6th Cir. 2009): The court held that the tape-recorded confession of a coconspirator describing the details of an armed robbery, including his and the defendant=s roles, was properly admitted as a declaration against penal interest. The court found that the statements tended to disserve the declarant=s interest because Athey admitted his participation in an unsolved murder and bank robbery.@ And the statements were trustworthy because they were made to a person the declarant thought to be his friend, at a time when the declarant did not know he was being recorded Aand therefore could not have made his statement in order to obtain a benefit from law enforcement.@ Moreover, the hearsay was not testimonial, because the declarant did not know he was being recorded or that the statement would be used in a criminal proceeding against the defendant.

Accomplice confession to law enforcement is testimonial, even if redacted: *United States v. Jones,* 371 F.3d 363 (7th Cir. 2004): An accomplice=s statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, could be admissible as a declaration against interest (a question it did not decide), its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And because the defendant never had a chance to cross-examine the accomplice, Aunder *Crawford*, no part of Rock=s confession should have been allowed into evidence.@

Declaration against interest made to an accomplice who was secretly recording the conversation for law enforcement was not testimonial: *United States v. Watson,* 525 F.3d 583 (7th Cir. 2008): After a bank robbery, one of the perpetrators was arrested and agreed to cooperate with the FBI. She surreptitiously recorded a conversation with Anthony, in which Anthony implicated himself and Watson in the robbery. The court found that Anthony=s statement was against his own interest, and rejected Watson=s contention that it was testimonial. The court noted that Anthony could not have anticipated that the statement would be used at a trial, because he did not know that the FBI was secretly recording the conversation. It concluded: AA statement unwittingly made to a confidential informant and recorded by the government is not testimonial for Confrontation Clause purposes.@ ***Accord United States v. Volpendesto*** , 746 F.3d 273 (7th Cir. 2014): Statements of an accomplice made to a confidential informant were properly admitted as declarations against interest and for the same reasons were not testimonial. The defendant argued that the court should reconsider its ruling in *Watson* because the Supreme Court, in *Michigan v. Bryant,* had in the interim stated that in determining primary motive, the court must look at the motivation of both the declarant and the other party to the conversation, and in this case as in *Watson* the other party was a confidential informant trying to obtain statements to use in a criminal prosecution. But the court noted that in *Bryant* the Court stated that the relevant inquiry Ais not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had.@ Applying this objective approach, the court concluded that the conversation Alooks like a casual, confidential discussion between co-conspirators.@

Accomplice=s confession to law enforcement was testimonial, even if redacted: *United States v. Shaw,* 758 F.3d 1187 (10th Cir. 2014): At the defendant=s trial, the court permitted a police officer to testify about a confession made by the defendant=s alleged accomplice. The accomplice was not a co-defendant, but the court, relying on the *Bruton* line of cases, ruled that the confession could be admitted so long as all references to the defendant were replaced with a neutral pronoun. The court of appeals found that this was error, because the confession to law enforcement was, under *Crawford*, clearly testimonial. It stated that A[r]edaction does not override the Confrontation Clause. It is just a tool to remove, in appropriate cases, the prejudice to the defendant from allowing the jury to hear evidence admissible against the codefendant but not admissible against the defendant.@ The trial court=s reliance on the *Bruton* cases was flawed because in those cases the accomplice is joined as a codefendant and the confession is admissible against the accomplice. In this case, where the defendant was tried alone and the confession was offered against him only, it was inadmissible for any purpose, whether or not redacted.

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Manfre,* 368 F.3d 832 (8th Cir. 2004): An accomplice made a statement to his fiancee that he was going to burn down a nightclub for the defendant. The court held that this statement was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor. Rather, it was a statement made informally to a trusted person. For the same reason, the statement was not testimonial under *Crawford*; it was a

statement made to a loved one and was Anot the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks.@

Accomplice statements to cellmate are not testimonial: *United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007): The defendant=s accomplice made statements to a cellmate, implicating himself and the defendant in a number of murders. The court found that these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement.

Jailhouse confession implicating defendant was admissible as a declaration against penal interest and was not testimonial: *United States v. Smalls,* 605 F.3d 765 (10th Cir. 2010): The court found no error in admitting a jailhouse confession that implicated a defendant in the murder of a government informant. The statements were not testimonial because they were not made with Athe primary purpose * * * of establishing or proving some fact potentially relevant to a criminal prosecution.@ The fact that the statements were made in a conversation with a government informant did not make them testimonial because the declarant did not know he was being interrogated, and the statement was not made under the formalities required for a statement to be testimonial. Finally, the statements were properly admitted under Rule 804(b)(3), because they implicated the declarant in a serious crime committed with another person, there was no attempt to shift blame to the defendant, and the declarant did not know he was talking to a government informant and therefore was not currying favor with law enforcement.

Declaration against interest is not testimonial: *United States v. U.S. Infrastructure, Inc.,* 576 F.3d 1195 (11th Cir. 2009): The declarant, McNair, made a hearsay statement that he was accepting bribes from one of the defendants. The statement was made in private to a friend. The court found that the statement was properly admitted as a declaration against McNair=s penal interest, as it showed that he accepted bribes from an identified person. The court also held that the hearsay was not testimonial, because it was Apart of a private conversation@ and no law enforcement personnel were involved.

Excited Utterances, 911 Calls, Etc.

911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution: *Davis v. Washington* and *Hammon v. Indiana,* 547 U.S. 813 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford*. In *Davis,* the victim=s statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon,* the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to the statements in *Hammon*. The Court set the dividing line for such statements as follows:

> Without attempting to produce an exhaustive classification of all conceivable statements B or even all conceivable statements in response to police interrogation B as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court defined testimoniality by whether the *primary motivation* in making the statements was for use in a criminal prosecution.

Pragmatic application of the emergency and primary purpose standards: *Michigan v. Bryant,* 562 U.S. 344 (2011): The Court held that the statement of a shooting victim to police, identifying the defendant as the shooter C and admitted as an excited utterance under a state rule of evidence C was not testimonial under *Davis* and *Crawford.* The Court applied the test for testimoniality established by *Davis*C whether the primary motive for making the statement was to have it used in a criminal prosecution C and found that in this case such primary motive did not exist. The Court noted that *Davis* focused on whether statements were made to respond to an emergency, as distinct from an investigation into past events. But it stated that the lower court had construed that distinction too narrowly to bar, as testimonial, essentially all statements of past events. The Court made the following observations about how to determine testimoniality when statements are made to responding police officers:

> 1. The primary purpose inquiry is objective. The relevant inquiry into the parties= statements and actions is not the subjective or actual purpose of the particular parties, but the purpose that reasonable participants would have had, as ascertained from the parties= statements and actions and the circumstances in which the encounter occurred.

2. As *Davis* notes, the existence of an Aongoing emergency@ at the time of the encounter is among the most important circumstances informing the interrogation's Aprimary purpose.@ An emergency focuses the participants not on proving past events potentially relevant to later criminal prosecution, but on ending a threatening situation. But there is no categorical distinction between present and past fact. Rather, the question of whether an emergency exists and is ongoing is a highly context-dependent inquiry. An assessment of whether an emergency threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized, because the threat to the first responders and public may continue.

3. An emergency's duration and scope may depend in part on the type of weapon involved; in *Davis* and *Hammon* the assailants used their fists, which limited the scope of the emergency C unlike in this case where the perpetrator used a gun, and so questioning could permissibly be broader.

4. A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one. It also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

5. Whether an ongoing emergency exists is simply one factor informing the ultimate inquiry regarding an interrogation's Aprimary purpose.@ Another is the encounter's informality. Formality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.

6. The statements and actions of *both* the declarant and interrogators provide objective evidence of the interrogation's primary purpose. Looking to the contents of both the questions and the answers ameliorates problems that could arise from looking solely to one participant, because both interrogators and declarants may have mixed motives.

Applying all these considerations to the facts, the Court found that the circumstances of the encounter as well as the statements and actions of the shooting victim and the police objectively indicated that the interrogation's Aprimary purpose@ was Ato enable police assistance to meet an ongoing emergency.@ The circumstances of the interrogation involved an armed shooter, whose motive for and location after the shooting were unknown and who had mortally wounded the victim within a few blocks and a few minutes of the location where the police found him. Unlike the emergencies in *Davis* and *Hammon*, the circumstances presented in *Bryant* indicated a potential threat to the police and the *public*, even if not the victim. And because this case involved a gun, the physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat.

The Court concluded that the statements and actions of the police and victim objectively indicated that the primary purpose of their discussion was not to generate statements for trial. When the victim responded to police questions about the crime, he was lying in a gas station

parking lot bleeding from a mortal gunshot wound, and his answers were punctuated with questions about when emergency medical services would arrive. Thus, the Court could not say that a person in his situation would have had a Aprimary purpose@ Ato establish or prove past events potentially relevant to later criminal prosecution.@ For their part, the police responded to a call that a man had been shot. They did not know why, where, or when the shooting had occurred; the shooter's location; or anything else about the crime. They asked exactly the type of questions necessary to enable them Ato meet an ongoing emergency@ C essentially, who shot the victim and where did the act occur. Nothing in the victim=s responses indicated to the police that there was no emergency or that the emergency had ended. The informality suggested that their primary purpose was to address what they considered to be an ongoing emergency C apprehending a suspect with a gun C and the circumstances lacked the formality that would have alerted the victim to or focused him on the possible future prosecutorial use of his statements.

Justice Sotomayor wrote the majority opinion for five Justices. Justice Thomas concurred in the judgment, adhering to his longstanding view that testimoniality is determined by whether the statement is the kind of formalized accusation that was objectionable under common law C he found no such formalization in this case. Justices Scalia and Ginsburg wrote dissenting opinions. Justice Kagan did not participate.

911 call reporting drunk person with an unloaded gun was not testimonial: *United States v. Cadieux,* 500 F.3d 37 (1st Cir. 2007): In a felon-firearm prosecution, the trial court admitted a tape of a 911 call, made by the daughter of the defendant=s girlfriend, reporting that the defendant was drunk and walking around with an unloaded shotgun. The court held that the 911 call was not testimonial. It relied on the following factors: 1) the daughter spoke about events Ain real time, as she witnessed them transpire@; 2) she specifically requested police assistance; 3) the dispatcher=s questions were tailored to identify Athe location of the emergency, its nature, and the perpetrator@; and 4) the daughter was Ahysterical as she speaks to the dispatcher, in an environment that is neither tranquil nor, as far as the dispatcher could reasonably tell, safe.@ The defendant argued that the call was testimonial because the daughter was aware that her statements to the police could be used in a prosecution. But the court found that after *Davis*, awareness of possible use in a prosecution is not enough for a statement to be testimonial. A statement is testimonial only if the Aprimary motivation@ for making it is for use in a criminal prosecution.

911 call was not testimonial under the circumstances: *United States v. Brito,* 427 F.3d 53 (1st Cir. 2005): The court affirmed a conviction of firearm possession by an illegal alien. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant=s right to confrontation. The court declared that the relevant question is whether the statement was made with an eye toward Alegal ramifications.@ The court noted that under this test, statements to police made while the declarant or others are still in personal danger

are ordinarily not testimonial, because the declarant in these circumstances Ausually speaks out of urgency and a desire to obtain a prompt response.@ In this case the 911 call was properly admitted because the caller stated that she had Ajust@ heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in Aimminent personal peril@ when the call was made and therefore it was not testimonial. The court also found that the 911 operator=s questioning of the caller did not make the answers testimonial, because Ait would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher C a question that only momentarily interrupted an otherwise continuous stream of consciousness.@

911 call C including statements about the defendant=s felony statusCwas not testimonial: ***United States v. Proctor,*** 505 F.3d 366 (5th Cir. 2007): In a firearms prosecution, the court admitted a 911 call from the defendant=s brother (Yogi), in which the brother stated that the defendant had stolen a gun and shot it into the ground twice. Included in the call were statements about the defendant=s felony status and that he was probably on cocaine. The court held that the entire call was nontestimonial. It applied the Aprimary purpose@ test and evaluated the call in the following passage:

> Yogi's call to 911 was made immediately after Proctor grabbed the gun and fired it twice. During the course of the call, he recounts what just happened, gives a description of his brother, indicates his brother's previous criminal history, and the fact that his brother may be under the influence of drugs. All of these statements enabled the police to deal appropriately with the situation that was unfolding. The statements about Proctor's possession of a gun indicated Yogi's understanding that Proctor was armed and possibly dangerous. The information about Proctor's criminal history and possible drug use necessary for the police to respond appropriately to the emergency, as it allowed the police to determine whether they would be encountering a violent felon. Proctor argues that the emergency had already passed, because he had run away with the weapon at the time of the 911 call and, therefore, the 911 conversation was testimonial. It is hard to reconcile this argument with the facts. During the 911 call, Yogi reported that he witnessed his brother, a felon possibly high on cocaine, run off with a loaded weapon into a nightclub. This was an ongoing emergency C not one that had passed. Proctor's retreat into the nightclub provided no assurances that he would not momentarily return to confront Yogi * * *. Further, Yogi could have reasonably feared that the people inside the nightclub were in danger. Overall, a reasonable viewing of the 911 call is that Yogi and the 911 operator were dealing with an ongoing emergency involving a dangerous felon, and that the 911 operator's questions were related to the resolution of that emergency.

See also United States v. Mouzone, 687 F.3d 207 (5th Cir. 2012) (911 calls found non-testimonial as Aeach caller simply reported his observation of events as they unfolded@; the 911 operators were not attempting to Aestablish or prove past events@; and Athe transcripts simply reflect an effort to meet the needs of the ongoing emergency@).

911 call, and statements made by the victim after police arrived, are excited utterances and not testimonial: ***United States v. Arnold,*** 486 F.3d 177 (6th Cir. 2007) (en banc): In a felon-firearm prosecution, the court admitted three sets of hearsay statements made by the daughter of the defendant=s girlfriend, after an argument between the daughter (Tamica) and the defendant. The first set were statements made in a 911 call, in which Tamica stated that Arnold pulled a pistol on her and is Afixing to shoot me.@ The call was made after Tamica got in her car and went around the corner from her house. The second set of statements occurred when the police arrived within minutes; Tamica was hysterical, and without prompting said that Arnold had pulled a gun and was trying to kill her. The police asked what the gun looked like and she said Aa black handgun.@ At the time of this second set of statements, Arnold had left the scene. The third set of statements was made when Arnold returned to the scene in a car a few minutes later. Tamica identified Arnold by name and stated Athat=s the guy that pulled the gun on me.@ A search of the vehicle turned up a black handgun underneath Arnold=s seat.

The court first found that all three sets of statements were properly admitted as excited utterances. For each set of statements, Tamica was clearly upset, she was concerned about her safety, and the statements were made shortly after or right at the time of the two startling events (the gun threat for the first two sets of statements and Arnold=s return for the third set of statements).

The court then concluded that none of Tamica=s statements fell within the definition of Atestimonial@ as developed by the Court in *Davis*. Essentially the court found that the statements were not testimonial for the very reason that they were excited utterances C Tamica was upset, she was responding to an emergency and concerned about her safety, and her statements were largely spontaneous and not the product of an extensive interrogation.

911 call is not testimonial*:* ***United States v. Thomas,*** 453 F.3d 838 (7th Cir. 2006): The court held that statements made in a 911 call were non-testimonial under the analysis provided by the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator was still at large. The court analyzed the statements as follows:

> [T]he caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*. Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

See also United States v. Dodds, 569 F.3d 336 (7th Cir. 2009) (unidentified person=s identification of a person with a gun was not testimonial: AIn this case, the police were responding to a 911 call reporting shots fired and had an urgent need to identify the person with the gun and to stop the shooting. The witness's description of the man with a gun was given in that context, and we believe it falls within the scope of *Davis*.@).

Statement made by a child immediately after an assault on his mother was admissible as excited utterance and was not testimonial: *United States v. Clifford,* 791 F.3d 884 (8th Cir. 2015): In an assault trial, the court admitted a hearsay statement from the victim's three-year-old son, made to a trusted adult, that the defendant "hurt mama." The statement was made immediately after the event and the child was shaking and crying; the statement was in response to the adult asking "what happened?" The court of appeals held that the statement was admissible as an excited utterance and was not testimonial. There was no law enforcement involvement and the court noted that the defendant "identifies no case in which questions from a private individual acting without any direction from state officials were determined to be equivalent to police interrogation." The court also noted that the interchange between the child and the adult was informal, and was in response to an emergency. Finally, the court relied on the Supreme Court's most recent decision in *Ohio v. Clark:*

> As in *Clark,* the record here shows an informal, spontaneous conversation between a very young child and a private individual to determine how the victim had just been injured. [The child's] age is significant since "statements by very young children will rarely, if ever, implicate the Confrontation Clause."

911 calls and statements made to officers responding to the calls were not testimonial: *United States v. Brun,* 416 F.3d 703 (8th Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant=s home. One was from the defendant=s 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance. The other call came 20 minutes later, from the defendant=s girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she told the responding officers that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the defendant=s right to confrontation after *Crawford.* The court first found that the nephew=s 911 call was not Atestimonial@ within the meaning of *Crawford*, as it was not the kind of statement that was equivalent to courtroom testimony. It had Ano doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated.@ The court used similar reasoning to find that the girlfriend=s 911 call was not testimonial. The court also found that

the girlfriend=s statement to the police was not testimonial. It reasoned that the girlfriend=s conversation with the officers Awas unstructured, and not the product of police interrogation.@

> **Note: The court=s decision in *Brun* preceded the Supreme Court=s treatment of 911 calls and statements to responding officers in *Davis/Hammon* and then *Bryant,* but the analysis appears consistent with that of the Supreme Court. It is true that in *Hammon* the Court found statements by the victim to responding police officers to be testimonial, but that was largely because the police officers engaged in a structured interview about past criminal activity; in *Brun* the victim spoke spontaneously in response to an emergency. And the Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they were directed more toward dealing with an emergency than toward investigating or prosecuting a crime. The *Brun* decision is especially consistent with the pragmatic approach to finding an emergency (and to the observation that emergency is only one factor in the primary motive test) that the Court found in *Michigan v. Bryant.***

Statements made by mother to police, after her son was taken hostage, were not testimonial: *United States v. Lira-Morales,* 759 F.3d 1105 (9th Cir. 2014): The defendant was charged with hostage-taking and related crimes. At trial, the court admitted statements from the hostage=s mother, describing a telephone call with her son=s captors. The call was arranged as part of a sting operation to rescue the son. The court found that the mother=s statements to the officers about what the captors had said were not testimonial, because the primary motive for making the call C and thus the report about it to the police officers C was to rescue the son. The court noted that throughout the event the mother was Avery nervous, shaking, and crying in response to continuous ransom demands and threats to her son=s life.@ Thus the agents faced an Aemergency situation@ and Athe primary purpose of the telephone call was to respond to these threats and to ensure [the son=s] safety.@ The defendant argued that the statements were testimonial because an agent attempted, unsuccessfully, to record the call that they had set up. But the court rejected this argument, noting that the agent Aprimarily sought to record the call to obtain information about Aguilar=s location and to facilitate the plan to rescue Aguilar. Far from an attempt to build a case for prosecution, Agent Goyco=s actions were good police work directed at resolving a life-threatening hostage situation. * * * That Agent Goyco may have also recorded the call in part to build a criminal case does not alter our conclusion that the *primary* purpose of the call was to diffuse the emergency hostage situation.@

Excited utterance not testimonial under the circumstances, even though made to law enforcement: *Leavitt v. Arave,* 371 F.3d 663 (9th Cir. 2004): In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim=s

statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that the statement was not testimonial under *Crawford*. The court explained as follows:

> Although the question is close, we do not believe that Elg=s statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. * * * Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.
>
> **Note: The court=s decision in *Leavitt* preceded the Supreme Court=s treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they are directed toward dealing with an emergency rather than prosecuting a crime. It is especially consistent with the pragmatic approach to applying the primary motive test established in *Michigan v. Bryant.***

Expert Witnesses

Confusion over expert witnesses testifying on the basis of testimonial hearsay: *Williams v. Illinois,* 132 S.Ct. 2221 (2012): This case is fully set forth in Part One. To summarize, the confusion is over whether an expert can, consistently with the Confrontation Clause, rely on testimonial hearsay so long as the hearsay is not explicitly introduced for its truth and the expert makes an independent judgment, i.e., is not just a conduit for the hearsay. That practice is permitted by Rule 703. Five members of the Court rejected the use of testimonial hearsay in this way, on the ground that it was based on an artificial distinction. But the plurality decision by Justice Alito embraces this Rule 703 analysis. At this early stage, the answer appears to be that an expert can rely on testimonial hearsay so long as it is not in the form of an affidavit or certificate C that proviso would then get Justice Thomas=s approval. As seen elsewhere in this outline, some courts have found *Williams* to have no precedential effect other than controlling cases that present the same facts as *Williams.* And other courts have held that the use of testimonial hearsay by an expert is permitted without regard to its formality, so long as the expert makes an independent conclusion and the hearsay itself is not admitted into evidence.

Expert=s reliance on testimonial hearsay does not violate the Confrontation Clause: *United States v. Henry*, 472 F.3d 910 (D.C. Cir. 2007): The court declared that *Crawford* Adid not involve expert witness testimony and thus did not alter an expert witness's ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion under Federal Rule of Evidence 703. In other words, while the Supreme Court in *Crawford* altered Confrontation Clause precedent, it said nothing about the Clause's relation to Federal Rule of Evidence 703.@ ***See also United States v. Law,*** 528 F.3d 888 (D.C. Cir. 2008)**:** Expert=s testimony about the typical practices of narcotics dealers did not violate *Crawford*. While the testimony was based on interviews with informants, AThomas testified based on his experience as a narcotics investigator; he did not relate statements by out-of-court declarants to the jury.@

> **Note: These opinions from the D.C. Circuit precede *Williams* and are questionable if you count the votes in *Williams.* But these cases are quite consistent with the Alito opinion in *Williams* and as stated above, some lower courts are treating the Alito opinion as controlling on an expert=s reliance on testimonial hearsay.**

Confrontation Clause violated where expert does no more that restate the results of a testimonial lab report: *United States v. Ramos-Gonzalez,* 664 F.3d 1 (1st Cir. 2011): In a drug case, a lab report indicated that substances found in the defendant=s vehicle tested positive for cocaine. The lab report was testimonial under *Melendez-Diaz*, and the person who conducted the test was not produced for trial. The government sought to avoid the *Melendez-Diaz* problem by calling an expert to testify to the results, but the court found that the defendant=s right to confrontation was nonetheless violated, because the expert did not make an independent assessment, but rather simply restated the report. The court explained as follows:

Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal. Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation. See, e.g., *United States v. Ayala*, 601 F.3d 256, 275 (4th Cir.2010) (A[Where] the expert is, in essence, ... merely acting as a transmitter for testimonial hearsay,@ there is likely a Crawford violation); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir.2009) (same); *United States v. Lombardozzi*, 491 F.3d 61, 72 (2d Cir.2007) (A[T]he admission of [the expert's] testimony was error ... if he communicated out-of-court testimonial statements ... directly to the jury in the guise of an expert opinion.@). In this case, we need not wade too deeply into the thicket, because the testimony at issue here does not reside in the middle ground.

The government is hard-pressed to paint Morales's testimony as anything other than a recitation of Borrero's report. On direct examination, the prosecutor asked Morales to Asay what are the results of the test,@ and he did exactly that, responding A[b]oth bricks were positive for cocaine.@ This colloquy leaves little room for interpretation. Morales was never asked, and consequently he did not provide, his independent expert opinion as to the nature of the substance in question. Instead, he simply parroted the conclusion of Borrero's report. Morales's testimony amounted to no more than the prohibited transmission of testimonial hearsay. While the interplay between the use of expert testimony and the Confrontation Clause will undoubtedly require further explication, the government cannot meet its Sixth Amendment obligations by relying on Rule 703 in the manner that it was employed here.

Note: Whatever *Williams* may mean, the court=s analysis in *Ramon-Gonzalez* surely remains valid. Five members of the *Williams* Court rejected the proposition that an expert can rely *at all* on testimonial hearsay even if the expert testifies to his own opinion. And even Justice Alito cautions that an expert may not testify if he does nothing more than parrot the testimonial hearsay.

Confrontation Clause not violated where testifying expert conducts his own testing that confirms the results of a testimonial report: *United States v. Soto*, 720 F.3d 51 (1st Cir. 2013): In a prosecution for identity theft and related offenses, a technician did a review of the defendant=s laptop and came to conclusions that inculpated the defendant. At trial, a different expert testified that he did the same test and it came out exactly the same as the test done by the absent technician. The defendant argued that this was surrogate testimony that violated *Bullcoming v. New Mexico,* in which the Court held that production of a surrogate who simply reported testimonial hearsay did not satisfy the Confrontation Clause. But the court disagreed:

> Agent Pickett did not testify as a surrogate witness for Agent Murphy. * * * Unlike in *Bullcoming*, Agent Murphy's forensic report was not introduced into evidence through Agent Pickett. Agent Pickett testified about a conclusion he drew from his own

> independent examination of the hard drive. The government did not need to get Agent Murphy's report into evidence through Agent Pickett. We do not interpret *Bullcoming* to mean that the agent who testifies against the defendant cannot know about another agent's prior examination or that agent's results when he conducts his examination. The government may ask an agent to replicate a forensic examination if the agent who did the initial examination is unable to testify at trial, so long as the agent who testifies conducts an independent examination and testifies to his own results.

The court reviewed the votes in *Bullcoming* and found that Ait appears that six justices would find no Sixth Amendment violation when a second analyst retests evidence and testifies at trial about her conclusions about her independent examination.@ This count resulted from the fact that Justice Ginsburg, joined by Justice Scalia, stated that the Confrontation problem in *Bullcoming* could have been avoided if the testifying expert had simply retested the substance and testified on the basis of the retest.

The *Soto* court did express concern, however, that the testifying expert did more than simply replicate the results of the prior test: he also testified that the tests came to identical results:

> Soto's argument that Agent Murphy's report bolstered Agent Pickett's testimony hits closer to the mark. At trial, Agent Pickett testified that the incriminating documents in Exhibit 20 were found on a laptop that was seized from Soto's car. Although Agent Pickett had independent knowledge of that fact, he testified that "everything that was in John Murphy's report was exactly the way he said it was," and that Exhibit 20 "was contained in the same folder that John Murphy had said that he had found it in." * * * These two out-of-court statements attributed to Agent Murphy were arguably testimonial and offered for their truth. Agent Pickett testified about the substance of Agent Murphy's report which Agent Murphy prepared for use in Soto's trial. * * * Agent Pickett's testimony about Agent Murphy's prior examination of the hard drive bolstered Agent Pickett's independent conclusion that the Exhibit 20 documents were found on Soto's hard drive.

But the court found no plain error, in large part because the bolstering was cumulative.

Expert reliance on a manufacturing label to conclude on point of origin did not violate the Confrontation Clause, because the label was not testimonial: *United States v. Torres-Colon,* 790 F.3d 26 (1st Cir. 2015): In a trial on a charge of unlawful possession of a firearm, the government's expert testified that the firearm was made in Austria. He relied on a manufacturing inscription on the firearm that stated "made in Austria." The court found no violation of confrontation in the expert's testimony. The statement on the firearm was clearly not made by the manufacturer with the primary purpose of use in a criminal prosecution.

Expert=s reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly presented to the jury*: United States v. Lombardozzi*, 491 F.3d 61 (2nd

Cir. 2007): The court stated that *Crawford* is inapplicable if testimonial statements are not used for their truth, and that Ait is permissible for an expert witness to form an opinion by applying her expertise because, in that limited instance, the evidence is not being presented for the truth of the matter asserted.@ The court concluded that the expert=s testimony would violate the Confrontation Clause Aonly if he communicated out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion.@ The court found any error in introducing the hearsay statements directly to be harmless. ***See also United States v. Mejia,*** 545 F.3d 179 (2nd Cir. 2008) (violation of Confrontation Clause where expert directly relates statements made by drug dealers during an interrogation).

> **Note: These opinions from the 2nd Circuit precede *Williams* and are questionable if you count the votes in *Williams.* But these cases are quite consistent with the Alito opinion in *Williams* and as indicated in this outline, many lower courts permit an expert to rely on testimonial hearsay, so long as the hearsay is not admitted at trial and the expert reaches his own conclusions.**

Expert reliance on printout from machine does not violate *Crawford*: *United States v. Summers,* 666 F.3d 192 (4th Cir. 2011): The defendant objected to the admission of DNA testing performed on a jacket that linked him to drug trafficking. The court first considered whether the Confrontation Clause was violated by the government=s failure to call the FBI lab employees who signed the internal log documenting custody of the jacket. The court found no error in admitting the log, because chain-of-custody evidence had been introduced by the defense and therefore the defendant had opened the door to rebuttal. The court next considered whether the Confrontation Clause was violated by testimony of an expert who relied on DNA testing results by lab analysts who were not produced at trial. The court again found no error. It emphasized that the expert did his own testing, and his reliance on the report was limited to a Apure instrument read-out.@ The court stated that A[t]he numerical identifiers of the DNA allele here, insofar as they are nothing more than raw data produced by a machine@ should be treated the same as gas chromatograph data, which the courts have held to be non-testimonial. ***See also United States v. Shanton,*** 2013 WL 781939 (4th Cir.) (Unpublished) (finding that the result concerning the admissibility of the expert testimony in *Summers* was unaffected by *Williams*: A[W]e believe five justices would affirm: Justice Thomas on the ground that the statements at issue were not testimonial and Justice Alito, along with the three justices who joined his plurality opinion, on the ground that the statements were not admitted for the truth of the matter asserted.@).

Expert reliance on confidential informants in interpreting coded conversation does not violate *Crawford: United States v. Johnson,* 587 F.3d 625 (4th Cir. 2009): The court found no error in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. The defendant argued that the experts relied on hearsay

statements by cooperators to help them reach a conclusion about the meaning of particular conversations. The defendant asserted that the experts were therefore relying on testimonial hearsay. The court stated that experts are allowed to consider inadmissible hearsay as long as it is of a type reasonably relied on by other experts C as it was in this case. It stated that A[w]ere we to push *Crawford* as far as [the defendant] proposes, we would disqualify broad swaths of expert testimony, depriving juries of valuable assistance in a great many cases.@ The court recognized that it is Aappropriate to recognize the risk that a particular expert might become nothing more than a transmitter of testimonial hearsay.@ But in this case, the experts never made reference to their interviews, and the jury heard no testimonial hearsay. AInstead, each expert presented his independent judgment and specialized understanding to the jury.@ Because the experts Adid not become mere conduits@ for the testimonial hearsay, their consideration of that hearsay Aposes no *Crawford* problem.@ ***Accord United States v. Ayala,*** 601 F.3d 256 (4th Cir. 2010) (no violation of the Confrontation Clause where the experts Adid not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury.@). ***Accord United States v Palacios,*** 677 F.3d 234 (4th Cir. 2012): Expert testimony on operation of a criminal enterprise, based in part on interviews with members, did not violate the Confrontation Clause because the expert Adid not specifically reference@ any of the testimonial interviews during his testimony, and simply relied on them as well as other information to give his own opinion.

Expert testimony translating coded conversations violated the right to confrontation where the government failed to make a sufficient showing that the expert was relying on her own evaluations rather than those of informants: *United States v. Garcia,* 752 F.3d 382 (4th Cir. 2014): The court reversed drug convictions in part because the law enforcement expert who translated purportedly coded conversations had relied, in coming to her conclusion, on input from coconspirators whom she had debriefed. The court distinguished *Johnson, supra*, on the ground that in this case the government had not done enough to show that the expert had conducted her own independent analysis in reaching her conclusions as to the meaning of certain conversations. The court noted that Athe question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay.@ In this case, Awe cannot say that Agent Dayton was giving such independent judgments. While it is true she never made direct reference to the content of her interviews, this could just has well have been the result of the Government=s failure to elicit a proper foundation for Agent Dayton=s interpretations.@ The government argued that the information from the coconspirators only served to confirm the Agent=s interpretations after the fact, but the court concluded that A[t]he record is devoid of evidence that this was, in fact, the sequence of Dayton=s analysis, to Garcia=s prejudice.@

Expert reliance on printout from machine and another expert=s lab notes does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert=s testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because Adata is not >statements= in any useful sense. Nor is a machine a >witness against=

anyone.@ Moreover, the expert=s reliance on another expert=s lab notes did not violate *Crawford* because the court concluded that an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The court noted that the defendant could Ainsist that the data underlying an expert=s testimony be admitted, see Fed.R.Evid. 705, but by offering the evidence themselves defendants would waive any objection under the Confrontation Clause.@ The court observed that the notes of the chemist, evaluating the data from the machine, were testimonial and should not have been independently admitted, but it found no plain error in the admission of these notes.

Note: The court makes two holdings in *Moon.* The first is that expert reliance on a machine output does not violate *Crawford* because the machine is not a witness. That holding appears unaffected by *Williams* C at least it can be said that *Williams* says nothing about whether machine output is testimony. The second holding, that an expert=s reliance on lab notes he did not prepare, is at the heart of *Williams.* It would appear that such a practice would be permissible even after *Williams* because 1) *post-Williams* courts have found that an expert may reliable on testimonial hearsay so long as the expert does his own analysis and the hearsay is not introduced at trial ; and 2) in any case, lab Anotes@ are not certificates or affidavits so they do not appear to be the kind of formalized statement that Justice Thomas finds to be testimonial.

Expert reliance on drug test conducted by another does not violate the Confrontation Clause C though on remand from *Williams* the court states that part of the expert=s testimony might have violated the Confrontation Clause, but finds harmless error*: United States v. Turner,* 591 F.3d 928 (7th Cir. 2010), on remand from Supreme Court, 709 F.3d 1187 (7th Cir. 2013) : At the defendant=s drug trial, the government called a chemist to testify about the tests conducted on the substance seized from the defendant C the tests indicating that it was cocaine. The defendant objected that the witness did not conduct the tests and was relying on testimonial statements from other chemists, in violation of *Crawford.* The court found no error, emphasizing that no statements of the official who actually tested the substance were admitted at trial, and that the witness unequivocally established that his opinions about the test reports were his own.

Note: The Supreme Court vacated the decision in *Turner* and remanded for reconsideration in light of *Williams.* On remand, the court declared that while a rule from *Williams* was difficult to divine, it at a minimum Acasts doubt on using expert testimony in place of testimony from an analyst who actually examined and tested evidence bearing on a defendant's guilt, insofar as the expert is asked about matters which lie solely within the testing analyst's knowledge.@ But the court noted that even after *Williams,* much of what the expert testified to was permissible because it was based on personal knowledge:

> We note that the bulk of Block's testimony was permissible. Block testified as both a fact and an expert witness. In his capacity as a supervisor at the state crime laboratory, he described the procedures and safeguards that employees of the laboratory observe in handling substances submitted for analysis. He also noted that he reviewed Hanson's work in this case pursuant to the laboratory's standard peer review procedure. As an expert forensic chemist, he went on to explain for the jury how suspect substances are tested using gas chromatography, mass spectrometry, and infrared spectroscopy to yield data from which the nature of the substance may be determined. He then opined, based on his experience and expertise, that the data Hanson had produced in testing the substances that Turner distributed to the undercover officer-introduced at trial as Government Exhibits 1, 2, and 3-indicated that the substances contained cocaine base. * * *
>
> As we explained in our prior decision, an expert who gives testimony about the nature of a suspected controlled substance may rely on information gathered and produced by an analyst who does not himself testify. Pursuant to Federal Rule of Evidence 703, the information on which the expert bases his opinion need not itself be admissible into evidence in order for the expert to testify. Thus, the government could establish through Block's expert testimony what the data produced by Hanson's testing revealed concerning the nature of the substances that Turner distributed, without having to introduce either Hanson's documentation of her analysis or testimony from Hanson herself. And because the government did not introduce Hanson's report, notes, or test results into evidence, Turner was not deprived of his rights under the Sixth Amendment's Confrontation Clause simply because Block relied on the data contained in those documents in forming his opinion.
>
> Nothing in the Supreme Court's *Williams* decision undermines this aspect of our decision. On the contrary, Justice Alito's plurality opinion in *Williams* expressly endorses the notion that an appropriately credentialed individual may give expert testimony as to the significance of data produced by another analyst. Nothing in either Justice Thomas's concurrence or in Justice Kagan's dissent takes issue with this aspect of the plurality's reasoning. Moreover, as we have indicated, Block in part testified in his capacity as Hanson's supervisor, describing both the procedures and safeguards that employees of the state laboratory are expected to follow and the steps that he took to peer review Hanson's work in this case. Block's testimony on these points, which were within his personal knowledge, posed no Confrontation Clause problem.

The *Turner* court on remand saw two Confrontation problems in the expert=s testimony: 1) his statement that Hanson followed standard procedures in testing the substances that Turner distributed to the undercover officer, and 2) his testimony that he reached the same conclusion about the nature of the substances that the analyst did. The court held that on those two points, ABlock necessarily was relying on out-of-court statements contained in Hanson's notes and report. These portions of Block's testimony

strengthened the government's case; and, conversely, their exclusion would have diminished the quantity and quality of evidence showing that the substances Turner distributed comprised cocaine base in the form of crack cocaine.@ And while the case was much like *Williams,* the court found two distinguishing factors: 1) it was tried to a jury, thus raising a question of whether Justice Alito=s not-for-truth analysis was fully applicable; and 2) the test was conducted with a suspect in mind, as Turner had been arrested with the substances to be tested in his possession. The defendant also argued that the report was Acertified@ and so was formal under the Thomas view. But the court noted that the analysts did not formally certify the results C the certification was made by the Attorney General to the effect that the report was a correct copy of the *report.* But the court implied that it was sufficiently formal in any case, because it was Aboth official and signed, it constituted a formal record of the result of the laboratory tests that Hanson had performed, and it was clearly designed to memorialize that result for purposes of the pending legal proceeding against Turner, who was named in the report.@

Ultimately the court found it unnecessary to decide whether the defendant=s Confrontation rights were violated because the error, if any, in the use of the analyst=s report was harmless.

No confrontation violation where expert did not testify that he relied on a testimonial report: *United States v. Maxwell,* 724 F.3d 724 (7th Cir. 2013): In a narcotics prosecution, the analyst from the Wisconsin State Crime Laboratory who originally tested the substance seized from Maxwell retired before trial, so the government offered the testimony of his co-worker instead. The coworker did not personally analyze the substance herself, but concluded that it contained crack cocaine after reviewing the data generated by the original analyst. The court found no plain error in permitting this testimony, explaining that there could be no Confrontation problem, even after *Bullcoming* and *Williams*, where there is no testimony that the expert relied on the report:

> What makes this case different (and relatively more straightforward) from those we have dealt with in the past is that Gee did not read from Nied's report while testifying * * * , she did not vouch for whether Nied followed standard testing procedures or state that she reached the same conclusion as Nied about the nature of the substance (as in *Turner*), and the government did not introduce Nied's report itself or any readings taken from the instruments he used (as in *Moon*). Maxwell argues that Nied's forensic analysis is testimonial, but Gee never said she relied on Nied's report or his interpretation of the data in reaching her own conclusion. Instead, Gee simply testified (1) about how evidence in the crime lab is typically tested when determining whether it contains a controlled substance, (2) that she had reviewed the data generated for the material in this case, and (3) that she reached an independent conclusion that the substance contained cocaine base after reviewing that data.

The court concluded that concluded that AMaxwell was not deprived of his Sixth Amendment right simply by virtue of the fact that Gee relied on Nied=s data in reaching her own conclusions, especially since she never mentioned what conclusions Nied reached about the substance.@

Expert=s reliance on report of another law enforcement agency did not violate the right to confrontation: *United States v. Huether,* 673 F.3d 789 (8th Cir. 2012): In a trial on charges of sexual exploitation of minors, an expert testified in part on the basis of a report by the National Center for Missing and Exploited Children. The court found no confrontation violation because the NCMEC report was not introduced into evidence and the expert drew his own conclusion and was not a conduit for the hearsay.

No confrontation violation where expert who testified did so on the basis of his own retesting: *United States v. Ortega,* 750 F.3d 1020 (8th Cir. 2014): In a drug conspiracy prosecution, the defendant argued that his right to confrontation was violated because the expert who testified at trial that the substances seized from a coconspirator=s car were narcotics had tested composite samples that another chemist had produced from the substances found in the car. But the court found no error, because the testifying expert had personally conducted his own test of the composite substances, and the original report of the other chemist who prepared the composite (and who concluded the substances were narcotics) was not offered by the government; nor was the testifying expert asked about the original test. The court noted that any objection about the composite really went to the chain of custody C whether the composite tested by the expert witness was in fact derived from what was found in the car C and the court observed that Ait is up to the prosecution to decide what steps are so crucial as to require evidence.@ The defendant made no showing of bad faith or evidence tampering, and so any question about the chain of custody was one of weight and not admissibility. Moreover, the government=s introduction of the original chemist=s statement about creating the composite sample did not violate the Confrontation Clause because Achain of custody alone does not implicated the Confrontation Clause@ as it is Anot a testimonial statement offered to prove the truth of the matter asserted.@

No Confrontation Clause violation where expert=s opinion was based on his own assessment and not on the testimonial hearsay: *United States v. Vera,* 770 F.3d 1232 (9th Cir. 2014): Appealing from convictions for drug offenses, the defendants argued that the testimony of a prosecution expert on gangs violated the Confrontation Clause because it was nothing but a conduit for testimonial hearsay from former gang members. The court agreed with the premise that expert testimony violates the Confrontation Clause when the expert Ais used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation.@ But the court disagreed that the expert operated as a conduit in this case. The court found that the witness relied on his extensive

experience with gangs and that his opinion Awas not merely repackaged testimonial hearsay but was an original product that could have been tested through cross-examination.@

Expert=s reliance on notes prepared by lab technicians did not violate the Confrontation Clause: *United States v. Pablo,* 625 F.3d 1285 (10th Cir. 2010), ***on remand for reconsideration under Williams,* 696 F.3d 1280 (10th Cir. 2012)**: The defendant was tried for rape and other charges. Two lab analysts conducted tests on the rape kit and concluded that the DNA found at the scene matched the defendant. The defendant complained that the lab results were introduced through the testimony of a forensic expert and the lab analysts were not produced for cross-examination. In the original appeal the court found no plain error, reasoning that the notes of the lab analysts were not admitted into evidence and were never offered for their truth. To the extent they were discussed before the jury, it was only to describe the basis of the expert=s opinion C which the court found to be permissible under Rule 703. The court observed that A[t]he extent to which an expert witness may disclose to a jury otherwise inadmissible testimonial hearsay without implicating a defendant=s confrontation rights * * * is a matter of degree.@ According to the court, if an expert Asimply parrots another individual=s testimonial hearsay, rather than conveying her own independent judgment that only incidentally discloses testimonial hearsay to assist the jury in evaluating her opinion, then the expert is, in effect, disclosing the testimonial hearsay for its substantive truth and she becomes little more than a backdoor conduit for otherwise inadmissible testimonial hearsay.@ In this case the court, applying the plain error standard, found insufficient indication that the expert had operated solely as a conduit for testimonial hearsay.

***Pablo* was vacated for reconsideration in light of *Williams*. On remand, the court once again affirmed the conviction.** The court stated that Awe need not decide the precise mandates and limits of *Williams,* to the extent they exist.@ The court noted that five members of the *Williams* Court Amight find@ that the expert=s reliance on the lab test was for its truth. But Awe cannot say the district court plainly erred in admitting Ms. Snider's testimony, as it is not plain that a majority of the Supreme Court would have found reversible error with the challenged admission.@ The court explained as follows in a parsing of *Williams:*

> On the contrary, it appears that five Justices would affirm the district court in this case, albeit with different Justices relying on different rationales as they did in Williams. The four-Justice plurality in *Williams* likely would determine that Ms. Snider's testimony was not offered for the truth of the matter asserted in Ms. Dick's report, but rather was offered for the separate purpose of evaluating Ms. Snider's credibility as an expert witness per Fed.R.Evid. 703; and therefore that the admission of her testimony did not offend the Confrontation Clause. Meanwhile, although Justice Thomas likely would conclude that the testimony was being offered for the truth of the matter asserted, he likely would further determine that the testimony was nevertheless constitutionally admissible because the appellate record does not show that the report was certified, sworn to, or otherwise imbued with the requisite Asolemnity@ required for the statements therein to be considered

> testimonial for purposes of the Confrontation Clause. Since Ms. Dick's report is not a part of the appellate record, we naturally cannot say that it plainly would meet Justice Thomas's solemnity test. In sum, it is not clear or obvious under current law that the district court erred in admitting Ms. Snider's testimony, so reversal is unwarranted on this basis.

The *Pablo* court on remand concluded that A the manner in which, and degree to which, an expert may merely rely upon, and reference during her in-court expert testimony, the out-of-court testimonial conclusions in a lab report made by another person not called as a witness is a nuanced legal issue without clearly established bright line parameters, particularly in light of the discordant 4B1B4 divide of opinions in *Williams*.@

Expert=s testimony on gang structure and practice did not violate the Confrontation Clause even though it was based in part on testimonial hearsay. *United States v. Kamahele,* 748 F.3d 984 (10th Cir. 2014): Appealing from convictions for gang-related activity, the defendants argued that a government expert=s testimony about the structure and operation of the gang violated the Confrontation Clause because it was based in part on interviews with cooperating witnesses and other gang members. The court found no error and affirmed, concluding that the admission of expert testimony violates the Confrontation Clause Aonly when the expert is simply parroting a testimonial fact.@ The court noted that in this case the expert Aapplied his expertise, formed by years of experience and multiple sources, to provide an independently formed opinion.@ Therefore, no testimonial hearsay was offered for its truth against the defendant.

Forfeiture

Constitutional standard for forfeiture C like Rule 804(b)(6) C requires a showing that the defendant acted wrongfully with the intent to keep the witness from testifying: *Giles v. California,* 554 U.S. 353 (2008): The Court held that a defendant does not forfeit his constitutional right to confront testimonial hearsay unless the government shows that the defendant engaged in wrongdoing *designed to keep the witness from testifying at trial.* Giles was charged with the murder of his former girlfriend. A short time before the murder, Giles had assaulted the victim, and she made statements to the police implicating Giles in that assault. The victim=s hearsay statements were admitted against the defendant on the ground that he had forfeited his right to rely on the Confrontation Clause, by murdering the victim. The government made no showing that Giles murdered the victim with the intent to keep her from testifying. The Court found an intent-to-procure requirement in the common law, and therefore, under the historical analysis mandated by *Crawford*, there is necessarily an intent-to-procure requirement for forfeiture of confrontation rights. Also, at one point in the opinion, the Court in dictum stated that Astatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment,@ are not testimonial C presumably because the primary motivation for making such statements is for something other than use at trial.

Murder of witness by co-conspirators as a sanction to protect the conspiracy against testimony constitutes forfeiture of both hearsay and Confrontation Clause objections: *United States v. Martinez,* 476 F.3d 961 (D.C. Cir. 2007): Affirming drug and conspiracy convictions, the court found no error in the admission of hearsay statements made to the DEA by an informant involved with the defendant=s drug conspiracy. The trial court found by a preponderance of the evidence that the informant was murdered by members of the defendant=s conspiracy, in part to procure his unavailability as a witness. The court of appeals affirmed this finding C rejecting the defendant=s argument that forfeiture could not be found because his co-conspirators would have murdered the informant anyway, due to his role in the loss of a drug shipment. The court stated that it is Asurely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying.@ It concluded that the defendant=s argument would have the Aperverse consequence@ of allowing criminals to avoid forfeiture if they could articulate more than one bad motivation for disposing of a witness. Finally, the court held that forfeiture under Rule 804(b)(6) by definition constituted forfeiture of the Confrontation Clause objection. It stated that *Crawford* and *Davis* Aforeclose@ the possibility that the admission of evidence under Rule 804(b)(6) could nonetheless violate the Confrontation Clause.

Fact that defendant had multiple reasons for killing a witness does not preclude a finding of forfeiture: *United States v. Jackson,* 706 F.3d 262 (4th Cir. 2013): The defendant argued that the constitutional right to confrontation can be forfeited only when a defendant was motivated *exclusively* by a desire to silence a witness. (In this case the defendant argued that while

he murdered a witness to silence him, he had additional reasons, including preventing the witness from harming the defendant=s drug operation and as retaliation for robbing one of the defendant=s friends.) The court rejected the argument, finding nothing in *Giles* to support it. To the contrary, the Court in *Giles* reasoned that the common law forfeiture rule was designed to prevent the defendant from profiting from his own wrong. Moreover, under a multiple-motive exception to forfeiture, defendants might be tempted to murder witnesses and then cook up another motive for the murder after the fact.

Forfeiture can be found on the basis of *Pinkerton* liability: *United States v. Dinkins,* 691 F.3d 358 (4th Cir. 2012): The court found that the defendant had forfeited his right of confrontation when a witness was killed by a coconspirator as an act to further the conspiracy by silencing the witness. The court concluded that in light of *Pinkerton* liability, Athe Constitution does not guarantee an accused person against the legitimate consequence of his own wrongful acts.@

Retaliatory murder of witnesses who testified against the accused in a prior case is not a forfeiture in the trial for murdering the witnesses: *United States v. Henderson,* 626 F.3d 626 (6th Cir. 2010): The defendant was convicted of bank robbery after two people (including his accomplice) testified against him. Shortly after the defendant was released from prison, the two witnesses were found murdered. At the trial for killing the two witnesses, the government offered statements made by the victims to police officers during the investigation of the bank robbery. These statements concerned their cooperation and threats made by the defendant. The trial judge admitted the statements after finding by a preponderance of the evidence that the defendant killed the witnesses. That decision, grounded in forfeiture, was made before *Giles* was decided. On appeal, the court found error under *Giles* because ABass and Washington could not have been killed, in 1996 and 1998, respectively, to prevent them from testifying against [the defendant] in the bank robbery prosecution in 1981.@ Thus there was no showing of intent to keep the witnesses from testifying, as *Giles* requires for a finding of forfeiture. The court found the errors to be harmless.

Forfeiture of confrontation rights, like forfeiture under Federal Rule 804(b)(6), is found upon a showing by a preponderance of the evidence: *United States v. Johnson,* 767 F.3d 815 (9th Cir. 2014): The court affirmed convictions for murder and armed robbery. At trial hearsay testimony of an unavailable witness was admitted against the defendant, after the government made a showing that the defendant had threatened the witness; the trial court found that the defendant had forfeited his right under both the hearsay rule and the Confrontation Clause to object to the hearsay. The court found no error. It held that a forfeiture of the right to object under the hearsay rule and under the Confrontation Clause is governed by the same standard: the government must establish by a preponderance of the evidence that the defendant acted wrongfully to cause the unavailability of a government witness, with the intent that the witness would not testify at trial. The defendant argued that the Constitution requires a showing of clear and convincing evidence before forfeiture of a right to confrontation can be found. But the court

disagreed. It noted that a clear and convincing evidence standard had been applied by some lower courts when the Confrontation Clause regulated the admission of unreliable hearsay. But now, after Crawford v. Washington, the Confrontation Clause does not bar unreliable hearsay from being admitted; rather it regulates testimonial hearsay. The court stated that after *Crawford*, Athe forfeiture exception is consistent with the Confrontation Clause, not because it is a means for determining whether hearsay is reliable, but because it is an equitable doctrine designed to prevent defendants from profiting from their own wrongdoing.@ The court also noted that the Supreme Court=s post-*Crawford* decisions of Davis v. Washington and Giles v. California Astrongly suggest, if not squarely hold, that the preponderance standard applies.@ On the facts, the court concluded that Athe evidence tended to show that Johnson alone had the means, motive, and opportunity to threaten [the witness], and did not show anyone else did. This was sufficient to satisfy the preponderance standard.@

Evaluating the kind of action the defendant must take to justify a finding of forfeiture: *Carlson v. Attorney General of California,* 791 F.3d 1003 (9th Cir. 2015): Reviewing the denial of a habeas petition, the court found that statements of victims to police were testimonial, but that the state trial court was not unreasonable in finding that the petitioner had forfeited his right to confront the declarants. In a careful analysis of Supreme Court cases, the court provided "a standard for the kind of action a defendant must take" to be found to have forfeited the right to confrontation. The court concluded that

> [T]he forfeiture-by-wrongdoing doctrine applies where there has been affirmative action on the part of the defendant that produces the desired result, non-appearance by a prospective witness against him in a criminal case. Simple tolerance of, or failure foil, a third party's previously unexpressed decision either to skip town himself rather than testifying or to prevent another witness from appearing [is] not a sufficient reason to foreclose a defendant's Sixth Amendment confrontation rights at trial.

On the merits --- and applying the standard of deference required by AEDPA, the court concluded that the trial court could reasonably have found, on the basis of circumstantial evidence, that the petitioner more likely than not was actively involved in procuring unavailability.

> **Note: The court says that a defendant's mere "acquiescence" is not enough to justify forfeiture. That language might raise a doubt with whether a forfeiture may be found by the defendant's mere membership in a conspiracy; many courts have found such membership to be sufficient where disposing of a witness is within the course and furtherance of the underlying conspiracy. See, e.g., *United States v. Dinkins,* 691 F.3d 358 (4th Cir. 2012). The *Carlson* court, however, cited the conspiracy cases favorably, and noted that in such cases, the defendant *has* acted affirmatively and committed wrongdoing by joining a conspiracy in which a foreseeable result is killing witnesses. The court noted that the restyled Rule 804(b)(6) provides that simple acquiescence is**

not enough to find forfeiture, but that a defendant who "acquiesced in wrongfully causing" the absence of the witness is sufficient --- and that would include joining a conspiracy.

Grand Jury, Plea Allocutions, Etc.

Grand jury testimony and plea allocution statement are both testimonial: *United States v. Bruno,* 383 F.3d 65 (2nd Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford.* The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford*. **See *also United States v. Becker,*** 502 F.3d 122 (2nd Cir. 2007) (plea allocution is testimonial even though redacted to take out direct reference to the defendant: Aany argument regarding the purposes for which the jury might or might not have actually considered the allocutions necessarily goes to whether such error was harmless, not whether it existed at all@); ***United States v. Snype,*** 441 F.3d 119 (2nd Cir. 2006) (plea allocution of the defendant=s accomplice was testimonial even though all direct references to the defendant were redacted); ***United States v. Gotti,*** 459 F.3d 296 (2nd Cir. 2006) (redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); ***United States v. Al-Sadawi,*** 432 F.3d 419 (2nd Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort=s plea allocution against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

Defendant charged with aiding and abetting has confrontation rights violated by admission of primary wrongdoer=s guilty plea: *United States v. Head,* 707 F.3d 1026 (8th Cir. 2013): The defendant was charged with aiding and abetting a murder committed by her boyfriend in Indian country. The trial court admitted the boyfriend=s guilty plea to prove the predicate offense. The court found that the guilty plea was testimonial and reversed the aiding and abetting conviction. The court relied on *Crawford=s* statement that Aprior testimony that the defendant was unable to cross-examine@ is one of the Acore class of >testimonial= statements.@

Grand jury testimony is testimonial: *United States v. Wilmore,* 381 F.3d 868 (9th Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford*. It could hardly have held otherwise, because even under the narrowest definition of Atestimonial@ (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

Implied Testimonial Statements

Testimony that a police officer=s focus changed after hearing an out-of-court statement impliedly included accusatorial statements from an accomplice and so violated the defendant=s right to confrontation: *United States v. Meises,* 645 F.3d 5 (1st Cir. 2011): At trial an officer testified that his focus was placed on the defendant after an interview with a cooperating witness. The government did not explicitly introduce the statement of the cooperating witness. On appeal, the defendant argued that the jury could surmise that the officer=s focus changed because of an out-of-court accusation of a declarant who was not produced at trial. The government argued that there was no confrontation violation because the testimony was all about the actions of the officer and no hearsay statement was admitted at trial. But the court agreed with the defendant and reversed the conviction. The court noted that it was irrelevant that the government did not introduce the actual statements, because such statements were effectively before the jury in the context of the trial. The court stated that Aany other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant=s statements into another witness=s testimony by implication. The government cannot be permitted to circumvent the Confrontation Clause by introducing the same substantive testimony in a different form.@ ***Compare United States v. Occhiuto,*** 784 F.3d 862 (1st Cir. 2015)**:** In a drug case, an officer testified that he arranged for a cooperating informant to buy drugs from the defendant; that he monitored the transactions; and that the drugs that were in evidence were the same ones that the defendant had sold to the informant. The defendant argued that the officer=s conclusion about the drugs must have rested on assertions from the informant, and therefore his right to confrontation was violated. The defendant relied upon *Meises,* but the court distinguished that case, because here the officer=s testimony was based on his own personal observations and did not necessarily rely on anything said by the informant. The fact that the officer=s surveillance was not airtight did not raise a confrontation issue, rather it raised a question of weight as to the officer=s conclusion.

Statements to law enforcement were testimonial, and right to confrontation was violated even though the statements were not stated in detail at trial: *Ocampo v. Vail,* 649 F.3d 1098 (9th Cir. 2011): In a murder case, an officer testified that on the basis of an interview with Vazquez, the police were able to rule out suspects other than the defendant. Vazquez was not produced for trial. The state court found no confrontation violation on the ground that the officer did not testify to the substance of anything Vazquez said. But the court found that the state court unreasonably applied *Crawford* and reversed the district court=s denial of a grant of habeas corpus. The statements from Vazquez were obviously testimonial because they were made during an investigation of a murder. And the court held that the Confrontation Clause bars not only quotations from a declarant, but also any testimony at trial that conveys the substance of a declarant=s testimonial hearsay statement. It reasoned as follows:

> Where the government officers have not only Aproduced@ the evidence, but then condensed it into a conclusory affirmation for purposes of presentation to the jury, the difficulties of testing the veracity of the source of the evidence are not lessened but exacerbated. With the language actually used by the out-of-court witness obscured, any clues to its truthfulness provided by that language C contradictions, hesitations, and other clues often used to test credibility C are lost, and instead a veneer of objectivity conveyed.
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> * * *
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> Whatever locution is used, out-of-court statements admitted at trial are Astatements@ for the purpose of the Confrontation Clause * * * if, fairly read, they convey to the jury the substance of an out-of-court, testimonial statement of a witness who does not testify.

See also United States v. Brooks, 772 F.3d 1161 (9th Cir. 2014): An agent testified that he telephoned a postal supervisor and provided him a description of the suspect, and then later searched a particular parcel with a tracking number and mailing information he had been provided over the phone as identifying the package mailed by the suspect. The postal supervisor was not produced for trial. The government argued that the agent=s testimony did not violate the Confrontation Clause because the postal supervisor=s actual statements were never offered at trial. But the court declared that Aout-of-court statements need not be repeated verbatim to trigger the protections of the Confrontation Clause.@ Fairly read, the agent=s testimony revealed the substance of the postal supervisor=s statements. And those statements were made with the motivation that they be used in a criminal prosecution. Therefore the agent=s testimony violated the Confrontation Clause.

Informal Circumstances, Private Statements, etc.

Statement of young child to his teacher is not sufficiently formal to be testimonial: *Ohio v. Clark,* 135 S.Ct. 2173 (2015): This case is fully discussed in Part I. The case involved a statement from a three-year-old boy to his teachers. It accused the defendant of injuring him. The Court held that a statement is extremely unlikely to be found testimonial in the absence of some participation by or with law enforcement. The presence of law enforcement is what signifies a statement made formally with the motivation that it will be used in a criminal prosecution. The Court did not establish a bright-line rule however, leaving at least the remote possibility that an accusation might be testimonial even if law enforcement had no role in the making of the statement.

Private conversations and casual remarks are not testimonial: *United States v. Malpica-Garcia,* 489 F.3d 393 (1st Cir. 2007): In a drug prosecution, the defendant argued that testimony of his former co-conspirators violated *Crawford* because some of their assertions were not based on personal knowledge but rather were implicitly derived from conversations with other people (e.g., that the defendant ran a protection racket). The court found that if the witnesses were in fact relying on accounts from others, those accounts were not testimonial. The court noted that the information was obtained from people Ain the course of private conversations or in casual remarks that no one expected would be preserved or later used at trial.@ There was no indication that the statements were made Ato police, in an investigative context, or in a courtroom setting.@

Informal letter found reliable under the residual exception is not testimonial: *United States v. Morgan,* 385 F.3d 196 (2nd Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford.* The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant=s hotel room; 5) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 6) it was not written to curry favor with the authorities or with anyone else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

Informal conversation between defendant and undercover informant was not testimonial under *Davis: United States v. Burden,* 600 F.3d 204 (2nd Cir. 2010): Appealing RICO and drug convictions, the defendant argued that the trial court erred in admitting a recording of a drug transaction between the defendant and a cooperating witness. The defendant argued that the statements on the recording were testimonial, but the court disagreed and affirmed. The defendant=s part of the conversation was not testimonial because he was not aware at the time that

the statement was being recorded or would be potentially used at his trial. As to the informant, Aanything he said was meant not as an accusation in its own right but as bait.@

> **Note: Other courts, as seen in the ANot Hearsay@ section below, have come to the same result as the Second Circuit in *Burden,* but using a different analysis: 1) admitting the defendant=s statement does not violate the Confrontation Clause because it is his own statement and he doesn=t have a right to confront himself; 2) the informant=s statement, while testimonial, is not offered for its truth but only to put the defendant=s statements in context C therefore it does not violate the right to confrontation because it is not offered as an accusation.**

Prison telephone calls between defendant and his associates were not testimonial: *United States v. Jones,* 716 F.3d 851 (4th Cir. 2013): Appealing from convictions for marriage fraud, the defendant argued that the trial court erred in admitting telephone conversations between the defendant and his associates, who were incarcerated at the time. The calls were recorded by the prison. The court found no error in admitting the conversations because they were not testimonial. The calls involved discussions to cover up and lie about the crime, and they were casual, informal statements among criminal associates, so it was clear that they were not primarily motivated to be used in a criminal prosecution. The defendant argued that the conversations were testimonial because the parties knew they were being recorded. But the court noted that Aa declarant=s understanding that a statement could potentially serve as criminal evidence does not necessarily denote testimonial intent@ and that Ajust because recorded statements are used at trial does not mean they were created for trial.@ The court also noted that a prison Ahas significant institutional reasons for recording phone calls outside or procuring forensic evidence C i.e., policing its own facility by monitoring prisoners= contact with individuals outside the prison.@

Statements made to an undercover informant setting up a drug transaction are not testimonial: *Brown v. Epps,* 686 F.3d 281 (5th Cir. 2012)**:** The court found no error in the state court=s admission of an intercepted conversation between the defendant, an accomplice, and an undercover informant. The conversation was to set up a drug deal. The court held that statements Aunknowingly made to an undercover officer, confidential informant, or cooperating witness are not testimonial in nature because the statements are not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for later use at trial.” The court elaborated further:

> The conversations did not consist of solemn declarations made for the purpose of establishing some fact. Rather, the exchange was casual, often profane, and served the purpose of selling cocaine. Nor were the unidentified individuals' statements made under circumstances that would lead an objective witness reasonably to believe that they would be available for use at a later trial. To the contrary, the statements were furthering a

> criminal enterprise; a future trial was the last thing the declarants were anticipating. Moreover, they were unaware that their conversations were being preserved, so they could not have predicted that their statements might subsequently become available at trial. * * * No witness goes into court to proclaim that he will sell you crack cocaine in a Wal-Mart parking lot. An objective analysis would conclude that the primary purpose of the unidentified individuals' statements was to arrange the drug deal. Their purpose was not to create a record for trial and thus is not within the scope of the Confrontation Clause.

Statements made by a victim to her friends and family are not testimonial: *Doan v. Carter,* 548 F.3d 449 (6th Cir. 2008): The defendant challenged a conviction for murder of his girlfriend. The trial court admitted a number of statements from the victim concerning physical abuse that the defendant had perpetrated on her. The defendant argued that these statements were testimonial but the court disagreed. The defendant contended that under *Davis* a statement is nontestimonial only if it is in response to an emergency, but the court rejected the defendant=s Anarrow characterization of nontestimonial statements.@ The court relied on the statement in *Giles v. California* that Astatements to friends and neighbors about abuse and intimidation * * * would be excluded, if at all, only by hearsay rules.@ ***See also United States v. Boyd,*** 640 F.3d 657 (6th Cir. 2011) (statements were non-testimonial because the declarant made them to a companion; stating broadly that Astatements made to friends and acquaintances are non-testimonial@).

Suicide note implicating the declarant and defendant in a crime was testimonial under the circumstances: *Miller v. Stovall,* 608 F.3d 913 (6th Cir. 2010): A former police officer involved in a murder wrote a suicide note to his parents, indicating he was going to kill himself so as not go to jail for the crime that he and the defendant committed. The note was admitted against the defendant. The court found that the note was testimonial and its admission against the defendant violated his right to confrontation, because the declarant could Areasonably anticipate@ that the note would be passed on to law enforcement C especially because the declarant was a former police officer.

> **Note: The court=s Areasonable anticipation@ test appears to be a broader definition of testimoniality than that applied by the Supreme Court in *Davis* and especially *Bryant.* The Court in *Davis* looked to the Aprimary motivation@ of the speaker. In this case, the Aprimary motivation@ of the declarant was probably to explain to his parents why he was going to kill himself, rather than to prepare a case against the defendant. So the case appears wrongly decided.**

Statements made by an accomplice to a jailhouse informant are not testimonial: *United States v. Honken,* 541 F.3d 1146 (8th Cir. 2008): When the defendant=s murder prosecution was pending, the defendant=s accomplice (Johnson) was persuaded by a fellow inmate (McNeese) that Johnson could escape responsibility for the crime by getting another inmate to falsely confess to the crime C but that in order to make the false confession believable, Johnson would have to disclose where the bodies were buried. Johnson prepared maps and notes describing where the bodies were buried, and gave it to McNeese with the intent that it be delivered to the other inmate who would falsely confess. In fact this was all a ruse concocted by McNeese and the authorities to get Johnson to confess, in which event McNeese would get a benefit from the government. The notes and maps were admitted at the defendant=s trial, over the defendant=s objection that they were testimonial. The defendant argued that Johnson had been subjected to the equivalent of a police interrogation. But the court held that the evidence was not testimonial, because Johnson didn=t know that he was speaking to a government agent. It explained as follows:

> Johnson did not draw the maps with the expectation that they would be used against Honken at trial * * * . Further, the maps were not a Asolemn declaration@ or a Aformal statement.@ Rather, Johnson was more likely making a casual remark to an acquaintance. We simply cannot conclude Johnson made a Atestimonial@ statement against Honken without the faintest notion that she was doing so.

See also United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008) (private conversation between inmates about a future course of action is not testimonial).

Statement from one friend to another in private circumstances is not testimonial: *United States v. Wright,* 536 F.3d 819 (8th Cir. 2008): The defendant was charged with shooting two people in the course of a drug deal. One victim died and one survived. The survivor testified at trial to a private conversation he had with the other victim, before the shootings occurred. The court held that the statements of the victim who died were not testimonial. The statements were made under informal circumstances to a friend. The court relied on the Supreme Court=s statement in *Giles v. California* that Astatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment,@ are not testimonial.

Accusatory statements in a victim=s diary are not testimonial: *Parle v. Runnels*, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The court held that the victim=s diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

Private conversation between mother and son is not testimonial: *United States v. Brown,* 441 F.3d 1330 (11th Cir. 2006): In a murder prosecution, the court admitted testimony that the defendant=s mother received a phone call, apparently from the defendant; the mother asked the caller whether he had killed the victim, and then the mother started crying. The mother=s reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford.* The court reasoned as follows:

> We need not divine any additional definition of Atestimonial@ evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford*. (Citations omitted).

Defendant's lawyer's informal texts with I.R.S. agent found not testimonial: *United States v. Wilson,* 788 F.3d 1298 (11th Cir. 2015): The defendant was charged with converting checks that he knew to be issued as a result of fraudulently filed income tax returns. He claimed that he was a legitimate cashier and did not know that the checks were obtained by fraud. The trial court admitted texts sent by the defendant's lawyer to the I.R.S. The texts involved the return of certain records that the I.R.S. agent had allowed the defendant to take to copy; the texts contradicted the defendant's account at trial that he didn't know he had to return the boxes (in essence a showing of consciousness of guilt). The defendant argued that the lawyer's texts to the I.R.S. agent were testimonial, but the court disagreed: "Here, the attorney communicated through informal text messages to coordinate the delivery of the boxes. The cooperative and informal nature of those text messages was such that an objective witness would not reasonably expect the texts to be used prosecutorially." ***See also United States v. Mathis,*** 767 F.3d 1264 (11th Cir. 2014) (text messages between defendant and a minor concerning sex were informal, haphazard communications and therefore not made with the primary motive to be used in a criminal prosecution).

Interpreters

Interpreter is not a witness but merely a language conduit and so testimony recounting the interpreter=s translation does not violate *Crawford*: *United States v. Orm Hieng,* 679 F.3d 1131 (9th Cir. 2012): At the defendant=s drug trial, an agent testified to inculpatory statements the defendant made through an interpreter. The interpreter was not called to testify, and the defendant argued that admitting the interpreter=s statements about what the defendant said violated his right to confrontation. The court found that the interpreter had acted as a Amere language conduit@ and so he was not a witness against the defendant within the meaning of the Confrontation Clause. The court noted that in determining whether an interpreter acts as a language conduit, a court must undertake a case-by-case approach, considering factors such as "which party supplied the interpreter, whether the interpreter had any motive to lead or distort, the interpreter=s qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated.@ The court found that these factors cut in favor of the lower court=s finding that the interpreter in this case had acted as a language conduit. Because the interpreter was only a conduit, the witness against the defendant was not the interpreter, but rather himself. The court concluded that when it is the defendant whose statements are translated, Athe Sixth Amendment simply has no application because a defendant cannot complain that he was denied the opportunity to confront himself.@ ***See also United States v. Romo-Chavez,*** 681 F.3d 955 (9th Cir. 2012): Where an interpreter served only as a language conduit, the defendant=s own statements were properly admitted under Rule 801(d)(2)(A), and the Confrontation Clause was not violated because the defendant was his own accuser and he had no right to cross-examine himself.

Interpreter=s statements were testimonial: *United States v. Charles,* 722 F.3d 1319 (11th Cir. 2013): The defendant was convicted of knowingly using a fraudulently authored travel document. When the defendant was detained at the airport, he spoke to the Customs Officer through an interpreter. At trial, the defendant=s statements were reported by the officer. The interpreter was not called. The court held that the defendant had the right to confront the interpreter. It stated that the interpreter=s translations were testimonial because they were rendered in the course of an interrogation and for these purposes the interpreter was the relevant declarant. But the court found that the error was not plain and affirmed the conviction. The court did not address the conflicting authority in the Ninth Circuit, supra. ***See also United States v. Curbelo,*** 726 F.3d 1260 (11th Cir. 2013) (transcripts of a wiretapped conversation that were translated constituted the translator=s implicit out-of-court representation that the translation was correct, and the translator=s implicit assertions were testimonial; but there was no violation of the Confrontation Clause because a party to the conversation testified to what was said based on his independent review of the recordings and the transcript, and the transcript itself was never admitted at trial).

Interrogations, Etc.

Formal statement to police officer is testimonial: ***United States v. Rodriguez-Marrero,*** 390 F.3d 1 (1st Cir. 2004): The defendant=s accomplice gave a signed confession under oath to a prosecutor in Puerto Rico. The court held that any information in that confession that incriminated the defendant, directly or indirectly, could not be admitted against him after *Crawford.* Whatever the limits of the term Atestimonial,@ it clearly covers sworn statements by accomplices to police officers.

Accomplice=s statements during police interrogation are testimonial: ***United States v. Alvarado-Valdez,*** 521 F.3d 337 (5th Cir. 2008): The trial court admitted the statements of the defendant=s accomplice that were made during a police interrogation. The statements were offered for their truth C to prove that the accomplice and the defendant conspired with others to transport cocaine. Because the accomplice had absconded and could not be produced for trial, admission of his testimonial statements violated the defendant=s right to confrontation.

Identification of a defendant, made to police by an incarcerated person, is testimonial: ***United States v. Pugh,*** 405 F.3d 390 (6th Cir. 2005): In a bank robbery prosecution, the court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* because Athe term >testimonial= at a minimum applies to police interrogations.@ The court also noted that the statement was sworn and that a person who Amakes a formal statement to government officers bears testimony.@ ***See also United States v. McGee****,* 529 F.3d 691 (6th Cir. 2008) (confidential informant=s statement identifying the defendant as the source of drugs was testimonial).

Accomplice statement to law enforcement is testimonial: ***United States v. Nielsen,*** 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial. The court found this to be error, as the statement was testimonial under *Crawford,* because it was made to police officers during an interrogation. The court noted that even the first part of Volz=s statement C that she did not have access to the floor safe C violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

Statement made by an accomplice after arrest, but before formal interrogation, is testimonial: *United States v. Summers,* 414 F.3d 1287 (10th Cir. 2005): The defendant=s accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, AHow did you guys find us?@ The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford.* The court explained as follows:

> Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed=s statement * * * implicated himself and thus was loosely akin to a confession.

Statements made by accomplice to police officers during a search are testimonial: *United States v. Arbolaez,* 450 F.3d 1283 (11th Cir. 2006): In a marijuana prosecution, the court found error in the admission of statements made by one of the defendant=s accomplices to law enforcement officers during a search. The government argued that the statements were offered not for truth but to explain the officers= reactions to the statements. But the court found that Atestimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay.@ The court also found that the accomplice=s statements were testimonial under *Crawford*, because they were made in response to questions from police officers.

Joined Defendants

Testimonial hearsay offered by another defendant violates *Crawford* where the statement can be used against the defendant: *United States v. Nguyen,* 565 F.3d 668 (9th Cir. 2009): In a trial of multiple defendants in a fraud conspiracy, one of the defendants offered statements he made to a police investigator. These statements implicated the defendant. The court found that the admission of the codefendant=s statements violated the defendant=s right to confrontation. The statements were clearly testimonial because they were made to a police officer during an interrogation. The court noted that the confrontation analysis Adoes not change because a co-defendant, as opposed to the prosecutor, elicited the hearsay statement. The Confrontation Clause gives the accused the right to be confronted with the witnesses against him. The fact that Nguyen=s co-counsel elicited the hearsay has no bearing on her right to confront her accusers.@

Judicial Findings and Judgments

Judicial findings and an order of judicial contempt are not testimonial: *United States v. Sine,* 493 F.3d 1021 (9th Cir. 2007): The court held that the admission of a judge=s findings and order of criminal contempt, offered to prove the defendant=s lack of good faith in a tangentially related fraud case, did not violate the defendant=s right to confrontation. The court found Ano reason to believe that Judge Carr wrote the order in anticipation of Sine=s prosecution for fraud, so his order was not testimonial.@

See also United States v. Ballesteros-Selinger, 454 F.3d 973 (9th Cir. 2006) (holding that an immigration judge=s deportation order was nontestimonial because it Awas not made in anticipation of future litigation@).

Law Enforcement Involvement

Accusations made to child psychologist appointed by law enforcement were testimonial: *McCarley v. Kelly,* 759 F.3d 535 (6th Cir. 2014): A three year old boy witnessed a murder but would not talk to the police about it. The police sought out a child psychologist, who interviewed the boy with the understanding that she would try to Aextract information@ from him about the crime and refer that information to the police. Helping the child was, at best, a secondary motive. Under these circumstances, the court found that the child=s statements to the psychologist were testimonial and erroneously admitted in the defendant=s state trial. The court noted that the sessions Awere more akin to police interrogations than private counseling sessions.@

> **Note: *McCarley* was decided before *Ohio v. Clark*, where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. *McCarley* differs in one respect from *Clark*, though. In *McCarley*, the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark*, where the child was being interviewed by his teachers. Still, the result in *McCarley* is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.**

Police officer=s count of marijuana plants found in a search is testimonial: *United States v. Taylor,* 471 F.3d 832 (7th Cir. 2006): The court found plain error in the admission of testimony by a police officer about the number of marijuana plants found in the search of the defendant=s premises. The officer did not himself count all of the plants; part of his total count was based on a hearsay statement of another officer who assisted in the count. The court held that the officer=s hearsay statement about the amount of plants counted was clearly testimonial as it was an evaluation prepared for purposes of criminal prosecution.

Social worker=s interview of child-victim, with police officers present, was the functional equivalent of interrogation and therefore testimonial: *Bobadilla v. Carlson,* 575 F.3d 785 (8th Cir. 2009): The court affirmed the grant of a writ of habeas after a finding that the defendant=s state conviction for child sexual abuse was tainted by the admission of a testimonial statement by the child-victim. A police officer arranged to have the victim interviewed at the police station five days after the alleged abuse. The officer sought the assistance of a social worker, who conducted the interview using a forensic interrogation technique designed to detect sexual abuse. The court found that Athis interview was no different than any other police interrogation: it was initiated by a police officer a significant time after the incident occurred for the purpose of gathering evidence during a criminal investigation.@ The court stated that the only difference

between the questioning in this case and that in *Crawford* was that Ainstead of a police officer asking questions about a suspected criminal violation, he sat silent while a social worker did the same.@ But the court found that this was Aa distinction without a difference@ because the interview took place at the police station, it was recorded for use at trial, and the social worker utilized a structured, forensic method of interrogation at the behest of the police. Under the circumstances, the social worker Awas simply acting as a surrogate interviewer for the police.@

> **Note: *Bobadilla* was decided before *Ohio v. Clark*, where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. *Bobadilla* differs in one respect from *Clark*, though. In *Bobadilla*, the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark*, where the child was being interviewed by his teachers. Still, the result in *Bobadilla* is questionable after *Clark* --- and especially so in light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer.**

Statements made by a child-victim to a forensic investigator are testimonial: *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005): In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford*. The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

> The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a ›forensic= interview . . . That [the victim=s] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.

> **Note: This case was decided before *Ohio v. Clark*, where the Supreme Court held that the statement of a young child is extremely unlikely to be testimonial, because the child would not have a primary motive that the statement would be used in a criminal prosecution. This case differs in one respect from *Clark*, though --- the party taking the statement definitely had a primary motive to use it in a criminal prosecution. This was not the case in *Clark*, where the child was being interviewed by his teachers. Still, the result here is questionable after *Clark* --- and especially so in**

light of the holding in *Michigan v. Bryant* that primary motivation must be assessed from the perspective of a reasonable person in the position of *both* the speaker and the interviewer. Moreover, the court concedes that there may have been a dual motive here --- treatment being the other motive. At a minimum, a court would have to make the finding that the prosecutorial motive was primary.

See also United States v. Eagle, 515 F.3d 794 (8th Cir. 2008) (statements from a child concerning sex abuse, made to a forensic investigator, are testimonial). ***Compare United States v. Peneaux,*** 432 F.3d 882 (8th Cir. 2005) (distinguishing *Bordeaux* where the child=s statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview resulted in any referral to law enforcement: AWhere statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial.@); ***United States v. DeLeon,*** 678 F.3d 317 (4th Cir. 2012) (discussed below under Amedical statements@ and distinguishing *Bordeaux* and *Bobodilla* as cases where statements were essentially made to law enforcement officers and not for treatment purposes).

Machines

Printout from machine is not hearsay and therefore its admission does not violate *Crawford*: *United States v. Washington,* 498 F.3d 225 (4th Cir. 2007): The defendant was convicted of operating a motor vehicle under the influence of drugs and alcohol. At trial, an expert testified on the basis of a printout from a gas chromatograph machine. The machine issued the printout after testing the defendant=s blood sample. The expert testified to his interpretation of the data issued by the machine C that the defendant=s blood sample contained PCP and alcohol. The defendant argued that *Crawford* was violated because the expert had no personal knowledge of whether the defendant=s blood contained PCP or alcohol. He read *Crawford* to require the production of the lab personnel who conducted the test. But the court rejected this argument, finding that the machine printout was not hearsay, and therefore its use at trial by the expert could not violate *Crawford* even though it was prepared for use at trial. The court reasoned as follows:

> The technicians could neither have affirmed or denied independently that the blood contained PCP and alchohol, because all the technicians could do was to refer to the raw data printed out by the machine. Thus, the statements to which Dr. Levine testified in court . . . did not come from the out-of-court technicians [but rather from the machine] and so there was no violation of the Confrontation Clause. . . . The raw data generated by the diagnostic machines are the Astatements@ of the machines themselves, not their operators. But Astatements@ made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause.

The court noted that the technicians might have needed to be produced to provide a chain of custody, but observed that the defendant made no objection to the authenticity of the machine=s report.

> **Note: The result in *Washington* appears unaffected by *Williams,* as the Court in *Williams* had no occasion to consider whether a machine output can be testimonial hearsay.**

See also United States v. Summers, 666 F.3d 192 (4th Cir. 2011): (expert=s reliance on a Apure instrument read-out@ did not violate the Confrontation Clause because such a read-out is not Atestimony@).

Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Moon,* 512 F.3d 359 (7th Cir. 2008): The court held that an expert=s testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because Adata is not >statements= in any useful sense. Nor is a machine a >witness against= anyone.@

Electronic tabulation of phone calls is not a statement and therefore cannot be testimonial hearsay: ***United States v. Lamons,*** 532 F.3d 1251 (11th Cir. 2008): Bomb threats were called into an airline, resulting in the disruption of a flight. The defendant was a flight attendant accused of sending the threats. The trial court admitted a CD of data collected from telephone calls made to the airline; the data indicated that calls came from the defendant=s cell phone at the time the threats were made. The defendant argued that the information on the CD was testimonial hearsay, but the court disagreed, because the information was entirely machine-generated. The court stated that Athe witnesses with whom the Confrontation Clause is concerned are *human* witnesses@ and that the purposes of the Confrontation Clause Aare ill-served through confrontation of the machine=s human operator. To say that a wholly machine-generated statement is unreliable is to speak of mechanical error, not mendacity. The best way to advance the truth-seeking process * * * is through the process of authentication as provided in Federal Rule of Evidence 901(b)(9).@ The court concluded that there was no hearsay statement at issue and therefore the Confrontation Clause was inapplicable.

Medical/Therapeutic Statements

Statements by victim of abuse to treatment manager of Air Force medical program were admissible under Rule 803(4) and non-testimonial: *United States v. DeLeon,* 678 F.3d 317 (4th Cir. 2012): The defendant was convicted of murdering his eight-year-old son. Months before his death, the victim had made statements about incidents in which he had been physically abused by the defendant as part of parental discipline. The statements were made to the treatment manager of an Air Force medical program that focused on issues of family health. The court found that the statements were properly admitted under Rule 803(4) and (essentially for that reason) were non-testimonial because their primary purpose was not for use in a criminal prosecution of the defendant. The court noted that the statements were not made in response to an emergency, but that emergency was only one factor under *Bryant.* The court also recognized that the Air Force program Aincorporates reporting requirements and a security component@ but stated that these factors were not sufficient to render statements to the treatment manager testimonial. The court explained why the Aprimary motive@ test was not met in the following passage:

> We note first that Thomas [the treatment manager] did not have, nor did she tell Jordan [the child] she had, a prosecutorial purpose during their initial meeting. Thomas was not employed as a forensic investigator but instead worked * * * as a treatment manager. And there is no evidence that she recorded the interview or otherwise sought to memorialize Jordan=s answers as evidence for use during a criminal prosecution. * * * Rather, Thomas used the information she gathered from Jordan and his family to develop a written treatment plan and continued to provide counseling and advice on parenting techniques in subsequent meetings with family members. * * * Thomas also did not meet with Jordan in an interrogation room or at a police station but instead spoke with him in her office in a building that housed * * * mental health service providers.
>
> Importantly, ours is also not a case in which the social worker operated as an agent of law enforcement. * * * Here, Thomas did not act at the behest of law enforcement, as there was no active criminal investigation when she and Jordan spoke. * * * An objective review of the parties= actions and the circumstances of the meeting confirms that the primary purpose was to develop a treatment plan C not to establish facts for a future criminal prosecution. Accordingly, we hold that the contested statements were nontestimonial and that their admission did not violate DeLeon=s Sixth Amendment rights.

Note: The court's analysis is strongly supported by the subsequent Supreme Court decision in *Ohio v. Clark.* The *Clark* Court held that: 1) Statements by children are extremely unlikely to be primarily motivated for use in a criminal prosecution; and 2) public officials do not become an agent of law enforcement by asking about suspected child abuse.

Statement admitted under Rule 803(4) are presumptively non-testimonial: ***United States v. Peneaux,*** 432 F.3d 882 (8th Cir. 2005): AWhere statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial.@

Miscellaneous

Labels on electronic devices, indicating that they were made in Taiwan, are not testimonial: *United States v. Napier,* 787 F.3d 333 (6th Cir. 2015): In a child pornography prosecution, the government proved the interstate commerce element by offering two cellphones used to commit the crimes. The cellphones were each labeled AMade in Taiwan.@ The defendant argued that the statements on the labels were hearsay and testimonial. But the court found that the labels clearly were not made with the primary motive of use in a criminal prosecution.

> **Note: The court in *Napier* reviewed the confrontation argument for plain error, because the defendant objected at trial only on hearsay grounds; a hearsay objection does not preserve a claim of error on confrontation grounds.**

Statement of an accomplice made to his attorney is not testimonial: *Jensen v. Pliler,* 439 F.3d 1086 (9th Cir. 2006): Taylor was in custody for the murder of Kevin James. He confessed the murder to his attorney, and implicated others, including Jensen. After Taylor was released from jail, Jensen and others murdered him because they thought he talked to the authorities. Jensen was tried for the murder of both James and Taylor, and the trial court admitted the statements made by Taylor to his attorney (Taylor=s next of kin having waived the privilege). The court found that the statements made by Taylor to his attorney were not testimonial, as they Awere not made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed.@ Finally, while Taylor=s statements amounted to a confession, they were not given to a police officer in the course of interrogation.

Non-Testimonial Hearsay and the Right to Confrontation

Clear statement and holding that *Crawford* overruled *Roberts* even with respect to non-testimonial hearsay: *Whorton v. Bockting,* 549 U.S. 406 (2007): The habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford.* His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a Awatershed@ rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts.* It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

> *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess.
>
> With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. But see 418 F.3d at 1058 (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred "in anything but the exceptional case"). *But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford's elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.* (Emphasis added).

One of the main reasons that *Crawford* in not retroactive (the holding) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts.* Thus, if hearsay is non-testimonial, there is no constitutional limit on its admission.

Non-Verbal Information

Videotape of drug transaction was not hearsay and so its introduction did not violate the right to confrontation: ***United States v. Wallace,*** 753 F.3d 671 (7th Cir. 2014): In a drug prosecution, the government introduced a videotape, without sound, which appeared to show the defendant selling drugs to an undercover informant. The defendant argued that the tape was inadmissible hearsay and violated his right to confrontation, because the undercover informant was never called to testify. But the court disagreed and affirmed his conviction. The court reasoned that the video was

> a picture; it was not a witness who could be cross-examined. The agent narrated the video at trial, and his narration was a series of statements, so he was subject to being cross-examined and was, and thus was Aconfronted.@ [The informant] could have testified to what he saw, but what could he have said about the recording device except that the agents had strapped it on him and sent him into the house, whether the device recorded whatever happened to be in front of it? Rule 801(a) of the Federal Rules of Evidence does define Astatement@ to include Anonverbal conduct,@ but only if the person whose conduct it was Aintended it as an assertion.@ We can=t fit the videotape to this definition.

Photographs of seized evidence was not testimony so its admission did not violate the Confrontation Clause: ***United States v. Brooks,*** 772 F.3d 1161 (9th Cir. 2014): In a narcotics trial, the defendant objected to the admission of photographs of a seized package on the ground it would violate his right to confrontation. But the court disagreed. It noted that the *Crawford* Court defined Atestimony@ as Aa solemn declaration or affirmation made for the purpose of establishing or proving some fact.@ The photographs did not meet that definition because they Awere not ›witnesses= against Brooks. They did not ›bear testimony= by declaring or affirming anything with a ›purpose.=@

Not Offered for Truth

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant=s own statements: *United States v. Bostick,* 791 F.3d 127 (D.C.Cir. 2015): In a surreptitiously taped conversation, the defendant made incriminating statements to a confidential informant in the course of a drug transaction. The defendant argued that the informant's part of the conversation violated his right to confrontation because the informant was motivated to make the statement for purposes of prosecution. But the court found that the Confrontation Clause was inapplicable because the informant's statements were not offered for their truth, but rather to provide "context" for the defendant's own statement regarding the drug transaction. Statements that are not hearsay cannot violate the Confrontation Clause even if they fit the definition of testimoniality.

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant=s own statements: *United States v. Hansen,* 434 F.3d 92 (1st Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The court found that the father=s statements during the conversation were testimonial under *Crawford* C as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant=s right to confrontation. The defendant=s own side of the conversation was admissible as a statement of a party-opponent, and the father=s side of the conversation was admitted not for its truth but to provide context for the defendant=s statements. *Crawford* does not bar the admission of statements not offered for their truth. ***Accord United States v. Walter,*** 434 F.3d 30 (1st Cir. 2006) (*Crawford* Adoes not call into question this court=s precedents holding that statements introduced solely to place a defendant=s admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause.@); ***United States v. Santiago,*** 566 F.3d 65 (1st Cir. 2009) (statements were not offered for their truth Abut as exchanges with Santiago essential to understand the context of Santiago=s own recorded statements arranging to >cook= and supply the crack@); ***United States v. Liriano,*** 761 F.3d 131 (1st Cir. 2014) (even though statements were testimonial, admission did not violation the Confrontation Clause where they were properly offered to place the defendant=s responses in context). ***See also Furr v. Brady,*** 440 F.3d 34 (1st Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice=s confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth; rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

Note: Five members of the Court in *Williams* disagreed with Justice Alito=s analysis that the Confrontation Clause was not violated because the testimonial lab report was never admitted for its truth. The question from *Williams* is whether those five Justices are opposed to *any* use of the not-for-truth analysis in answering Confrontation Clause challenges. The answer is apparently that their objection to the not-for truth analysis in *Williams* does not extend to situations in which (in their personal view) the statement has a *legitimate* not-for-truth purpose. Thus, Justice Thomas distinguishes the expert=s use of the lab report from the prosecution=s admission of an accomplice=s confession in *Tennessee v. Street,* where the confession Awas not introduced for its truth, but only to impeach the defendant=s version of events.@ In *Street* the defendant challenged his confession on the ground that he had been coerced to copy Peele=s confession. Peele=s confession was introduced not for its truth but only to show that it differed from Street=s. For that purpose, it didn=t matter whether it was true. Justice Thomas stated that A[u]nlike the confession in *Street,* statements introduced to explain the basis of an expert=s opinion are not introduced for a plausible nonhearsay purpose@ because Ato use the inadmissible information in evaluating the expert=s testimony, the jury must make a preliminary judgment about whether this information is true.@ Justice Kagan in her opinion essentially repeats Justice Thomas=s analysis and agrees with his distinction between legitimate and illegitimate use of the Anot-for-truth@ argument. Both Justices Kagan and Thomas agree with the Court=s statement in *Crawford* that the Confrontation Clause Adoes not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.@ Both would simply add the proviso that the not-for-truth use must be *legitimate* or *plausible.*

It follows that the cases under this Anot-for-truth@ headnote are probably unaffected by *Williams,* as they largely permit admission of testimonial statements as offered Anot-for-truth@ only when that purpose is legitimate, i.e., *only when the statement is offered for a purpose as to which it is relevant regardless of whether it is true or not.*

Statements by informant to police officers, offered implausibly to prove the Abackground@ of the police investigation, probably violate *Crawford,* but admission is not plain error: *United States v. Maher,* 454 F.3d 13 (1st Cir. 2006): At the defendant=s drug trial, several accusatory statements from an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because Athe statements were made while the police

were interrogating Johnson after Johnson=s arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . . In this context, it is clear that an objectively reasonable person in Johnson=s shoes would understand that the statement would be used in prosecuting Maher at trial.@ The court then addressed the government=s argument that the informant=s statements were not admitted for their truth, but to explain the background of the police investigation:

> The government=s articulated justification C that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* C is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford=s* constitutional rule. . . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he had acted upon Ainformation received,@ or words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant=s statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony Awas followed immediately by a sua sponte instruction to the effect that any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs.@

Accomplice statements purportedly offered for Abackground@ were actually admitted for their truth, resulting in a Confrontation Clause violation: *United States v. Cabrera-Rivera,* 583 F.3d 26 (1st Cir. 2009): In a robbery prosecution, the government offered hearsay statements that accomplices made to police officers. The government argued that the statements were not offered for their truth, but rather to explain how the government was able to find other evidence in the case. But the court found that the accusations were not properly admitted to provide for the purpose of explaining the police investigation. The government at trial emphasized the details of the accusations that had nothing to do with leading the government to other evidence; and the government did not contend that one of the accomplice=s confessions led to any other evidence. Because the statements were testimonial, and because they were in fact offered for their truth, admission of the statements violated *Crawford.*

Note: The result in *Cabrera-Rivera* is certainly unchanged by *Williams.* The prosecution=s was not offering the accusations for any *legitimate* not-for-truth purpose.

Statements offered to provide context for the defendant=s part of a conversation were not hearsay and therefore could not violate the Confrontation Clause: *United States v. Hicks,* 575 F.3d 130 (1st Cir. 2009): The court found no error in admitting a telephone call that the defendant placed from jail in which he instructed his girlfriend how to package and sell cocaine. The defendant argued that admission of the girlfriend=s statements in the telephone call violated *Crawford.* But the court found that the girlfriend=s part of the conversation was not hearsay and therefore did not violate the defendant=s right to confrontation. The court reasoned that the girlfriend=s statements were admissible not for their truth but to provide the context for understanding the defendant=s incriminating statements. The court noted that the girlfriend=s statements were Alittle more than brief responses to Hicks=s much more detailed statements.@ ***See also United States v. Occhiuto,*** 784 F.3d 862 (1st Cir. 2015) (statements by undercover informant made to defendant during a drug deal were properly admitted; they were offered not for their truth but to provide context for the defendant=s own statements, and so they did not violate the Confrontation Clause).

Accomplice=s confession, when offered in rebuttal to explain why police did not investigate other suspects and leads, is not hearsay and therefore its admission does not violate *Crawford: United States v. Cruz-Diaz,* 550 F.3d 169 (1st Cir. 2008): In a bank robbery prosecution, defense counsel cross-examined a police officer about the decision not to pursue certain investigatory opportunities after apprehending the defendants. Defense counsel identified Aeleven missed opportunities@ for tying the defendants to the getaway car, including potential fingerprint and DNA evidence. In response, the officer testified that the defendant=s co-defendant had given a detailed confession. The defendant argued that introducing the cohort=s confession violated his right to confrontation, because it was testimonial under *Crawford.* But the court found the confession to be not hearsay C as it was offered for the not-for-truth purpose of explaining why the police conducted the investigation the way they did. Accordingly admission of the statement did not violate *Crawford.*

The defendant argued that the government=s true motive was to introduce the confession for its truth, and that the not-for-truth purpose was only a pretext. But the court disagreed, noting that the government never tried to admit the confession until defense counsel attacked the thoroughness of the police investigation. Thus, introducing the confession for a not-for-truth purpose was proper rebuttal. The defendant suggested that Aif the government merely wanted to

explain why the FBI and police failed to conduct a more thorough it could have had the agent testify in a manner that entirely avoided referencing Cruz=s confession@ C for example, by stating that the police chose to truncate the investigation Abecause of information the agent had.@ But the court held that this kind of sanitizing of the evidence was not required, because it Awould have come at an unjustified cost to the government.@ Such generalized testimony, without any context, Awould not have sufficiently rebutted Ayala=s line of questioning@ because it would have looked like one more cover-up. The court concluded that A[w]hile there can be circumstances under which Confrontation Clause concerns prevent the admission of the substance of a declarant=s out-of-court statement where a less prejudicial narrative would suffice in its place, this is not such a case.@ ***See also United States v. Diaz,*** 670 F.3d 332 (1st Cir. 2012) (testimonial statement from one police officer to another to effect an arrest did not violate the right to confrontation because it was not hearsay: AThe government offered Perez=s out-of-court statement to explain why Veguilla had arrested [the defendant], not as proof of the drug sale that Perez allegedly witnesses. Out-of-court statements providing directions from one individual to another do not constitute hearsay.@).

False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth: ***United States v. Logan,*** 419 F.3d 172 (2nd Cir. 2005): The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The court found no Confrontation Clause violation in admitting the alibi statements. The court relied on *Crawford* for the proposition that the Confrontation Clause Adoes not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted.@ The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant=s own account that the accomplices planned to use the alibi. Thus Athe fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan.@

> **Note: The *Logan* court reviewed the defendant=s Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection.**

Statements made to defendant in a conversation were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant=s statements: ***United States v. Paulino,*** 445 F.3d 211 (2nd Cir. 2006): The court stated: AIt has long been the rule that so long as statements are not presented for the truth of the matter asserted, but

only to establish a context, the defendant=s Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary.@

> **Note: This typical use of Acontext@ is not in question after *Williams*, because the focus is on the defendant=s statements and not on the truth of the declarant=s statements. Use of context could be *illegitimate* however if the focus is in fact on the truth of the declarant=s statements. See, e.g., *United States v. Powers* from the Sixth Circuit, infra.**

Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford* because they were not offered for their truth: *United States v. Stewart,* 433 F.3d 273 (2nd Cir. 2006)**:** In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with government investigators. Each defendant=s statement was offered against the other, to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford,* even though they were Aprovided in a testimonial setting.@ It noted first that to the extent the statements were false, they did not violate *Crawford* because A*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted.@ The defendants argued, however, that some of the statements made during the course of the obstruction were actually true, and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that admitting the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

> It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. * * * The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator=s attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

Note: Offering a testimonial statement to prove it is false is a typical and presumably legitimate not-for-character purpose and so would appear to be unaffected by *Williams.* That is, to the extent five (or more) members of the Court apply a distinction between legitimate and illegitimate not-for-truth usage, offering the statement to prove it is false is certainly on the legitimate side of the line. It is one of the clearest cases of a statement not being offered to prove that the assertions therein are true. Of course, the government must provide independent evidence that the statement is in fact false.

Accomplice statements to police officer were testimonial, but did not violate the Confrontation Clause because they were admitted to show they were false: *United States v. Trala,* 386 F.3d 536 (3rd Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant=s car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford*, as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no purpose. ***See also United States v. Lore,*** 430 F.3d 190 (3rd Cir. 2005) (relying on *Trala*, the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing Awere admitted because they were so obviously false.@).

Confessions of other targets of an investigation were testimonial, but did not violate the Confrontation Clause because they were offered to rebut charges against the integrity of the investigation: *United States v. Christie,* 624 F.3d 558 (3rd Cir. 2010): In a child pornography investigation, the FBI obtained the cooperation of the administrator of a website, which led to the arrests of a number of users, including the defendant. At trial the defendant argued that the investigation was tainted because the FBI, in its dealings with the administrator, violated its own guidelines in treating informants. Specifically the defendant argued that these misguided law enforcement efforts led to unreliable statements from the administrator. In rebuttal, the government offered and the court admitted evidence that twenty-four other users identified by the administrator confessed to child pornography-related offenses. The defendant argued that admitting the evidence of the others= confessions violated the hearsay rule and the Confrontation Clause, but the court rejected these arguments and affirmed. It reasoned that the confessions were not offered for their truth, but to show why the FBI could believe that the administrator was a

reliable source, and therefore to rebut the charge of improper motive on the FBI=s part. As to the confrontation argument, the court declared that Aour conclusion that the testimony was properly introduced for a non-hearsay purpose is fatal to Christie=s *Crawford* argument, since the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.@

Accomplice=s testimonial statement was properly admitted for impeachment purposes, but failure to give a limiting instruction was error: *Adamson v. Cathel,* 633 F.3d 248 (3rd Cir. 2011): The defendant challenged his confession at trial by arguing that the police fed him the details of his confession from other confessions by his alleged accomplices, Aljamaar and Napier. On cross-examination, the prosecutor introduced those confessions to show that they differed from the defendant=s confession on a number of details. The court found no error in the admission of the accomplices' confessions. While testimonial, they were offered for impeachment and not for their truth and so did not violate the Confrontation Clause. However, the trial court gave no limiting instruction, and the court found that failure to be error. The court concluded as follows:

> Without a limiting instruction to guide it, the jury that found Adamson guilty was free to consider those facially incriminating statements as evidence of Adamson=s guilt. The careful and crucial distinction the Supreme Court made between an impeachment use of the evidence and a substantive use of it on the question of guilt was completely ignored during the trial.
>
> **Note: The use of the cohort=s confessions to show differences from the defendant=s confession is precisely the situation reviewed by the Court in *Tennessee v. Street.* As noted above, while five Justices in *Williams* rejected the Anot-for-truth@ analysis as applied to expert reliance on testimonial statements, all of the Justices approved of that analysis as applied to the facts of *Street.***

Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: *United States v. Holmes,* 406 F.3d 337 (5th Cir. 2005): The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford*. The clerk testified that the clerk=s office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The court considered the possibility that the clerk=s testimony

was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford*. It also noted, however, that the clerk=s statement Ais not the run-of-the-mill co-conspirator=s statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator=s statement that is derived from a formalized testimonial source C recorded and sworn civil deposition testimony.@ Ultimately the court found it unnecessary to determine whether the deposition testimony was Atestimonial@ within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony Ato establish its *falsity* through independent evidence.@ ***See also United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (accomplice=s statement offered to impeach him as a witness C by showing it was inconsistent with the accomplice=s refusal to answer certain questions concerning the defendant=s involvement with the crime C did not violate *Crawford* because the statement was not admitted for its truth and the jury received a limiting instruction to that effect).

Informant=s accusation, offered to explain why police acted as they did, was testimonial but it was not hearsay, and so its admission did not violate the Confrontation Clause: *United States v. Deitz,* 577 F.3d 672 (6th Cir. 2009): The court found no error in allowing an FBI agent to testify about why agents tailed the defendant to what turned out to be a drug transaction. The agent testified that a confidential informant had reported to them about Deitz=s drug activity. The court found that the informant=s statement was testimonial C because it was an accusation made to a police officer C but it was not hearsay and therefore its admission did not violate Deitz=s right to confrontation. The court found that the testimony Aexplaining why authorities were following Deitz to and from Dayton was not plain error as it provided mere background information, not facts going to the very heart of the prosecutor=s case.@ The court also observed that Ahad defense counsel objected to the testimony at trial, the court could have easily restricted its scope.@ ***See also United States v. Al-Maliki,*** , 787 F.3d 784 (6th Cir. 2015) (in a prosecution for child sex abuse, the trial court admitted his wife=s statement accusing the defendant of sexual abuse; but the court found no error because it was offered for the limited purpose of explaining why an official investigation began: ATwo conclusions follow: It is not hearsay, * * * and the government did not violate the Confrontation Clause@); ***United States v. Davis***, 577 F.3d 660 (6th Cir. 2009): A woman=s statement to police that she had recently seen the defendant with a gun in a car that she described along with the license plate was not hearsay C and so even though testimonial did not violate the defendant=s right to confrontation C because it was offered only to explain the police investigation that led to the defendant and the defendant=s conduct when he learned the police were looking for him. ***Accord United States v. Napier,*** 787 F.3d 333 (6th Cir. 2015): In a child pornography prosecution, the government offered a document from Time Warner cable, obtained pursuant to a government subpoena, showing that an email address was accessed at the defendant=s home and that the defendant was the subscriber to the account. The court found no confrontation violation because the document was offered not for its truth, but rather Ato

demonstrate how the Cincinnati office of the FBI located Napier.@ The court noted that the trial court gave the jury a limiting instruction that the document could be considered only to prove the course of the investigation.

Statement offered to prove the defendant=s knowledge of a crime was non-hearsay and so did not violate the accused=s confrontation rights: *United States v. Boyd,* 640 F.3d 657 (6th Cir. 2011): A defendant charged with being an accessory after the fact to a carjacking and murder had told police officers that his friend Davidson had told him that he had committed those crimes. At trial the government offered that confession, which included the underlying statements of Boyd. The defendant argued that admitting Davidson=s statements violated his right to confrontation. But the court found no error because the hearsay was not offered for its truth: ADavidson=s statements to Boyd were offered to prove Boyd=s knowledge [of the crimes that Davidson had committed] rather than for the truth of the matter asserted.@

Admission of complaints offered for non-hearsay purpose did not violate the Confrontation Clause: *United States v. Adams,* 722 F.3d 788 (6th Cir. 2013): The defendants were convicted for participation in a vote-buying scheme in three elections. They complained that their confrontation rights were violated when the court admitted complaints that were contained within state election reports. The court of appeals rejected that argument, because the complaints were offered for proper non-hearsay purposes. Some of the information was offered to prove it was false, and other information was offered to show that the defendants adjusted their scheme based on the complaints received. The court did find, however, that the complaints were erroneously admitted under Rule 403, because of the substantial risk that the jury would use the assertions for their truth; that the probative value for the non-hearsay purpose was Aminimal at best@; and the government had other less prejudicial evidence available to prove the point. Technically, this should mean that there was a violation of the Confrontation Clause, because the evidence was not *properly* offered for a not-for-truth purpose. But the court did not make that holding. It reversed on evidentiary grounds.

Informant=s statements were not properly offered for Acontext,@ so their admission violated *Crawford*: *United States v. Powers,* 500 F.3d 500 (6th Cir. 2007): In a drug prosecution, a law enforcement officer testified that he had received information about the defendant=s prior criminal activity from a confidential informant. The government argued on appeal that even

though the informant=s statements were testimonial, they did not violate the Confrontation Clause, because they were offered Ato show why the police conducted a sting operation@ against the defendant. But the court disagreed and found a *Crawford* violation. It reasoned that Adetails about Defendant=s alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation.@ ***See also United States v. Hearn***, 500 F.3d 479 (6th Cir.2007) (confidential informant=s accusation was not properly admitted for background where the witness testified with unnecessary detail and "[t]he excessive detail occurred twice, was apparently anticipated, and was explicitly relied upon by the prosecutor in closing arguments").

Admitting informant=s statement to police officer for purposes of Abackground@ did not violate the Confrontation Clause: ***United States v. Gibbs,*** 506 F.3d 479 (6th Cir. 2007): In a trial for felon-firearm possession, the trial court admitted a statement from an informant to a police officer; the informant accused the defendant of having firearms hidden in his bedroom. Those firearms were not part of the possession charge. While this accusation was testimonial, its admission did not violate the Confrontation Clause, Abecause the testimony did not bear on Gibbs=s alleged possession of the .380 Llama pistol with which he was charged.@ Rather, it was admitted Asolely as background evidence to show why Gibbs=s bedroom was searched.@ ***See also United States v. Macias-Farias,*** 706 F.3d 775 (6th Cir. 2013) (officer=s testimony that he had received information from someone was offered not for its truth but to explain the officer=s conduct, thus no confrontation violation).

Admission of the defendant=s conversation with an undercover informant does not violate the Confrontation Clause, where the undercover informant=s part of the conversation is offered only for Acontext@: ***United States v. Nettles,*** 476 F.3d 508 (7th Cir. 2007): The defendant made plans to blow up a government building, and the government had an undercover informant contact him and ostensibly offer to help him obtain materials. At trial, the court admitted a recorded conversation between the defendant and the informant. Because the informant was not produced for trial, the defendant argued that his right to confrontation was violated. But the court found no error, because the admission of the defendant=s part of the conversation was not barred by the Confrontation Clause, and the informant=s part of the conversation was admitted only to place the defendant=s part in Acontext.@ Because the informant=s statements were not offered for their truth, they did not implicate the Confrontation Clause.

The *Nettles* court did express some concern about the breadth of the Acontext@ doctrine, stating A[w]e note that there is a concern that the government may, in future cases, seek to submit based on >context= statements that are, in fact, being offered for their truth.@ But the court found no such danger in this case, noting the following: 1) the informant presented himself as not being proficient in English, so most of his side of the conversation involved asking the defendant to better explain himself; and 2) the informant did not Aput words in Nettles=s mouth or try to persuade Nettles to commit more crimes in addition to those that Nettles had already decided to commit.@ ***See also United States v. Tolliver,*** 454 F.3d 660 (7th Cir. 2006) (statements of one party to a conversation with a conspirator were offered not for their truth but to provide context to the conspirator=s statements: A*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case, . . . Shye's statements were admissible to put Dunklin's admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused.@); ***United States v. Bermea-Boone***, 563 F.3d 621 (7th Cir. 2009): A conversation between the defendant and a coconspirator was properly admitted; the defendant=s side of the conversation was a statement of a party-opponent, and the accomplice=s side was properly admitted to provide context for the defendant=s statements: AWhere there is no hearsay, the concerns addressed in *Crawford* do not come in to play. That is, the declarant, Garcia, did not function as a witness against the accused.@; ***United States v. York,*** 572 F.3d 415 (7th Cir. 2009) (informant=s recorded statements in a conversation with the defendant were admitted for context and therefore did not violate the Confrontation Clause: Awe see no indication that Mitchell tried to put words in York=s mouth@); ***United States v. Hicks,*** 635 F.3d 1063 (7th Cir. 2011): (undercover informant=s part of conversations were not hearsay, as they were offered to place the defendant=s statements in context; because they were not offered for truth their admission did not violate the defendant=s right to confrontation); ***United States v. Gaytan,*** 649 F.3d 573 (7th Cir. 2011) (undercover informant=s statements to the defendant in a conversation setting up a drug transaction were clearly testimonial, but not offered for their truth: AGaytan=s responses [>what you need?= and >where the loot at?=] would have been unintelligible without the context provided by Worthen=s statements about his or his brother=s interest in >rock=@; the court noted that there was no indication that the informant was Aputting words in Gaytan=s mouth@); ***United States v. Foster,*** 701 F.3d 1142 (7th Cir. 2012) (AHere, the CI=s statement regarding the weight [of the drug] was not offered to show what the weight *actually* was * * * but rather to explain the defendant=s acts and make his statements intelligible. The defendant=s statement to >give me sixteen fifty= (because the original price was 17) would not have made sense without reference to the CI=s comment that the quantity was off. Because the statements were admitted only to prove context, *Crawford* does not require confrontation.@); ***United States v. Ambrose,*** 668 F.3d 943 (7th Cir. 2012) (conversation between two crime family members about actions of a cooperating witness were not offered for their truth

but rather to show that information had been leaked; because the statements were not offered for their truth, there was no violation of the right to confrontation).

For more on Acontext@ see ***United States v. Wright,*** 722 F.3d 1064 (7th Cir. 2013): In a drug prosecution, the defendant=s statement to a confidential information that he was Astocked up@ would have been unintelligible without providing the context of the informant=s statements inquiring about drugs, Aand a jury would not have any sense of why the conversation was even happening.@ The court also noted that Amost of the CI=s statements were inquiries and not factual assertions.@ The court expressed concern, however, that the district court=s limiting instruction on Acontext@ was boilerplate, and that the jury Acould have been told that the CI=s half of the conversation was being played only so that it could understand what Wright was responding to, and that the CI=s statements standing alone were not to be considered as evidence of Wright=s guilt.@

> **Note: The concerns expressed in *Nettles* about possible abuse of the Acontext@ usage are along the same lines as those expressed by Justices Thomas and Kagan in *Williams,* when they seek to distinguish legitimate and illegitimate not-for-truth purposes. If the relevance of the statement requires the factfinder to assess its truth, then the statement is not being offered for a legitimate not-for-truth purpose.**

Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial: *United States v. Price,* 418 F.3d 771 (7th Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an Aintelligence alert@ identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury was instructed not to consider the accusations in the report as true, but only for the fact that the report had been intercepted and kept by one of the conspirators. The court found that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the use of out-of-court statements Afor purposes other than proving the truth of the matter asserted.@

Accusation offered not for truth, but to explain police conduct, was not hearsay and did not violate the defendant=s right to confrontation: *United States v. Dodds,* 569 F.3d 336 (7th Cir. 2009): Appealing a firearms conviction, the defendant argued that his right to

confrontation was violated when the trial court admitted a statement from an unidentified witness to a police officer. The witness told the officer that a black man in a black jacket and black cap was pointing a gun at people two blocks away. The court found no confrontation violation because Athe problem that *Crawford* addresses is the admission of hearsay@ and the witness=s statement was not hearsay. It was not admitted for its truth C that the witness saw the man he described pointing a gun at people C but rather Ato explain why the police proceeded to the intersection of 35th and Galena and focused their attention on Dodds, who matched the description they had been given.@ The court noted that the trial judge did not provide a limiting instruction, but also noted that the defendant never asked the court to do so and that the lack of an instruction was not raised on appeal. ***See also United States v. Taylor,*** 569 F.3d 742 (7th Cir. 2009): An accusation from a bystander to a police officer that the defendant had just taken a gun across the street was not hearsay because it was offered to explain the officers= actions in the course of their investigation C Afor example, why they looked across the street * * * and why they handcuffed Taylor when he approached.@ The court noted that absent Acomplicating circumstances, such as a prosecutor who exploits nonhearsay statements for their truth, nonhearsay testimony does not present a confrontation problem.@ The court found no Acomplicating circumstances@ in this case.

> **Note: The Court=s reference in *Taylor* to the possibility of exploiting a not-for-truth purpose unfairly runs along the same lines as those expressed by Justice Thomas and Kagan in *Williams.***

Testimonial statement was not legitimately offered for context or background and so was a violation of *Crawford: United States v. Adams,* 628 F.3d 407 (7th Cir. 2010): In a narcotics prosecution, statements made by confidential informants to police officers were offered against the defendant. For example, the government offered testimony from a police officer that he stopped the defendant=s car on a tip from a confidential informant that the defendant was involved in the drug trade and was going to buy crack. A search of the car uncovered a large amount of money and a crack pipe. The government offered the informant=s statement not for the truth of the assertion but as Afoundation for what the officer did.@ The trial court admitted the statement and gave a limiting instruction. But the court of appeals found error, though harmless, because the informant=s statements Awere not necessary to provide any foundation for the officer=s subsequent actions.@ It explained as follows:

> The CI=s statements here are different from statements we have found admissible that gave context to an otherwise meaningless conversation or investigation. [cites omitted] Here the CI=s accusations did not counter a defense strategy that police officers randomly targeted Adams. And, there was no need to introduce the statements for context C even if the CI=s

statements were excluded, the jury would have fully understood that the officer searched Adams and the relevance of the items recovered in that search to the charged crime.

See also United States v. Walker, 673 F.3d 649 (7th Cir. 2012) (confidential informant=s statements to the police C that he got guns from the defendant C were not properly offered for context but rather were testimonial hearsay: AThe government repeatedly hides behind its asserted needs to provide >context= and relate the >course of investigation.= These euphemistic descriptions cannot disguise a ploy to pin the two guns on Walker while avoiding the risk of putting Ringswald on the stand. * * * A prosecutor surely knows that hearsay results when he elicits from a government agent that >the informant said he got this gun from X= as proof that X supplied the gun.@); ***Jones v. Basinger,*** 635 F.3d 1030 (7th Cir. 2011) (accusation made to police was not offered for background and therefore its admission violated the defendant=s right to confrontation; the record showed that the government encouraged the jury to use the statements for their truth).

Note: *Adams, Walker* and *Jones* are all examples of illegitimate use of not-for-truth purposes and so finding a Confrontation violation in these cases is quite consistent with the analysis of not-for-truth purposes in the Thomas and Kagan opinions in *Williams.*

Statements by a confidential informant included in a search warrant were testimonial and could not be offered at trial to explain the police investigation: ***United States v. Holmes,*** 620 F.3d 836 (8th Cir. 2010): In a drug trial, the defendant tried to distance himself from a house where the drugs were found in a search pursuant to a warrant. On redirect of a government agent C after defense counsel had questioned the connection of the defendant to the residence C the trial judge permitted the agent to read from the statement of a confidential informant. That statement indicated that the defendant was heavily involved in drug activity at the house. The government acknowledged that the informant=s statements were testimonial, but argued that the statements were not hearsay, as they were offered only to show the officer=s knowledge and the propriety of the investigation. But the court found the admission to be error. It noted that informants= statements are admissible to explain an investigation Aonly when the propriety of the investigation is at issue in the trial.@ In this case, the defendant did not challenge the validity of the search warrant and the propriety of the investigation was not disputed. The court stated that if the real purpose of admitting the evidence was to explain the officer=s knowledge and the nature of the investigation, Aa question asking whether someone had told him that he had seen Holmes at the residence would have addressed the issue * * * without the need to go into the damning details of what the CI told Officer Singh.@ ***Compare United States v. Brooks,*** 645 F.3d 971 (8th Cir. 2011)

(AIn this case, the statement at issue [a report by a confidential informant that Brooks was selling narcotics and firearms from a certain premises] was not offered to prove the truth of the matter asserted C that is, that Brooks was indeed a drug and firearms dealer. It was offered purely to explain why the officers were at the multi-family dwelling in the first place, which distinguishes this case from *Holmes.* In *Holmes,* it was undisputed that officers had a valid warrant. Accordingly less explanation was necessary. Here, the CI=s information was necessary to explain why the officers went to the residence without a warrant and why they would be more interested in apprehending the man on the stairs than the man who fled the scene. Because the statement was offered only to show why the officers conducted their investigation in the way they did, the Confrontation Clause is not implicated here.@). ***See also United States v. Shores,*** 700 F.3d 366 (8th Cir. 2012) (confidential informant=s accusation made to police officer was properly offered to prove the propriety of the investigation: AFrom the early moments of the trial, it was clear that Shores would be premising his defense on the theory that he was a victim of government targeting.@); ***United States v. Wright,*** 739 F.3d 1160 (8th Cir. 2014) (Officer=s statement to another officer, Acome into the room, I=ve found something@ was not hearsay because it was offered only to explain why the second officer came into the room and to rebut the defense counsel=s argument that the officer entered the room in response to a loud noise: AIf the underlying statement is testimonial but not hearsay, it can be admitted without violating the defendant=s Sixth Amendment rights.@).

Accusatory statements offered to explain why an officer conducted an investigation in a certain way are not hearsay and therefore admission does not violate *Crawford: United States v. Brown,* 560 F.3d 754 (8th Cir. 2009): Challenging drug conspiracy convictions, one defendant argued that it was error for the trial court to admit an out-of-court statement from a shooting victim to a police officer. The victim accused a person named AClean@ who was accompanied by a man named Charmar. The officer who took this statement testified that he entered ACharmar@ into a database to help identify AClean@ and the database search led him to the defendant. The court found no error in admitting the victim=s statement, stating that Ait is not hearsay when offered to explain why an officer conducted an investigation in a certain way.@ The defendant argued that the purported nonhearsay purpose for admitting the evidence Awas only a subterfuge to get Williams= statement about Brown before the jury.@ But the court responded that the defendant Adid not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value.@ The court also observed that the trial court twice instructed the jury that the statement was admitted for the limited purpose of understanding why the officer searched the database for Charmar. Finally, the court held that because the statement properly was not offered for its truth, Ait does not implicate the confrontation clause.@

Statement offered as foundation for good faith basis for asking question on cross-examination does not implicate *Crawford: United States v. Spears,* 533 F.3d 715 (8th Cir. 2008): In a bank robbery case, the defendant testified and was cross-examined and asked about her knowledge of prior bank robberies. In order to inquire about these bad acts, the government was required to establish to the court a good-faith basis for believing that the acts occurred. The government=s good-faith basis was the confession of the defendant=s associate to having taken part in the prior robberies. The defendant argued that the associate=s statements, made to police officers, were testimonial. But the court held that *Crawford* was inapplicable because the associate=s statements were not admitted for their truth C indeed they were not admitted at all. The court noted that there was Ano authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross-examination of the defendant at trial implicates the Confrontation Clause.@

Admitting testimonial statements that were part of a conversation with the defendant did not violate the Confrontation Clause because they were not offered for their truth: *United States v. Spencer,* 592 F.3d 866 (8th Cir. 2010): Affirming drug convictions, the court found no error in admitting tape recordings of a conversation between the defendant and a government informant. The defendant=s statements were statements by a party-opponent and admitting the defendant=s own statements cannot violate the Confrontation Clause. The informant=s statements were not hearsay because they were admitted only to put the defendant=s statements in context.

Statement offered to prove it was false is not hearsay and so did not violate the Confrontation Clause: *United States v. Yielding,* 657 F.3d 688 (8th Cir. 2011): In a fraud prosecution, the trial court admitted the statement of an accomplice to demonstrate that she used a false cover story when talking to the FBI. The court found no error, noting that Athe point of the prosecutor=s introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false.@ The court found that the government introduced other evidence to show that the declarant=s assertions that a transaction was a loan were false. The court cited *Bryant* for the proposition that because the statements were not hearsay, their admission did not violate the Confrontation Clause.

Admitting testimonial statements to show a common (false) alibi did not violate the Confrontation Clause: *United States v. Young*, 753 F.3d 757 (8th Cir. 2014): Young was accused of conspiring with Mock to murder Young=s husband and make it look like an accident. The government introduced the statement that Mock made to police after the husband was killed. The statement was remarkably consistent in all details with the alibi that Young had independently provided, and many of the assertions were false. The government offered Mock=s statement for the inference that she had Young had collaborated on an alibi. Young argued that introducing Mock=s statement to the police violated her right to confrontation, but the court disagreed. It observed that the Confrontation Clause does not bar the admission of out-of-court statements that are not hearsay. In this case, Mock=s statement was not offered for its truth but rather Ato show that Young and Mock had a common alibi, scheme, or conspiracy. In fact, Mock=s statements to Deputy Salsberry are valuable to the government because they are false.@

Statements not offered for truth do not violate the Confrontation Clause even if testimonial: ***United States v. Faulkner,*** 439 F.3d 1221 (10th Cir. 2006): The court stated that Ait is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement.@ ***See also United States v. Mitchell,*** 502 F.3d 931 (9th Cir. 2007) (information given by an eyewitness to a police officer was not offered for its truth but rather Aas a basis@ for the officer=s action, and therefore its admission did not violate the Confrontation Clause); ***United States v. Brinson,*** 772 F.3d 1314 (10th Cir. 2014) (In a prosecution for sex trafficking, statements made to an undercover police officer that set up a meeting for sex were properly admitted as not hearsay and so their admission did not violate the Confrontation Clause: AThe prosecution did not present the out-of-court statements to prove the truth of the statements about the location, price, or lack of a condom. Rather, the prosecution offered these statements to explain why Officer Osterdyk went to Room 123, how he knew the price, and why he agreed to pay for oral sex.@; the court also found that the statements were not testimonial anyway because the declarant did not know she was talking to a police officer.) .

Accomplice=s confession, offered to explain a police officer=s subsequent conduct, was not hearsay and therefore did not violate the Confrontation Clause: ***United States v. Jiminez,*** 564 F.3d 1280 (11th Cir. 2009): The court found no plain error in the admission of an accomplice=s confession in the defendant=s drug conspiracy trial. The police officer who had taken the accomplice=s confession was cross-examined extensively about why he had repeatedly interviewed the defendant and about his decision not to obtain a written and signed confession from him. This cross-examination was designed to impeach the officer=s credibility and to suggest that he was lying about the circumstances of the interviews and about the defendant=s confession.

In explanation, the officer stated that he approached the defendant the way he did because the accomplice had given a detailed confession that was in conflict with what the defendant had said in prior interviews. The court held that in these circumstances, the accomplice=s confession was properly admitted to explain the officer=s motivations, and not for its truth. Accordingly its admission did not violate the Confrontation Clause, even though the statement was testimonial.

> **Note**: **The court assumed that the accomplice=s confession was admitted for a proper, not-for-truth purpose, even though there was no such finding on the record, and the trial court never gave a limiting instruction. Part of the reason for this deference is that the court was operating under a plain error standard. The defendant at trial objected only on hearsay grounds, and this did not preserve any claim of error on confrontation clause grounds. The concurring judge noted, however, Athat the better practice in this case would have been for the district court to have given an instruction as to the limited purpose of Detective Wharton=s testimony@ because Athere is no assurance, and much doubt, that a typical jury, on its own, would recognize the limited nature of the evidence.@**

See also United States v. Augustin, 661 F.3d 1105 (11th Cir. 2011) (no confrontation violation where declarant=s statements Awere not offered for the truth of the matters asserted, but rather to provide context for [the defendant=s] own statements@).

Present Sense Impression

911 call describing ongoing drug crime is admissible as a present sense impression and not testimonial under *Bryant*: *United States v. Polidore,* 690 F.3d 705 (5th Cir. 2012): In a drug trial, the defendant objected that a 911 call from a bystander to a drug transaction C together with answers to questions from the 911 operators C was testimonial and also admitted in violation of the rule against hearsay. On the hearsay question, the court found that the bystander=s statements in the 911 call were admissible as present sense impressions, as they were made while the transaction was ongoing. As to testimoniality, the court held that the case was unlike the 911 call cases decided by the Supreme Court, as there was no ongoing emergency C rather the caller was simply recording that a crime was taking place across the street, and no violent activity was occurring. But the court noted that under *Bryant* an ongoing emergency is relevant but not dispositive to whether statements about a crime are testimonial. Ultimately the court found that the caller=s statements were not testimonial, reasoning as follows:

> [A]lthough the 911 caller appeared to have understood that his comments would start an investigation that could lead to a criminal prosecution, the primary purpose of his statements was to request police assistance in stopping an ongoing crime and to provide the police with the requisite information to achieve that objective. * * * The 911 caller simply was not acting as a witness; he was not testifying. What he said was not a weaker substitute for live testimony at trial. In other words, the caller's statements were not ex parte communications that created evidentiary products that aligned perfectly with their courtroom analogues. No witness goes into court to report that a man is currently selling drugs out of his car and to ask the police to come and arrest the man while he still has the drugs in his possession.

Present sense impression, describing an event that occurred months before a crime, is not testimonial: *United States v. Danford,* 435 F.3d 682 (7th Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager=s statement was testimonial under *Crawford*, but the court disagreed. The court stated that Athe conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule.@

Present-sense impressions of DEA agents during a buy-bust operation were safety-related and so not testimonial: *United States v. Solorio,* 669 F.3d 943 (9th Cir. 2012): Appealing from a conviction arising from a Abuy-bust@ operation, the defendant argued that hearsay statements of DEA agents at the scene C which were admitted as present sense impressions C were testimonial and so should have been excluded under *Crawford.* The court disagreed. It concluded that the statements were made in order to communicate observations to other agents in the field and thus assure the success of the operation, Aby assuring that all agents involved knew what was happening and enabling them to gauge their actions accordingly.@ Thus the statements were not testimonial because the primary purpose for making them was not to prepare a statement for trial but rather to assure that the arrest was successful and that the effort did not escalate into a dangerous situation. The court noted that the buy-bust operation Awas a high-risk situation involving the exchange of a large amount of money and a substantial quantity of drugs@ and also that the defendant was visibly wary of the situation.

Reports on forensic testing by law enforcement are testimonial: ***Melendez-Diaz v. Massachusetts,*** 557 U.S. 305 (2009): In a drug case, the trial court admitted three Acertificates of analysis@ showing the results of the forensic tests performed on the seized substances. The certificates stated that Athe substance was found to contain: Cocaine.@ The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contentious 5-4 case, held that these certificates were Atestimonial@ under *Crawford* and therefore admitting them without a live witness violated the defendant=s right to confrontation. The majority noted that affidavits prepared for litigation are within the core definition of Atestimonial@ statements. The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that A[w]e can safely assume that the analysts were aware of the affidavits= evidentiary purpose, since that purpose C as stated in the relevant state-law provision C was reprinted on the affidavits themselves.@

The implications of *Melendez-Diaz* C beyond requiring a live witness to testify to the results of forensic tests conducted primarily for litigation C are found in the parts of the majority opinion that address the dissent=s arguments that the decision will lead to substantial practical difficulties. These implications are discussed in turn:

1. In a footnote, the majority declared in dictum that Adocuments prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.@ Apparently these are more like traditional business records than records prepared primarily for litigation, though the question is close C the reason these records are maintained, with respect to forensic testing equipment, is so that the tests conducted can be admitted as reliable. At any rate, the footnote shows some flexibility, in that not every record involved in the forensic testing process will necessarily be found testimonial.

2. The dissent argued that forensic testers are not Aaccusatory@ witnesses in the sense of preparing factual affidavits about the crime itself. But the majority rejected this distinction, declaring that the text of the Sixth Amendment Acontemplates two classes of witnesses C those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent=s assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.@ This statement raises questions about the reasoning of some lower courts that have admitted autopsy reports and other certificates after *Crawford* C these cases are discussed below.

3. Relatedly, the defendant argued that the affidavits at issue were nothing like the affidavits found problematic in the case of Sir Walter Raleigh. The Raleigh affidavits were a substitute for a witness testifying to critical historical facts about the crime. But the

majority responded that while the ex parte affidavits in the Raleigh case were the paradigmatic confrontation concern, Athe paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the ex parte examinations in Raleigh=s Case.@

4. The majority noted that cross-examining a forensic analyst may be necessary because A[a]t least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination.@ This implies that if the evidence is nothing but a machine print-out, it will not run afoul of the Confrontation Clause. As discussed earlier in this Outline, a number of courts have held that machine printouts are not hearsay at all C because a machine can=t make a Astatement@ C and have also held that a machine=s output is not Atestimony@ within the meaning of the Confrontation Clause. This case law appears to survive the Court=s analysis in *Melendez-Diaz C* and the later cases of *Bullcoming* and *Williams* do not touch the question of machine evidence.

5. The majority does approve the basic analysis of Federal courts after *Crawford* with respect to business and public records, i.e., that if the record is admissible under FRE 803(6) or 803(8) it is, for that reason, non-testimonial under *Crawford.* For business records, this is because, to be admissible under Rule 803(6), it cannot be prepared primarily for litigation. For public records, this is because law enforcement reports prepared for a specific litigation are excluded under Rule 803(8)(B) and (C).

6. In response to an argument of the dissent, the majority seems to state, at least in dictum, that certificates that merely authenticate proffered documents are not testimonial.

7. As counterpoint to the argument about prior practice allowing certificates authenticating records, the *Melendez-Diaz* majority cited a line of cases about affidavits offered to prove the *absence* of a public record:

> Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk=s certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk=s statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk=s certificate would qualify as an official record under respondent=s definition C it was prepared by a public officer in the regular course of his official duties C and although the clerk was certainly not a Aconventional witness@ under the dissent=s approach, the clerk was nonetheless subject to confrontation. See People v. Bromwich, 200 N. Y. 385, 388-389, 93 N. E. 933, 934 (1911).

This passage should probably be read to mean that any use of Rule 803(10) in a criminal case is prohibited. But the Court did find that a notice-and-demand provision would satisfy the Confrontation Clause because if, after notice, the defendant made no demand to

produce, a waiver could properly be found. Accordingly, the Committee proposed an amendment to Rule 803(10) that added a notice-and-demand provision. That amendment was approved by the Judicial Conference and became effective December 1, 2013.

Admission of a testimonial forensic certificate through the testimony of a witness with no personal knowledge of the testing violates the Confrontation Clause under *Melendez-Diaz: Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011): The Court reaffirmed the holding in *Melendez-Diaz* that certificates of forensic testing prepared for trial are testimonial, and held further that the Confrontation Clause was not satisfied when such a certificate was entered into evidence through the testimony of a person who was not involved with, and had no personal knowledge of, the testing procedure. Judge Ginsburg, writing for the Court, declared as follows:

> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

Lower Court Cases on Records and Certificates Decided Before Melendez-Diaz

Certification of business records under Rule 902(11) is not testimonial: *United States v. Adefehinti,* 519 F.3d 319 (D.C. Cir. 2007): The court held that a certification of business records under Rule 902(11) was not testimonial even though it was prepared for purposes of litigation. The court reasoned that because the underlying business records were not testimonial, it would make no sense to find the authenticating certificate testimonial. It also noted that Rule 902(11) provided a procedural device for challenging the trustworthiness of the underlying records: the proponent must give advance notice that it plans to offer evidence under Rule 902(11), in order to provide the opponent with a fair opportunity to challenge the certification and the underlying records. The court stated that in an appropriate case, "the challenge could presumably take the form of calling a certificate-s signatory to the stand. So hedged, the Rule 902(11) process seems a far cry from the threat of *ex parte* testimony that *Crawford* saw as underlying, and in part defining,

the Confrontation Clause.@ In this case, the Rule 902(11) certificates were used only to admit documents that were acceptable as business records under Rule 803(6), so there was no error in the certificate process.

Note: While 902(11) may still be viable after *Melendez-Diaz*, some of the rationales used by the *Adefehinti* court are now suspect. First, the *Melendez-Diaz* Court rejects the argument that the certificate is not testimonial just because the underlying records are nontestimonial. Second, the argument that the rule is valid because the defendant can challenge the affidavit by calling the signatory is questionable; the *Melendez-Diaz* majority rejected the government=s argument that any confrontation problem was solved by allowing the defendant to call the analyst. In response to that argument, Justice Scalia stated that Athe Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.@

The *Melendez-Diaz* Court held that the Confrontation Clause would not bar the government from imposing a basic notice-and-demand requirement on the defendant. That is, the state could require the defendant to give a pretrial notice of an intent to challenge the evidence, and only then would the government have to produce the witness. But while Rule 902(11) does have a notice and procedure, there is no provision for a demand for production of government production of a witness.

The better argument, after *Melendez-Diaz*, is that 902(11) is simply an authentication provision, and that the *Melendez-Diaz* majority stated, albeit in dicta, that certificates of authenticity are not testimonial. But the problem with that argument is that the certificate does more than establish the genuineness of the business record.

Despite all these concerns, the lower courts *after Melendez-Diaz* have rejected Confrontation Clause challenges to the use of Rule 902(11) to self-authenticate business records. See the cases discussed under the next heading C cases on records after *Melendez-Diaz*.

Warrant of deportation is not testimonial: *United States v. Garcia*, 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not

testimonial under *Crawford*. The court noted that every circuit considering the matter has held Athat defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation@ because such officers have no motivation to do anything other than Amechanically register an unambiguous factual matter.@

Note: Other circuits before Melendez-Diaz reached the same result on warrants of deportation. See, e.g., United States v. Valdez-Matos, 443 F.3d 910 (5th Cir. 2006) (warrant of deportation is non-testimonial because Athe official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter@); ***United States v. Torres-Villalobos,*** 487 F.3d 607 (8th Cir. 2007) (noting that warrants of deportation Aare produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions.@); ***United States v. Bahena-Cardenas,*** 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation is non-testimonial "because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter."); ***United States v. Cantellano,*** 430 F.3d 1142 (11th Cir. 2005) (noting that a warrant of deportation s recorded routinely and not in preparation for a criminal trial@).

> **Note: Warrants of deportation still satisfy the Confrontation Clause after *Melendez-Diaz*. Unlike the forensic analysis in that case, a warrant of deportation is prepared for regulatory purposes and is clearly not prepared for the illegal reentry litigation, because by definition that crime has not been committed at the time it=s prepared. As seen below, post-*Melendez-Diaz* courts have found warrants of deportation to be non-testimonial. See also *United States v. Lopez,* 747 F.3d 1141 (9th Cir. 2014) (adhering to pre-*Melendez-Diaz* case law holding that deportation documents in an A-file are not testimonial when admitted in illegal re-entry cases).**

Proof of absence of business records is not testimonial: *United States v. Munoz-Franco,* 487 F.3d 25 (1st Cir. 2007): In a prosecution for bank fraud and conspiracy, the trial court admitted the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants= confrontation argument in the following passage:

> The Court in *Crawford* plainly characterizes business records as Astatements that by their nature [are] not testimonial.@ 541 U.S. at 56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.

Note: This analysis appears unaffected by *Melendez-Diaz,* as no certificate or affidavit is involved and the record itself was not prepared for litigation purposes.

Business records are not testimonial: *United States v. Jamieson,* 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were essentially business records. The court found that admitting the summaries did not violate the defendant=s right to confrontation. The underlying records were not testimonial under *Crawford* because they did not Aresemble the formal statement or solemn declaration identified as testimony by the Supreme Court.@ ***See also United States v. Baker,*** 458 F.3d 513 (6th Cir. 2006) (AThe government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.@).

Note: The court=s analysis of business records appears unaffected by *Melendez-Diaz,* because the records were not prepared primarily for litigation and no certificate or affidavit was prepared for use in the litigation.

Post office box records are not testimonial: *United States v. Vasilakos,* 508 F.3d 401 (6th Cir. 2007): The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. The checks for the commissions were sent to post office boxes maintained by the defendants. The defendants argued that admitting the post office box records at trial violated their right to confrontation. But the court held that the government established proper foundation for the records through the testimony of a postal inspector, and that the records were therefore admissible as business records; the court noted that Athe Supreme Court specifically characterizes business records as non-testimonial.@

Note: The court=s analysis of business records is unaffected by *Melendez-Diaz.*

Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial: *United States v. Ellis,* 460 F.3d 920 (7th Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant=s blood and urine after he was arrested. The test was conducted by a hospital employee named Kristy, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying

witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* C despite the fact that both records were prepared with the knowledge that they were going to be used in a prosecution. As to the medical reports, the *Ellis* court concluded as follows:

> While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. * * * They were employees simply recording observations which, because they were made in the ordinary course of business, are "statements that by their nature were not testimonial." *Crawford*, 541 U.S. at 56.

Note: *Ellis* is cited by the dissent in *Melendez-Diaz* (not a good thing for its continued viability), and the circumstances of preparing the toxic screen in *Ellis* are somewhat similar to those in *Melendez-Diaz.* That said, toxicology tests conducted by *private* organizations may be found nontestimonial if it can be shown that law enforcement was not involved in or managing the testing. The *Melendez-Diaz* majority emphasized that the forensic analyst knew that the test was being done for a prosecution, as that information was right on the form. Essentially, after *Melendez-Diaz,* the less the tester knows about the use of the test, and the less involvement by the government, the better for admissibility. Primary motive for use in a prosecution is obviously less likely to be found if the tester is a private organization.

As to the certification of business record, prepared under Rule 902(11) specifically to qualify the medical records in this prosecution, the *Ellis* court similarly found that it was not testimonial because the records that were certified were prepared in the ordinary course, and the certifications were essentially ministerial. The court explained as follows:

> The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about Ellis, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.

Note: As discussed in the treatment of *Melendez-Diaz* earlier in this outline, the fact that the certificate conveys no personal information about Ellis is not dispositive, because the information imparted is being used against Ellis. Moreover, the certificate is prepared exclusively for use in litigation. On the other hand, as discussed above, Rule 902(11) might well be upheld as a rule simply permitting the authentication of a record.

Note: Three circuits have held that the reasoning of *Ellis* remains sound after *Melendez-Diaz,* and that 902(11) and (12) certificates are not testimonial. *See United States v. Yeley-Davis,* 632 F.3d 673 (10th Cir. 2011), ***United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012), and ***United States v. Anekwu,*** 695 F.3d 967 (9th Cir. 2012) all infra.

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: *United States v. Gilbertson,* 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford.* He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford*. But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

> The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.
>
> **Note: this result is unaffected by *Melendez-Diaz* as the records clearly were not prepared for purposes of litigation C the crime had not occurred at the time the records were prepared.**

Tax returns are business records and so not testimonial: *United States v. Garth,* 540 F.3d 766 (8th Cir. 2008): The defendant was accused of assisting tax filers to file false claims. The defendant argued that her right to confrontation was violated when the trial court admitted some

tax returns of the filers. But the court found no error. The tax returns were business records, and the defendant made no argument that they were prepared for litigation, Aas is expected of testimonial evidence.@

Note: this result is unaffected by *Melendez-Diaz.*

Certificate of a record of a conviction found not testimonial: *United States v. Weiland,* 420 F.3d 1062 (9th Cir. 2006): The court held that a certificate of a record of conviction prepared by a public official was not testimonial under *Crawford*: ANot only are such certifications a routine cataloguing of an unambiguous factual matter, but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly.@

Note: **The reliance on burdens in countless criminal cases is precisely the argument that was rejected in *Melendez-Diaz.* Nonetheless, certificates of conviction may still be found non-testimonial, because the *Melendez-Diaz* majority states, albeit in dicta, that a certificate is not testimonial if it does nothing more than authenticate another document.**

In *United States v. Albino-Loe,* 747 F.3d 1206 (9th Cir. 2014), the court adhered to its ruling in *Weiland,* declaring that a routine certification or authenticity of a record (in that case documents in an A-file) are not testimonial in nature, because they Adid not accomplish anything other than authenticating the A-file documents to which they were attached.@

Absence of records in database is not testimonial; and drug ledger is not testimonial: *United States v. Mendez,* 514 F.3d 1035 (10th Cir. 2008): In an illegal entry case, an agent testified that he searched the ICE database for information indicating that the defendant entered the country legally, and found no such information. The ICE database is Aa nation-wide database of information which archives records of entry documents, such as permanent resident cards, border crossing cards, or certificates of naturalization.@ The defendant argued that the entries into the database (or the asserted lack of entries in this case) were testimonial. But the court disagreed, because the records Aare not prepared for litigation or prosecution, but rather administrative and regulatory purposes.@ The court also observed that Rule 803(8) tracked *Crawford* exactly: a public record is admissible under Rule 803(8) unless it is prepared with an eye

toward litigation or prosecution; and under *Crawford,* Athe very same characteristics that preclude a statement from being classified as a public record are likely to render the statement testimonial.@

Mendez also involved drug charges, and the defendant argued that admitting a drug ledger with his name on it violated his right to confrontation under *Crawford.* The court also rejected this argument. It stated first that the entries in the ledger were not hearsay at all, because they were offered to show that the book was a drug ledger and thus a Atool of the trade.@ As the entries were not offered for truth, their admission could not violate the Confrontation Clause. But the court further held that even if the entries were offered for truth, they were not testimonial, because A[a]t no point did the author keep the drug ledger for the *primary purpose* of aiding police in a criminal investigation, the focus of the *Davis* inquiry.@ (emphasis the court=s). The court noted that it was not enough that the statements were relevant to a criminal prosecution, otherwise Aany piece of evidence which aids the prosecution would be testimonial.@

> **Note: Both holdings in the above case survive *Melendez-Diaz.* The first holding is about the absence of public records C records that were not prepared in testimonial circumstances. If that absence had been proved by a *certificate,* then the Confrontation Clause, after *Melendez-Diaz,* would have been violated. But the absence was proved by a testifying agent. The second holding states the accepted proposition that business records admissible under Rule 803(6) are, for that reason, non-testimonial. Drug ledgers in particular are absolutely not prepared for purposes of litigation.**

Lower Court Cases on Records and Certificates After Melendez-Diaz

Letter describing results of a search of court records is testimonial after *Melendez-Diaz: United States v. Smith,* 640 F.3d 358 (D.C. Cir. 2011): To prove a felony in a felon firearm case, the government admitted a letter from a court clerk stating that Ait appears from an examination of the files in this office@ that Smith had been convicted of a felony. Each letter had a seal and a signature by a court clerk. The court found that the letters were testimonial. The clerk did not merely authenticate a record, rather he created a record of the search he conducted. The letters were clearly prepared in anticipation of litigation C they Arespond[ed] to a prosecutor=s question with an answer.@

Note: The analysis in *Smith* provides more indication that certificates of the absence of a record are testimonial after *Melendez-Diaz.* The clerk=s letters in *Smith* are exactly like a CNR; the only difference is that they report on the presence of a record rather than an absence.

Note: The case also highlights the question of whether a certificate qualifying a business record under Rule 902(11) is testimonial under *Melendez-Diaz.* The letters did not come within the narrow Aauthentication@ exception recognized by the *Melendez-Diaz* Court because they provided Aan interpretation of what the record contains or shows.@ Arguably 902(11) certificates do just that. But because the only Circuit Court cases on the specific subject of Rule 902(11) certificates find that they are *not* testimonial, there is certainly no call at this point to propose an amendment to Rule 902(11).

Autopsy reports generated through law enforcement involvement found testimonial after *Melendez-Diaz: United States v. Moore,* 651 F.3d 30 (D.C. Cir. 2011): The court found autopsy reports to be testimonial. The court emphasized the involvement of law enforcement in the generation of the autopsy reports admitted in this case:

> The Office of the Medical Examiner is required by D.C.Code ' 5B1405(b)(11) to investigate A[d]eaths for which the Metropolitan Police Department [AMPD@], or other law enforcement agency, or the United States Attorney's Office requests, or a court orders investigation.@ The autopsy reports do not indicate whether such requests were made in the instant case but the record shows that MPD homicide detectives and officers from the Mobile Crimes Unit were present at several autopsies. Another autopsy report was supplemented with diagrams containing the notation: AMobile crime diagram (not [Medical Examiner]Cuse for info only).@ Still another report included a ASupervisor's

> Review Record@ from the MPD Criminal Investigations Division commenting: AShould have indictment re John Raynor for this murder.@ Law enforcement officers thus not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports. Furthermore, the autopsy reports were formalized in signed documents titled Areports.@ These factors, combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are Acircumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.@ *MelendezBDiaz*, 129 S.Ct. at 2532 (citation and quotation marks omitted).

In a footnote, the court emphasized that it was *not* holding that all autopsy reports are testimonial:

> Certain duties imposed by the D.C.Code on the Office of the Medical Examiner demonstrate, the government suggests, that autopsy reports are business records not made for the purpose of litigation. It is unnecessary to decide as a categorical matter whether autopsy reports are testimonial, and, in any event, it is doubtful that such an approach would comport with Supreme Court precedent.

Finally, the court rejected the government=s argument that there was no error because the expert witness simply relied on the autopsy reports in giving independent testimony. In this case, the autopsy reports were clearly entered into evidence.

State court did not unreasonably apply federal law in admitting autopsy report as non-testimonial: ***Nardi v. Pepe,*** 662 F.3d 107 (1st Cir. 2011): The court affirmed the denial of a habeas petition, concluding that the state court did not unreasonably apply federal law in admitting an autopsy report as non-testimonial. The court reasoned as follows:

> Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *MelendezBDiaz* and *Bullcoming*, and it is uncertain how the Court would resolve the question. We treated such reports as not covered by the Confrontation Clause, *United States v. De La Cruz*, 514 F.3d 121, 133B34 (1st Cir.2008), but the law has continued to evolve and no one can be certain just what the Supreme Court would say about that issue today. However, our concern here is with Aclearly established@ law when the SJC acted. * * * That close decisions in the later Supreme Court cases extended *Crawford* to new situations hardly shows the outcomes were clearly preordained. And, even now it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial.

Immigration interview form was not testimonial: *United States v. Phoeun Lang,* 672 F.3d 17 (1st Cir. 2012): The defendant was convicted of making false statements and unlawfully applying for and obtaining a certificate of naturalization. The defendant argued that his right to confrontation was violated because the immigration form (N-445) on which he purportedly lied contained verification checkmarks next to his false responses C thus the contention was that the verification checkmarks were testimonial hearsay of the immigration agent who conducted the interview. But the court found no error. The court concluded that the form was not Aprimarily to be used in court proceedings.@ Rather it was a record prepared as Aa matter of administrative routine, for the primary purpose of determining Lang=s eligibility for naturalization.@ For essentially the same reasons, the court held that the form was admissible under Rule 803(8)(A)(ii) despite the fact that the rule appears to exclude law enforcement reports. The court distinguished between Adocuments produced in an adversarial setting and those produced in a routine non-adversarial setting for purposes of Rule 803(8)(A)(ii).@ The court relied on the passage in *Melendez-Diaz* which declared that the test for admissibility or inadmissibility under Rule 803(8) was the same as the test of testimoniality under the Confrontation Clause, i.e., whether the primary motive for preparing the record was for use in a criminal prosecution.

> **Note: This case was decided before *Williams,* but it would appear to satisfy both the Alito and the Kagan version of the Aprimary motive@ test. Both tests agree that a statement cannot be testimonial unless the primary motive for making it is to have it used in a criminal prosecution. The difference is that Justice Alito provides another qualification C the statement is testimonial only if it was made to be used in the *defendant=s* criminal prosecution. In *Phoeun Lang* the first premise was not met C the statements were made for administrative purposes, and not primarily for use in any criminal prosecution.**

Expert=s reliance on standard samples for comparison does not violate the Confrontation Clause because any communications regarding the preparation of those samples was not testimonial: *United States v. Razo,* 782 F.3d 31 (1st Cir. 2015). A chemist testified about the lab analysis she performed on a substance seized from the defendant=s coconspirator. The crime lab used a Aknown standard@ methamphetamine sample to create a reference point for comparison with seized evidence. That sample was received from a chemical company. The chemist testified that in comparing the seized sample with the known standard sample, she relied on the manufacturer=s assurance that the known standard sample was 100% pure. The Court found no confrontation violation because the known standard sample C and the manufacturer=s assurance about it C were not testimonial. Any statements regarding the known

standard sample were not made with the primary motivation that they would be used at a criminal trial, because the sample was prepared for general use by the laboratory. The court noted that the chemist=s conclusions about the *seized* sample would raise confrontation questions, but the government produced the chemist to be cross-examined about those conclusions. As to the standard sample, it was prepared Aprior to and without regard to any particular investigation, let alone any particular prosecution.@

In reaching its result, the *Razo* court provided a good interpretation of *Williams*. The court saw support in the fact that the Alito plurality would find any communications regarding the known standard sample to be non-testimonial because that sample was Anot prepared for the primary purpose of accusing a targeted individual.@ And the fifth vote of support would come from Justice Thomas, because nothing about the known standard sample was in the nature of a formalized statement.

Certain records of internet activity sent to law enforcement found testimonial: *United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012): In a child pornography prosecution, the court held that admission of certain records about suspicious internet activity violated the defendant=s right to Confrontation Clause. The evidence principally at issue related to accounts with Yahoo. Yahoo received an anonymous report that child pornography images were contained in a Yahoo account. Yahoo sent a reportC called a ACP Report@ C to the National Center for Missing and Exploited Children (NCMEC) listing the images being sent with the report, attaching the images, and listing the date and time at which the image was uploaded and the IP Address from which it was uploaded. NCMEC in turn sent a report of child pornography to the Maine State Police Internet Crimes Against Children Unit (ICAC), which obtained a search warrant for the defendant=s computers. The government introduced testimony of a Yahoo employee as to how certain records were kept and maintained by the company, but the government did not introduce the Image Upload Data indicating the date and time each image was uploaded to the Internet. The government also introduced testimony by a NCMEC employee explaining how NCMEC handled tips regarding child pornography. The court held that admission of various data collected by Yahoo and Google automatically in order to further their business purposes was proper, because the data was contained in business records and was not testimonial for Sixth Amendment purposes. But the court held, 2-1, that the reports Yahoo prepared and sent to NCMEC were different and were testimonial because the primary purpose for the reports was to record past events that were potentially relevant to a criminal prosecution. The court relied on the following considerations to conclude that the CP Reports were testimonial: 1) they referred to a Asuspect@ screen name, email address, and IP address C and Yahoo did not treat its customers as Asuspects@ in the ordinary course of its business; 2) before a CP Report is created, someone in the legal department at Yahoo has to determine that an account contained child pornography images; 3) Yahoo did not simply

keep the reports but sent them to NCMEC, which was under the circumstances an agent of law enforcement, because it received a government grant to accept reports of child pornography and forward them to law enforcement. The government argued that Confrontation was not at issue because the CP Reports contained business records that were unquestionably nontestimonial, such as records of users= IP addresses. But the court responded that the CP Reports were themselves statements. The court noted that A[i]f the CP Reports simply consisted of the raw underlying records, or perhaps underlying records arranged and formatted in a reasonable way for presentation purposes, the Reports might well have been admissible.@

The government also argued that the CP Reports were not testimonial under the Alito definition of primary motive in *Williams*. Like the DNA reports in *Williams*, the CP Reports were prepared at a time when the perpetrator was unknown and so they were not targeted toward a particular individual. The court distinguished *Williams* by relying on a statement in the Alito opinion that at the time of the DNA report, the technicians had Ano way of knowing whether it will turn out to be incriminating or exonerating.@ In contrast, when the CP Reports were prepared, Yahoo personnel knew that they were incriminating: AYahoo=s employees may not have known *whom* a given CP Report might incriminate, but they almost certainly were aware that a Report would incriminate *somebody*.@

Finally, the court held that the NCMEC reports sent to the police were testimonial, because they were statements independent of the CP Reports, and they were sent to law enforcement for the primary purpose of using them in a criminal prosecution. One judge, dissenting in part, argued that the connection between an identified user name, the associated IP address, and the digital images archived from that user=s account all existed well before Yahoo got the anonymous tip, were an essential part of the service that Yahoo provided, and thus were ordinary business records that were not testimonial.

Note: *Cameron* cannot be read to hold that business records admissible under Rule 803(6) can be testimonial under *Crawford.* The court notes that under *Palmer v. Hoffman,* 318 U.S. 109 (1943), records are not admissible as business records when they are calculated for use in court. *Palmer* is still good law under Rule 803(6), as the Court recognized in *Melendez-Diaz.* The *Cameron* court noted that the Yahoo reports were subject to the same infirmity as the records found inadmissible in *Hoffman:* they were not made for business purposes, but rather for purposes of litigation. Thus according to the court, the Yahoo reports were probably not admissible as business records anyway.

Telephone records are not testimonial: ***United States v. Burgos-Montes,*** 786 F.3d 92 (1st Cir. 2015): The government introduced phone records of a conspirator. They were accompanied by a certification made under Rule 902(11). The defendant argued that the phone records were testimonial but the court disagreed. The defendant argued that the records were produced by the phone company in response to a demand from the government, but the court found this irrelevant. The records were gathered and maintained by the phone company in the routine course of business. AThe fact that the print-out of this data in this particular format was requested for litigation does not turn the data contained in the print-out into information created for litigation.@

Routine autopsy report was not testimonial: ***United States v. James,*** 712 F.3d 79 (2nd Cir. 2013): The court considered whether its *pre-Melendez-Diaz* case law C stating that autopsy reports were not testimonial C was still valid. The court adhered to its view that Aroutine@ autopsy reports were not testimonial because they are not primarily motivated to create a record for a criminal trial. Applying the test of Aroutine@ to the facts presented, the court found as follows:

> Somaipersaud's autopsy was nothing other than routine C there is no suggestion that Jindrak or anyone else involved in this autopsy process suspected that Somaipersaud had been murdered and that the medical examiner's report would be used at a criminal trial. [A government expert] testified that causes of death are often undetermined in cases like this because it could have been a recreational drug overdose or a suicide. The autopsy report itself refers to the cause of death as "undetermined" and attributes it both to "acute mixed intoxication with alcohol and chlorpromazine" combined with "hypertensive and arteriosclerotic cardiovascular disease."
>
> The autopsy was completed on January 24, 1998, and the report was signed June 16, 1998, substantially before any criminal investigation into Somaipersaud's death had begun. [N]either the government nor defense counsel elicited any information suggesting that law enforcement was ever notified that Somaipersaud's death was suspicious, or that any medical examiner expected a criminal investigation to result from it. Indeed, there is reason to believe that none is pursued in the case of most autopsies.

The court noted that Asomething in the order of ten percent of deaths investigated by the OCME lead to criminal investigations.@ It distinguished the 11th Circuit=s opinion C discussed below C which found an autopsy report to be testimonial, noting that Athe decision was based in part on the fact that the Florida Medical Examiner's Office was created and exists within the Department of Law Enforcement. Here, the OCME is a wholly independent office.@ Thus, an autopsy report prepared outside the auspices of a criminal investigation is very unlikely to be found testimonial under the Second Circuit=s view.

Note: In considering the effect of *Williams*, the *James* court declined to use either of the rationales espoused by Justice Alito on the ground that they had been rejected by five members of the Court. The court found that in fact there was no lesson at all to be derived from *Williams*, as there was no rationale on which five members of the Court could agree. Thus, the Court found that *Williams* controlled only in cases exactly like it.

Business records are not testimonial: *United States v. Bansal,* 663 F.3d 634 (3rd Cir. 2011): In a prosecution related to a controlled substance distribution operation, the trial court admitted records kept by domestic and foreign businesses of various transactions. The court rejected the claim that the records were testimonial, stating that Athe statements in the records here were made for the purpose of documenting business activity, like car sales and account balances, and not for providing evidence to law enforcement or a jury.@

Admission of credit card company=s records identifying customer accounts that had been compromised did not violate the right to confrontation: *United States v. Keita,* 742 F.3d 184 (4th Cir. 2014): In a prosecution for credit card fraud, the trial court admitted Acommon point of purchase@ records prepared by American Express. These were internal documents revealing which accounts have been compromised. American Express creates the reports daily as part of regular business practice, and they are used by security analysts to determine whether to contact law enforcement or to investigate the matter internally in the first instance. The court held that the records were not testimonial (even though they could possibly be used for criminal prosecution), relying on the language in *Melendez-Diaz* stating that Abusiness records are generally admissible absent confrontation.@ The court concluded that the records were primarily prepared for the administration of Amex=s regularly conducted business.

Admission of purported drug ledgers violated the defendant=s confrontation rights where the proof of authenticity was the fact that they were produced by an accomplice at a proffer session: *United States v. Jackson,* 625 F.3d 875 (5th Cir. 2010), amended 636 F.3d 687 (5th Cir. 2011): In a drug prosecution, purported drug ledgers were offered to prove the defendant=s participation in drug transactions. An officer sought to authenticate the ledgers as business records but the court found that he was not a Aqualified witness@ under Rule 803(6) because he had no knowledge that the ledgers came from any drug operation associated with the defendant. The court found that the only adequate basis of authentication was the fact that the defendant=s accomplice had produced the ledgers at a proffer session with the government. But because the production at the proffer session was unquestionably a testimonial statement C and because the accomplice was

not produced to testify C admission of the ledger against the defendant violated his right to confrontation under *Crawford.*

> ***Note:*** **The *Jackson* court does *not* hold that business records are testimonial. The reasoning is muddled, but the best way to understand it is that the evidence used to *authenticate* the business record C the cohort=s production of the records at a proffer session C was testimonial.**

Pseudoephedrine logs are not testimonial: *United States v. Towns,* 718 F.3d 404 (5th Cir. 2013): In a methamphetamine prosecution, the agent testified to patterns of purchasing pseudoephedrine at various pharmacies. This testimony was based on logs kept by the pharmacies of pseudoephedrine purchases. The court found that the logs C and the certifications to the logs provided by the pharmacies C were properly admitted as business records. It further held that the records were not testimonial. As to the Rule 803(6) question, the court found irrelevant the fact that the records were required by statute to be kept and were pertinent to law enforcement. The court stated that Athe regularly conducted activity here is selling pills containing pseudoephedrine; the purchase logs are kept in the course of that activity. Why they are kept is irrelevant at this stage.@ As to the certifications from the records custodians of the pharmacies, the court found them proper under Rule 803(6) and 902(11) C the certifications tracked the language of Rule 803(6) and there was no requirement that the custodians do anything more, such as explain the process of record keeping. As to the Confrontation Clause, the court noted that the Supreme Court in *Melendez-Diaz* had declared that business records are ordinarily non-testimonial. Moreover, the logs were not prepared solely with an eye toward trial. The court concluded as follows:

> The pharmacies created these purchase logs *ex ante* to comply with state regulatory measures, not in response to an active prosecution. Additionally, requiring a driver=s license for purchases of pseudoephedrine deters crime. The state thus has a clear interest in businesses creating these logs that extends beyond their evidentiary value. Because the purchase logs were not prepared specifically and solely for use at trial, they are not testimonial and do not violate the Confrontation Clause.

Court rejects the Atargeted individual@ test in reviewing an affidavit pertinent to illegal immigration: *United States v. Duron-Caldera,* 737 F.3d 988 (5th Cir. 2013): The defendant was charged with illegal reentry. The dispute was over whether he was in fact an alien. He claimed he was a citizen because his mother, prior to his birth, was physically present in the U.S. for at least ten years, at least five of which were before she was 14. To prove that this was not the case, the government offered an affidavit from the defendant=s grandmother, prepared 40

years before the instant case. The affidavit was prepared in connection with an investigation into document fraud, including the alleged filing of fraudulent birth certificates by the defendant=s parents and grandmother. The affidavit accused others of document fraud, and stated that the defendant=s mother did not reside in the United States for an extended period of time. The trial court admitted the affidavit but the court of appeals held that it was testimonial and reversed. The government argued that the affidavit was a business record because it was found in regularly kept immigration records. But the court noted that it could not qualify as a business record because the grandmother was not acting in the ordinary course of regularly conducted activity.

The court found that the government had not shown that the affidavit was prepared outside the context of a criminal investigation, and therefore the affidavit was testimonial under the primary motive test. The government relied on the Alito opinion in *Williams*, under which the affidavit would not be testimonial, because it clearly was not targeted toward the defendant, as he was only a child when it was prepared. But the court rejected the targeted individual test. It noted first that five members of the court in *Williams* had rejected the test. It also stated that the targeted individual limitation could not be found in any of the *Crawford* line of cases before *Williams*: noting, for example, that in *Crawford* the Court defined testimonial statements as those one would expect to be used Aat *a* later trial.@ Finally, the court contended that the targeted individual test was inconsistent with the terms of the Confrontation Clause, which provide a right of the accused to be confronted with the A*witnesses against him.*@ In this case, the grandmother, by way of affidavit, was a witness against the defendant.

> ***Reporter=s Note:*** **The Court=s construction of the Confrontation Clause could come out the other way. The reference to Awitnesses against him@ in the Sixth Amendment could be interpreted as something personal, i.e.,** ***at the time the statement was made,*** **it was being directed at the defendant. The** ***Duron-Caldera*** **court reads Awitnesses@ as of the time the statement is being introduced. But at that time, the witness is not there. All the Awitnessing@ is done at the time the statement is made; and if the witness is not targeting the individual at the time the statement is made, it could well be argued that the witness is not testifying Aagainst him.@**
>
> **Another note from** ***Duron-Caldera:*** **The court notes that there is no rule to be taken from** ***Williams*** **under the** ***Marks*** **test --- under which you take the narrowest view on which the plurality and the concurrence can agree. In** ***Williams,*** **there is nothing on which the plurality and Justice Thomas agreed.**

Preparing an exhibit for trial is not testimonial: ***United States v. Vitrano,*** 747 F.3d 922 (7th Cir. 2014): In a prosecution for fraud and perjury, the government offered records of phone calls made by the defendant. The defendant argued that there was a confrontation violation because the technician who prepared the phone calls as an exhibit did not testify. The court found that the confrontation argument was properly rejected, because no statements of the technician were admitted at trial. The court declared that A[p]reparing an exhibit for trial is not itself testimonial.@

Records of sales at a pharmacy are business records and not testimonial under ***Melendez-Diaz: United States v. Mashek,*** 606 F.3d 922 (8th Cir. 2010): The defendant was convicted of attempt to manufacture methamphetamine. At trial the court admitted logbooks from local pharmacies to prove that the defendant made frequent purchases of pseudoephedrine. The defendant argued that the logbooks were testimonial under *Melendez-Diaz,* but the court disagreed and affirmed his conviction. The court first noted that the defendant probably waived his confrontation argument because at trial he objected only on the evidentiary grounds of hearsay and Rule 403. But even assuming the defendant preserved his confrontation argument, A*Melendez-Diaz* does not provide him any relief. The pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law and are business records under Federal Rule of Evidence 803(6). Business records under Rule 803(6) are not testimonial statements; *see Melendez-Diaz,* 129 S.Ct. At 2539-40 (explaining that business records are typically not testimonial)"). ***Accord, United States v. Ali,*** 616 F.3d 745 (8th Cir. 2010) (business records prepared by financial services company, offered as proof that tax returns were false, were not testimonial, as A*Melendez-Diaz* does not apply to the HSBC records that were kept in the ordinary course of business.@); ***United States v. Wells,*** 706 F.3d 908 (8th Cir. 2013) (*MelendezBDiaz* did not preclude the admission of pseudoephedrine logs, because they constitute non-testimonial business records under Federal Rule of Evidence 803(6)).

Rule 902(11) authentication was not testimonial: ***United States v. Thompson,*** 686 F.3d 575 (8th Cir. 2012): To prove unexplained wealth in a drug case, the government offered and the court admitted a record from the Iowa Workforce Development Agency showing no reported wages for Thompson's social security number during 2009 and 2010. The record was admitted through an affidavit of self-authentication offered pursuant to Rule 902(11). The court found that the earnings records themselves were non-testimonial because they were prepared for administrative purposes. As to the exhibit itself, the court stated that A[b]ecause the IWDA record itself was not created for the purpose of establishing or proving some fact at trial, admission of a certified copy of that record did not violate Thompson's Confrontation Clause rights.@ The court

emphasized that A[b]oth the majority and dissenting opinions in *MelendezBDiaz* noted that a clerk's certificate authenticating a recordCor a copy thereofCfor use as evidence was traditionally admissible even though the certificate itself was testimonial, having been prepared for use at trial.@ It concluded that A[t]o the extent Thompson contends that a copy of an existing record or a printout of an electronic record constitutes a testimonial statement that is distinguishable from the non-testimonial statement inherent in the original business record itself, we reject this argument.@ ***See also United States v. Johnson***, 688 F.3d 494 (8th Cir. 2012) (certificates of authenticity presented under Rule 902(11) are not testimonial, and the notations on the lab report by the technician indicating when she checked the samples into and out of the lab did not raise a confrontation question because they were offered only to establish a chain of custody and not to prove the truth of any matter asserted).

GPS tracking reports were properly admitted as non-testimonial business records: ***United States v. Brooks,*** 715 F.3d 1069 (8th Cir. 2013): Affirming bank robbery and related convictions, the court rejected the defendant=s argument that admission at trial of GPS tracking reports violated his right to confrontation. The reports recorded the tracking of a GPS device that was hidden by a teller in the money taken from the bank. The court held that the records were properly admitted as business records under Rule 803(6), and they were not testimonial. The court reasoned that the primary purpose of the tracking reports was to track the perpetrator in an ongoing pursuit C not for use at trial. The court stated that A[a]lthough the reports ultimately were used to link him to the bank robbery, they were not *created* . . . to establish some fact at trial. Instead, the GPS evidence was generated by the credit union=s security company for the purpose of locating a robber and recovering stolen money.@

Prior conviction in which the defendant did not have the opportunity to cross-examine witnesses cannot be used in a subsequent trial to prove the facts underlying the conviction: ***United States v. Causevic,*** 636 F.3d 998 (8th Cir. 2011): The defendant was charged with making materially false statements in an immigration matter C specifically that he lied about committing a murder in Bosnia. To prove the lie at trial, the government offered a Bosnian judgment indicating that the defendant was convicted in absentia of the murder. The court held that the judgment was testimonial to prove the underlying facts, and there was no showing that the defendant had the opportunity to cross-examine the witnesses in the Bosnian court. The court distinguished proof of the *fact* of a conviction being entered (such as in a felon-firearm prosecution), as in that situation the public record is prepared for recordkeeping and not for a trial. In contrast the factual findings supporting the judgment were obviously generated for purposes of a criminal prosecution.

Note: The statements of facts underlying the prior conviction are testimonial under both versions of the primary motive test contested in *Williams.* They meet the Kagan test because they were obviously prepared for purpose of C indeed as part of C a criminal prosecution. And they meet the Alito proviso because they targeted the specific defendant against whom they were used at trial.

Affidavit that birth certificate existed was testimonial: *United States v. Bustamante,* 687 F.3d 1190 (9th Cir. 2012): The defendant was charged with illegal entry and the dispute was whether he was a United States citizen. The government contended that he was a citizen of the Philippines but could not produce a birth certificate, as the records had been degraded and were poorly kept. Instead it produced an affidavit from an official who searched birth records in the Phillipines as part of the investigation into the defendant-s citizenship by the Air Force 30 years earlier. The affidavit stated that birth records indicated that the defendant was born in the Philippines and the affidavit purported to transcribe the information from the records. The court held that the affidavit was testimonial under *Melendez-Diaz* and reversed the conviction. The court distinguished this case from cases finding that birth records and certificates of authentication are not testimonial:

> Our holding today does not question the general proposition that birth certificates, and official duplicates of them, are ordinary public records Acreated for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial.@ *MelendezBDiaz*, 129 S.Ct. at 2539B40. But Exhibit 1 is not a copy or duplicate of a birth certificate. Like the certificates of analysis at issue in *MelendezBDiaz*, despite being labeled a copy of the certificate, Exhibit 1 is Aquite plainly@ an affidavit. It is a typewritten document in which Salupisa testifies that he has gone to the birth records of the City of Bacolod, looked up the information on Napoleon Bustamante, and summarized that information at the request of the U.S. government for the purpose of its investigation into Bustamante's citizenship. Rather than simply authenticating an existing non-testimonial record, Salupisa created a new record for the purpose of providing evidence against Bustamante. The admission of Exhibit 1 without an opportunity for cross examination therefore violated the Sixth Amendment.

Filed statement of registered car owner, made after impoundment, that he sold the car to the defendant, was testimonial: *United States v. Esparza,* 791 F.3d 1067 (9th Cir. 2015): The defendant was arrested entering the United States with marijuana hidden in the gas tank and

dashboard; the fact in dispute was the defendant's knowledge, and specifically whether he owned the car he was driving. At the time of arrest, the registered owner was Donna Hernandez. The government relied on two hearsay statements made in records filed with the DMV by Hernandez that she had sold the car to the defendant six days before his arrest. But these records were filed *after* the defendant was arrested and Hernandez had received a notice indicating that the car had been seized because it was used to smuggle marijuana into the country. Under the circumstances, the court found that the post-hoc records filed by Hernandez with the DMV were testimonial. The court noted that Hernandez did not create the record "for the routine administration of the DMV's affairs." Nor was Hernandez merely "a private citizen who, in the course of a routine sale, simply notified the DMV of the transfer of her car. Instead, her car had already been seized for serious criminal violations, and she sent the transfer form to the DMV only after receiving a notice of seizure from [Customs and Border Protection]."

Note: This is an interesting case in which a statement was found testimonial in the absence of significant law enforcement involvement in the generation of the statement. As the Court has noted in *Bryant* and *Clark*, law enforcement involvement is critical to finding a statement testimonial, because a statement not made to or with law enforcement is unlikely to be sufficiently formal, and unlikely to be primarily motivated for use in a criminal trial. But at least it can be said that there is formality here --- Hernandez filed formal statements claiming that the ownership was transferred. And there was involvement of the state both in spurring her interest in filing and in receiving her filing.

Government concedes a *Melendez-Diaz* error in admitting affidavit on the absence of a public record: *United States v. Norwood,* 603 F.3d 1063 (9th Cir. 2010): In a drug case, the government sought to prove that the defendant had no legal source for the large amounts of cash found in his car. The trial court admitted an affidavit of an employee of the Washington Department of Employment Security, which certified that a diligent search failed to disclose any record of wages reported for the defendant in a three-month period before the crime. On appeal, the government conceded that the affidavit was erroneously admitted in light of the intervening decision in *Melendez-Diaz.* (The court found the error to be harmless).

CNR is testimonial but a warrant of deportation is not: *United States v. Orozco-Acosta,* 607 F.3d 1156 (9th Cir. 2010): In an illegal reentry case, the government proved removal by introducing a warrant of deportation under Rule 803(8), and it proved unpermitted reentry by introducing a certificate of non-existence of permission to reenter (CNR) under Rule 803(10). The trial was conducted and the defendant convicted before

Melendez-Diaz. On appeal, the government conceded that introducing the CNR violated the defendant=s right to confrontation because under *Melendez-Diaz* that record is testimonial. The court in a footnote agreed with the government=s concession, stating that its previous cases holding that CNRs were not testimonial were Aclearly inconsistent with *Melendez-Diaz*@ because like the certificates in that case, a CNR is prepared solely for purposes of litigation, after the crime has been committed. In contrast, however, the court found that the warrant of deportation was properly admitted even under *Melendez-Diaz.* The court reasoned that Aneither a warrant of removal=s sole purpose nor even its primary purpose is use at trial.@ It explained that a warrant of removal must be prepared in every case resulting in a final order of removal, and only a Asmall fraction of these warrants are used in immigration prosecutions.@ The court concluded that A*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal C or, for that matter, any business or public record C could be used in a later criminal prosecution renders it testimonial under *Crawford*.@ The court found that the error in admitting the CNR was harmless and affirmed the conviction. ***See also United States v. Rojas-Pedroza,*** 716 F.3d 1253 (9th Cir. 2013) (adhering to *Orozco-Acosta* in response to the defendant=s argument that it had been undermined by *Bullcoming* and *Bryant;* holding that a Notice of Intent in the defendant=s A-File C which apprises the alien of the determination that he is removable C was non-testimonial because Atheir primary purpose is to effect removals, not to prove facts at a criminal trial.@); ***United States v. Lopez,*** 762 F.3d 852 (9th Cir. 2014) (verification of removal C recording the physical removal of an alien across the border, is not testimonial; like a warrant of removal, it is made for administrative purposes and not primarily designed to be admitted as evidence at a trial; the only difference from a warrant of removal Ais that a verification of removal is used to record the removal of aliens pursuant to expedited removal procedures, while the warrant of removal records the removal of aliens following a hearing before an immigration judge@; also holding that, for the same reasons, the verification of removal was admissible as a public record under Rule 803(8)(A)(ii), despite the exclusion for law enforcement reports); ***United States v. Albino-Loe,*** 747 F.3d 1206 (9th Cir. 2014) (statements concerning the defendant=s alienage in a notice of removal C which is the charging document for deportation C are not testimonial in an illegal entry case; the primary purpose of a notice of removal Ais simply to effect removals, not to prove facts at a criminal trial@); ***United States v. Torralba-Mendia,*** 784 F.3d 652 (9th Cir. 2015) (I-213 Forms, offered to show that passengers detained during an investigation were deported, were admissible under the public records hearsay exception and were not testimonial: AThe admitted record of a deportable alien contains the same information as a verification of removal: The alien=s name, photograph, fingerprints, as well as the date, port and method of departure . . . .[T]he admitted forms are a ministerial, objective observation [and] Agents complete I-213 forms regardless of whether the government decides to prosecute anyone criminally.@).

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Documents in alien registration file not testimonial: ***United States v. Valdovinos-Mendez,*** 641 F.3d 1031 (9th Cir. 2011): In an illegal re-entry prosecution, the defendant argued that admission of documents from his A-file violated his right to Confrontation. The court held that the challenged documents C a Warrant of Removal, a Warning to Alien ordered Deported, and the Order from the Immigration Judge C were not testimonial. They were not prepared with the primary motive of use in a criminal prosecution, because at the time they were prepared the crime of illegal reentry had not occurred.

Forms prepared by border patrol agents interdicting aliens found not testimonial: ***United States v. Morales,*** 720 F.3d 1194 (9th Cir. 2013): In a prosecution for illegally transporting aliens, the trial court admitted Field 826 forms, prepared by Border Patrol agents who interviewed the aliens. The Field 826 form records the date and location of arrest, the funds found in the alien=s possession, and basic biographical data about the alien, and also provides the alien options, including an admission that the alien is illegally in the country and wishes to return home. The court of appeals rejected the defendant=s argument that these forms were testimonial. It stated that Aa Border Patrol agent uses the form in the field to document basic information, to notify the aliens of their administrative rights, and to give the aliens a chance to request their preferred disposition. The Field 826s are completed whether or not the government decides to prosecute the aliens or anyone else criminally. The nature and use of the Field 826 makes clear that its primary purpose is administrative, not for use as evidence at a future criminal trial. Even though statements within the form may become relevant to later criminal prosecution, this potential future use does not automatically place the statements within the ambit of >testimonial.=@ The court did find that the part of the report that contained information from the aliens was improperly admitted in violation of the *hearsay* rule. The Field 826 is a public record but information coming from the alien is not information coming from a public official. The court found the violation of the hearsay rule to be harmless error.

Social Security application was not testimonial as it was not prepared under adversarial circumstances: ***United States v. Berry***, **683 F.3d 1015 (9th Cir. 2012)**: The court affirmed the defendant=s conviction for social security fraud for taking money paid for maintenance of his son while the defendant was a representative payee. The trial judge admitted routine Social Security Administration records showing that the defendant applied for benefits on behalf of the son. The defendant argued that an SSA application was tantamount to a police report

and therefore the record was inadmissible under Rule 803(8) and also that its admission violated his right to confrontation. The court disagreed, reasoning that "a SSA interviewer completes the application as part of a routine administrative process@ and such a record is prepared for each and every request for benefits. ANo affidavit was executed in conjunction with preparation of the documents, and there was no anticipation that the documents would become part of a criminal proceeding. Rather, every expectation was that Berry would use the funds for their intended purpose.@ The court quoted *MelendezBDiaz* for the proposition that A[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but becauseChaving been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trialCthey are not testimonial.@ The court concluded as follows:

> [N]o reasonable argument can be made that the agency documents in this case were created solely for evidentiary purposes and/or to aid in a police investigation. Importantly, no police investigation even existed when the documents were created. * * * Because the evidence at trial established that the SSA application was part of a routine, administrative procedure unrelated to a police investigation or litigation, we conclude that the district court did not abuse its discretion by admitting the application under Fed.R.Evid. 803(8), and no constitutional violation occurred.

Affidavit seeking to amend a birth certificate, prepared by border patrol agents for use at trial, was testimonial: *United States v. Macias,* 789 F.3d 1011 (9th Cir. 2015): The defendant was arrested for illegal reentry but claimed that he had a California birth certificate and was a U.S. citizen. He was charged with illegal reentry and making a false claim of citizenship. During his trial he introduced a "delayed registration of birth" document issued by the State of California, and the jury deadlocked. After the trial, border patrol agents conducted an investigation into the defendant's place of birth, interviewing family members and reviewing family documents, and determined that he had been born in Mexico. They then attempted to correct the birthplace on the California document; pursuant to California law, they submitted sworn affidavits in an application to amend the California document. At the second trial, the government introduced the delayed registration as well as the amending affidavit. On appeal, the defendant argued that the amending affidavit was testimonial and its admission violated his right to confrontation. The court reviewed this claim for plain error because at trial the defendant's objection was on hearsay grounds only. The court found that the amending affidavit was clearly testimonial, as its sole purpose was to create evidence for the defendant's second trial. However, the court found that the plain error did not affect the defendant's substantial rights, because the government at trial introduced the defendant's Mexican birth certificate, as well as testimony from family members that the defendant was born in Mexico.

Affidavits authenticating business records and foreign public records are not testimonial: *United States v. Anekwu,* 695 F.3d 967 (9th Cir. 2012): In a fraud case, the government authenticated foreign public records and business records by submitting certificates of knowledgeable witnesses. This is permitted by 18 U.S.C. ' 3505 for foreign records and Rule 902(12) for foreign business records. The court found that the district court did not commit plain error in finding that the certificates were not testimonial. The certificates were not themselves substantive evidence but rather a means to authenticate records. The court relied on the 10th Circuit=s decision in *Yeley-Davis*, immediately below, and on the statement in *Melendez-Diaz* that certificates that do no more than authenticate other records are not testimonial.

Records of cellphone calls kept by provider as business records are not testimonial, and Rule 902(11) affidavit authenticating the records is not testimonial: *United States v. Yeley-Davis,* 632 F.3d 673 (10th Cir. 2011): In a drug case the trial court admitted cellphone records indicating that the defendant placed calls to coconspirators. The foundation for the records was provided by an affidavit of the records custodian that complied with Rule 902(11). The defendant argued that both the cellphone records and the affidavit were testimonial. The court rejected both arguments and affirmed the conviction. As to the records, the court found that they were not prepared Asimply for litigation.@ Rather, the records were kept for Verizon=s business purposes, and accordingly were not testimonial. As to the certificate, the court relied on pre-*Melendez-Diaz* cases such as *United States v. Ellis, supra*, which found that authenticating certificates were not the kind of affidavits that the Confrontation Clause was intended to cover. The defendant responded that cases such as *Ellis* had been abrogated by *Melendez-Diaz*, but the court disagreed:

> If anything, the Supreme Court's recent opinion supports the conclusion in *Ellis.* * * * Justice Scalia expressly described the difference between an affidavit created to provide evidence against a defendant and an affidavit created to authenticate an admissible record: AA clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant.@ Id. at 2539. In addition, Justice Scalia rejected the dissent's concern that the majority's holding would disrupt the long-accepted practice of authenticating documents under Rule 902(11) and would call into question the holding in *Ellis*. See *Melendez-Diaz*, 129 S.Ct. at 2532 n. 1 (AContrary to the dissent's suggestion, ... we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the ... authenticity of the sample ... must appear in person as part of the prosecution's case.@); see also id. at 2547 (Kennedy, J., dissenting) (expressing concern about the implications for evidence admitted pursuant to Rule 902(11) and future of *Ellis*).

The Court's ruling in *Melendez-Diaz* does not change our holding that Rule 902(11) certifications of authenticity are not testimonial.

The court found *Yeley-Davis* Adispositive@ in *United States v. Brinson,* 772 F.3d 1314 (10th Cir. 2014), in which the court admitted a certificate of authenticity of credit card records. The court again distinguished *Melendez-Diaz* as a case concerned with affidavits showing the results of a forensic analysis C whereas the certificate of authenticity Adoes not contain any >analysis= that would constitute out-of-court testimony. Without that analysis, the certificate is simply a non-testimonial statement of authenticity.@ ***See also United States v. Keck,*** 643 F.3d 789 (10th Cir. 2011): Records of wire-transfer transactions were not testimonial because they Awere created for the administration of Moneygram=s affairs and not the purpose of establishing or proving some fact at trial. And since the wire-transfer data are not testimonial, the records custodian=s actions in preparing the exhibits [by cutting and pasting the data] do not constitute a Confrontation Clause violation.@

Immigration forms containing biographical data, country of origin, etc. are not testimonial: *United States v. Caraballo,* 595 F.3d 1214 (11th Cir. 2010): In an alien smuggling case, the trial court admitted I-213 forms prepared by an officer who found aliens crammed into a small room in a boat near the shore of the United States. The forms contained basic biographical information, and were used at trial to prove that the persons were aliens and not admittable. The defendant argued that the forms were inadmissible hearsay and also testimonial. The court of appeals found no error. On the hearsay question, the court held that the forms were properly admitted as public records C the exclusion of law enforcement records in Rule 803(8) did not apply because the forms were routine and nonadversarial documents requested from every alien entering the United States. Nor were the forms testimonial, even after *Melendez-Diaz.* The court distinguished *Melendez-Diaz* in the following passage:

> Like a Warrant of Deportation * * * (and unlike the certificates of analysis in *Melendez-Diaz*), the basic biographical information recorded on the I-213 form is routinely requested from every alien entering the United States, and the form itself is filled out for anyone entering the Untied States without proper immigration papers. * * * Rose gathered that biographical information from the aliens in the normal course of administrative processing at the Pembroke Pines Border Patrol Station in Pembroke Pines, Florida. * * *
>
> The I-213 form is primarily used as a record by the INS for the purpose of tracking the entry of aliens into the United States. This routine, objective cataloging of unambiguous biographical matters becomes a permanent part of every deportable/inadmissible alien's A-File. It is of little moment that an incidental or secondary

use of the interviews underlying the I-213 forms actually furthered a prosecution. The Supreme Court has instructed us to look only at the *primary* purpose of the law enforcement officer's questioning in determining whether the information elicited is testimonial. The district court properly ruled that the primary purpose of Rose's questioning of the aliens was to elicit routine biographical information that is required of every foreign entrant for the proper administration of our immigration laws and policies. The district court did not violate Caraballo's constitutional rights in admitting the smuggled aliens's redacted I-213 forms.

Summary charts of admitted business records is not testimonial: *United States v. Naranjo,* 634 F.3d 1198 (11th Cir. 2011): In a prosecution for concealing money laundering, the defendant argued that his confrontation rights were violated when the government presented summary charts of business records. The court found no error. The bank records and checks that were the subject of the summary were business records and A[b]usiness records are not testimonial.@ And A[s]ummary evidence also is not testimonial if the evidence underlying the summary is not testimonial.@

Autopsy reports prepared as part of law enforcement are found testimonial under *Melendez-Diaz: United States v. Ignasiak,* 667 F.3d 1217 (11th Cir. 2012): In a prosecution against a doctor for health care fraud and illegally dispensing controlled substances, the court held that the admission of autopsy reports of the defendant=s former patients were testimonial under *Melendez-Diaz.* The court relied heavily on the fact that the autopsy reports were filed from an arm of law enforcement. The court reasoned as follows:

> We think the autopsy records presented in this case were prepared Afor use at trial.@ Under Florida law, the Medical Examiners Commission was created and exists within the Department of Law Enforcement. Fla. Stat. ' 406.02. Further, the Medical Examiners Commission itself must include one member who is a state attorney, one member who is a public defender, one member who is sheriff, and one member who is the attorney general or his designee, in addition to five other non-criminal justice members. Id. The medical examiner for each district Ashall determine the cause of death@ in a variety of circumstances and Ashall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney.@ Fla. Stat. ' 406.11(1). Further, any person who becomes aware of a person dying under circumstances described in section ' 406.11 has a duty to report the death to the medical examiner. Id. at ' 406.12. Failure to do so is a first degree misdemeanor. Id.

* * *

In light of this statutory framework, and the testimony of Dr. Minyard, the autopsy reports in this case were testimonial: Amade under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.@ As such, even though not all Florida autopsy reports will be used in criminal trials, the reports in this case are testimonial and subject to the Confrontation Clause.

Note: The Court's test for testimoniality is broader than that used by the Supreme Court. The Supreme Court finds statements to be testimonial only when they are *primarily motivated* to be used in a criminal prosecution. The 11th Circuit's "reasonable anticipation" test would cover many more statements, and accordingly the court's decision in *Ignasiak* is subject to question.

State of Mind Statements

Statement admissible under the state of mind exception is not testimonial: *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004): Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton=s accomplice. Christian had told a friend that he was broke; that he had asked a drug supplier to front him some drugs; that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier. The court held that Christian=s statements were not Atestimonial@ within the meaning of *Crawford*. The court explained that the statements Awere not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . . In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial.@

Testifying Declarant

Cross-examination sufficient to admit prior statements of the witness that were testimonial: *United States v. Acosta,* 475 F.3d 677 (5th Cir. 2007): The defendant=s accomplice testified at his trial, after informing the court that he did not want to testify, apparently because of threats from the defendant. After answering questions about his own involvement in the crime, he refused on direct examination to answer several questions about the defendant=s direct participation in the crime. At that point the government referenced statements made by the accomplice in his guilty plea. On cross-examination, the accomplice answered all questions; the questioning was designed to impeach the accomplice by showing that he had a motive to lie so that he could receive a more lenient sentence. The government then moved to admit the accomplice=s statements made to qualify for a safety valve sentence reduction C those statements directly implicated the defendant in the crime. The court found that statements made pursuant to a guilty plea and to obtain a safety valve reduction were clearly testimonial. However, the court found no error in admitting these statements, because the accomplice was at trial subject to cross-examination. The court noted that the accomplice admitted making the prior statements, and answered every question he was asked on cross-examination. While the cross-examination did not probe into the underlying facts of the crime or the accomplice=s previous statements implicating the defendant, the court noted that AAcosta could have probed either of these subjects on cross-examination.@ The accomplice was therefore found sufficiently subject to cross-examination to satisfy the Confrontation Clause.

Crawford **inapplicable where hearsay statements are made by a declarant who testifies at trial: *United States v. Kappell,*** 418 F.3d 550 (6th Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford.* But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens*, 484 U.S. 554 (1988). Under *Owens*, the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant=s complaint was that his cross-examination would have been more effective if the victims had been older. AUnder *Owens,* however, that is not enough to establish a Confrontation Clause violation.@

Admission of testimonial statements does not violate the Confrontation Clause because declarant testified at trial C even though the declarant did not recall making the

statements: *Cookson v. Schwartz,* 556 F.3d 647 (7th Cir. 2009): In a child sex abuse prosecution, the trial court admitted the victim=s hearsay statements accusing the defendant. These statements were testimonial. The victim then testified at trial, describing some incidents perpetrated by the defendant. But the victim could not remember making any of the hearsay statements that had previously been admitted into evidence. The court found no error in admitting the victim=s testimonial hearsay, because the victim had been subjected to cross-examination at trial. The defendant argued that the victim was in effect unavailable because she lacked memory about the statements. But the court found this argument was foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). The court noted that the defendant in this case was better off than the defendant in *Owens* because the victim in this case Acould remember the underlying events described in the hearsay statements.@

Witness=s reference to statements made by a victim in a forensic report did not violate the Confrontation Clause because the declarant testified at trial: *United States v. Charbonneau,* 613 F.3d 860 (8th Cir. 2010): Appealing from child-sex-abuse convictions, the defendant argued that it was error for the trial court to allow the case agent to testify that he had conducted a forensic interview with one of the victims and that the victim identified the perpetrator. The court recognized that the statements by the victim may have been testimonial. But in this case the victim testified at trial. The court declared that A*Crawford* did not alter the principle that the Confrontation Clause is satisfied when the hearsay declarant, here the child victim, actually appears in court and testifies in person.@

Statements of interpreter do not violate the right to confrontation where the interpreter testified at trial: *United States v. Romo-Chavez,* 681 F.3d 955 (9th Cir. 2012): The court held that even if the translator of the defendant=s statements could be thought to have served as a witness against the defendant, there was no confrontation violation because the translator testified at trial. AHe may not have remembered the interview, but the Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. All the Confrontation Clause requires is the ability to cross-examine the witness about his faulty recollections.@

Statements to police officers implicating the defendant in the conspiracy are testimonial, but no confrontation violation because the declarant testified: *United States v. Allen,* 425 F.3d 1231 (9th Cir. 2005): The court held that a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement,

however, because the declarant testified at trial and was cross-examined. ***See also United States v. Lindsey,*** 634 F.3d 541 (9th Cir. 2011) (AAlthough Gibson=s statements to Agent Arbuthnot qualify as testimonial statements, they do not offend the Confrontation Clause because Gibson himself testified at trial and was cross-examined by Lindsey=s counsel.@).

Admitting hearsay accusation did not violate the right to confrontation where the declarant testified and was subject to cross-examination about the statement: *United States v. Pursley,* 577 F.3d 1204 (10th Cir. 2009): A victim of a beating identified the defendant as his assailant to a federal marshal. That accusation was admitted at trial as an excited utterance. The victim testified at trial to the underlying event, and he also testified that he made the accusation, but he did not testify on either direct or cross-examination *about* the statement. The defendant argued that admitting the hearsay statement violated his right to confrontation. The court assumed arguendo that the accusation was testimonial C even though it had been admitted as an excited utterance. But even if it was testimonial hearsay, the defendant=s confrontation rights were not violated because he had a full opportunity to cross-examine the victim about the statement. The court stated that the defendant=s Afailure to seize this opportunity demolishes his Sixth Amendment claim.@ The court observed that the defendant had a better opportunity to confront the victim Athan defendants have had when testifying declarants have indicated that they cannot remember their out-of-court statements. Yet, courts have found no Confrontation Clause violation in that situation.@

Statement to police admissible as past recollection recorded is testimonial but admission does not violate the right to confrontation: *United States v. Jones*, 601 F.3d 1247 (11th Cir. 2010): Affirming firearms convictions, the court held that the trial judge did not abuse discretion in admitting as past recollection recorded a videotaped police interview of a 16-year-old witness who sold a gun to the defendant and rode with him to an area out of town where she witnessed the defendant shoot a man. The court also rejected a Confrontation Clause challenge. Even though the videotaped statement was testimonial, the declarant testified at trial C as is necessary to qualify a record under Rule 803(5) C and was subject to unrestricted cross-examination.

Waiver

Waiver found where defense counsel=s cross-examination opened the door for testimonial hearsay: ***United States v. Lopez-Medina,*** 596 F.3d 716 (10th Cir. 2010): In a drug trial, an officer testified about the investigation that led to the defendant. On cross-examination, defense counsel inquired into the information that the officer received from an informant C presumably to discredit the basis for the police having targeted the defendant. The trial court then allowed the government to question the officer and elicit some of the accusations about the defendant that the informant=s had made to the officer. The court found no error. It recognized that Aa confidential informant=s statement to a law enforcement officer are clearly testimonial.@ But the court concluded that the defendant Aopened the door to further questioning on Officer Johnson regarding the information he received from the confidential informant. Where, as here, defense counsel purposefully and explicitly opens the door on a particular (and otherwise inadmissible) line of questioning, such conduct operates as a limited waiver allowing the government to introduce further evidence on that same topic.@ The court observed that a waiver would not be found if there was any indication that the defendant had disagreed with defense counsel=s decision to open the door. But there was no indication of dissent in this case. ***Accord, United States v. Acosta,*** 475 F.3d 677 (5th Cir. 2007) (waiver found where defense counsel opened the door to testimonial hearsay). ***Contra, and undoubtedly wrong, United States v. Cromer,*** 389 F.3d 662, 679 (6th Cir. 2004) (Athe mere fact that Cromer may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation@).

TAB 9

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Reporter's Memorandum

To: Advisory Committee on Evidence Rules

From: Dan Capra, Reporter

Re: Suggestion from member of the public for an amendment to the Evidence Rules, regarding partial waiver of Fifth Amendment privilege.

Date: September 10, 2015

The Committee is required to consider all proposals from members of the public for amendments to the Federal Rules of Evidence. Professor Ron Carlson, of the University of Georgia Law School, has submitted a proposal for the Committee's consideration. The premise for the proposal is that there is a risk that a criminal defendant will be found to have made a full waiver of his Fifth Amendment right when testifying at a trial, even if the defendant's direct testimony is limited to a discrete issue.

Here is the hypothetical used by Professor Carlson to illustrate his concern:[1] A defendant is charged with two separate bank robberies. He testifies that on the day of bank robbery One, he was in another state helping his sister move. He carefully limits the direct examination to bank robbery One. However, on cross-examination, he is asked about his whereabouts on the day of bank robbery Two. Professor Carlson posits that a court may find that the defendant, by testifying about one of the bank robberies, waived his Fifth Amendment privilege as to the other. Professor Carlson concedes that the defendant has waived his Fifth Amendment privilege with respect to questions about bank robbery One --- so the prosecution can, for example, ask about the details of the alleged moving day, why the defendant had so much money to spend the day after the robbery, and so forth. Professor Carlson calls this a permissibly-found "limited waiver" --- in contrast to a full waiver that would extend to bank robbery Two.

Professor Carlson's solution to this perceived problem is to add a provision to the Federal Rules of Evidence that is currently found in the Military Rules of Evidence as Rule 301(c). Military Rule 301(c) provides as follows:

[1] Professor Carlson's suggestion is more fully explicated in an article he has co-authored on the subject. See Carlson and Carlson, *Unconstitutionality and the Rule of Wide-Open Cross-Examination: Encroaching on the Fifth Amendment When Examining the Accused*, 8 John Marshall L.Rev. 269 (2014).

Rule 301. Privilege concerning compulsory self-incrimination

(c) Limited Waiver. An accused who chooses to testify as a witness waives the privilege against self-incrimination only with respect to the matters concerning which he or she testifies. If the accused is on trial for two or more offenses and on direct examination testifies about only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified. * * *

Professor Carlson recognizes that under Federal Rule 611(b), *all* witnesses are protected from a cross-examination that goes beyond the scope of direct. He notes, in a letter to the Reporter, that "[t]he unconstitutional choice which is posed to a defendant is not present in federal courts * * * as a result of Federal Rule 611(b)." His concern is mainly with those states (such as Georgia), which follow the English rule --- allowing cross-examination on any relevant matter, even if that matter was not addressed on direct. But in his letter to the Reporter, Professor Carlson explains his rationale for recommending the addition of Military Rule 301 to the Federal Rules, even given the presence of Rule 611(b):

> The reason [Miltary Rule 301(c)] may be valuable for the Federal Rules is that its inclusion will insure that in days and years ahead, in the event a future rules committee would move to amend Rule 611(b) in the direction of a wide-open rule, the rights of the accused will always be protected.

Reporter's Comment on the Proposal

Assuming Professor Carlson is right, and Rule 611(b) provides a criminal defendant all the protection from broadened cross-examination to which he is entitled, there is no need to amend the Federal Rules to include Military Rule 301(c). Amendments are disruptive and costly, and the policy of the Evidence Rules Committee is to propose amendments only when necessary to solve a real problem. The costs of an amendment are not justified by adding suspenders when there is already a belt.

It is not an amendment-worthy "problem" that a future Advisory Committee might amend Rule 611(b) in a way that would leave a criminal defendant subject to a loss of Fifth Amendment rights. Never has an amendment been proposed with the idea that it would be necessary to solve a problem created by a future amendment that would threaten constitutional rights. Under that kind of thinking, the Committee should now propose amendments to the hearsay rule that would protect criminal defendants, just in case a future Committee decides to do away with the hearsay rule.

It might be argued, though, that a version of Military Rule 301(c) would be useful if Rule 611(b), as presently constituted, is *not* sufficiently protective of a criminal defendant's Fifth Amendment rights. For example, in our bank robbery hypothetical above, would Rule 611(b) actually shield the defendant from cross-examination on bank robbery Two when he testifies to his alibi on bank robbery One? Rule 611(b) provides that "Cross-examination *should* not go beyond the *scope of direct* examination and *matters affecting the witness's credibility.*" And it further provides that the trial court "may allow inquiry into additional matters as if on direct examination."

There is a lot of wiggle room in Rule 611(b). The rule is a "should" rule, not a "must" rule – a point emphasized by the second sentence, which gives the court discretion to allow wide-open cross-examination. Moreover, the term "scope" of direct examination is not defined, and creditable arguments can be made in most cases that when a criminal defendant testifies about innocence, pretty much everything is within the scope of that direct examination. See, e.g., *United States v. Brockenborrough,* 575 F.3d 726 (D.C.Cir. 2009) (in a wire fraud case, the defendant's testimony that his relationship with an alleged coconspirator was that he did her taxes, cross-examination on a sexual relationship between the two was within the scope of direct); *United States v. Vasquez,* 858 F.2d 1387 (9th Cir. 1988) (where defendant testified on direct that he had left an apartment, cross-examination about items found in the apartment was within the scope of direct); *United States v. Musk,* 719 F.3d 962 (8th Cir. 2103) (in a fraud case, where the defendant testified that his representations on certain transactions were truthful, he could be cross-examined about representations he made as to other transactions). Finally, there is significant discretion in allowing cross-examination on the ground that another bad act would be relevant to credibility under Rule 608.

But even if Rule 611(b) provides only limited protection against a broad cross-examination, it is unclear that the Military Rule provides much (or any) more. That rule states that "the accused may not be cross-examined as to guilt or innocence with respect to the other offenses *unless the cross-examination is relevant to an offense concerning which the accused has testified.*" It goes without saying that "relevant" is a permissive term. To go back to the hypothetical, a prosecutor could well argue that the facts of robbery Two are "relevant" to robbery One, in the same way that they would be under Rule 404(b), i.e., for intent, identity, etc. etc. It would seemingly be the rarest of cases in which a defendant could cabin his testimony so narrowly that he wouldn't open himself up to cross-examination about other crimes charged under the "relevant" standard. (Indeed, such a defendant who tried to testify so narrowly would risk a strategic backfire --- a negative inference from the jury that he was trying too hard and actually was admitting guilt as to the other crimes.).

Yet this relative lack of protection in the evidence rules is completely understandable, because the case law on the subject of waiver by testifying is itself quite broad --- it is the broad standard of "relevance." *Raffel v. United States,* 271 U.S. 494, 497-98 (1926), is the leading case. It involved a defendant who, in a second trial on the same charges testified on direct as to

his innocence, denying that he made an incriminatory statement. He was cross-examined as to why he did not testify in the first trial. The Court found that his waiver of the Fifth Amendment privilege in the second trial extended to (opened the door to) questions about why he said nothing in the first trial. The Court defined and applied the relevant waiver standard as follows:

> The immunity from giving testimony is one which the defendant may waive by offering himself as a witness. When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. * * * His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.
>
> If, therefore, the question asked of the defendant were logically relevant, and competent within the scope of the rules of cross-examination they were proper questions, unless there is some reason of policy in the law of evidence which requires their exclusion.
>
> * * *
>
> We * * * do not think the questions asked of him were irrelevant or incompetent; for, if the cross-examination had revealed that the real reason for the defendant's failure to contradict the government's testimony on the first trial was a lack of faith in the truth or probability of his own story, his answers would have a bearing on his credibility and on the truth of his own testimony in chief.[2]

Essentially, the standard of "relevance" set forth in Military Rule 301(c) codifies the relevance standard established by the Supreme Court in *Raffel:* the waiver extends to cross-examination on matters relevant to those raised on direct. See, e.g., *United States v. Ray*, 15 M.J. 808 (1983) (construing Military Rule 301 and concluding: "Having elected to testify voluntarily on the issue of guilt or innocence, an accused necessarily waives his privilege against self-incrimination as to any relevant matters reasonably raised by his direct testimony."). Query then whether --- even in a jurisdiction with wide-open cross-examination rules --- it is necessary to codify this case law.

It may be wondered, then, why the Military Rules contain a provision like Rule 301(c) while *also* implementing the American Rule of limited cross-examination in Military Rule 611(b). One can argue that it is simply a belt-and-suspenders approach, or a means of emphasizing the need for a court to be vigilant about protecting against an overbroad application

[2] See also McGautha v. California, 402 U.S. 183, 215 (1971) (defendant who testifies cannot then claim a privilege from cross-examination "on matters reasonably related to the subject matter of his direct examination"); United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977) (defendant, by testifying that she was under duress during the time of the charged bank robbery, waived her Fifth Amendment rights regarding a later, uncharged crime in which she acted without duress). Compare Calloway v. Wainright, 409 F.2d 59 (5th Cir. 1968) (defendant who testified that his confession was coerced did not waive his Fifth Amendment right with regard to facts about the underlying crime).

of waiver. In any event, under the standards of necessity employed for proposing amendments to the Evidence Rules, belt-and-suspenders and extra emphasis would not seem to qualify as reasons for an amendment.

Conclusion

There appears to be no reason at this time to go forward with an amendment to the Evidence Rules that would include a provision like Military Rule 301(c). This is so for a number of reasons:

1. Rule 611(b), even as fuzzy as it is, already provides sufficient protection against an overbroad finding of waiver and is consistent with the constitutional standards of relevance.

2. There is no reason to think that Rule 611(b) would ever be changed in such a way as to require a new rule to be implemented to protect testifying criminal defendants from overbroad waiver. In any case there is no reason to guard against such a possibility at this point.

3. The extent of a waiver is already governed by long-standing and uniform Supreme Court case law, and a new rule would do no more than codify that law --- which in any case is consistent with the existing Federal Rule 611(b).

4. The problem to which the proposal is directed is very unlikely to occur, because in most cases where a criminal defendant testifies, their denial of guilt on direct examination will in fact open the door to cross-examination about other charges, foundational issues, and the like.

If, however, the Committee determines that a possible amendment is worth further investigation, the Reporter will prepare a report, and possible language for an amendment, for the next meeting. Any amendment should probably be by way of an addition to Rule 611, as opposed to an independent rule. Logistically, the best way to go would probably be dividing Rule 611(b) into two subparts, with the new language as the second subpart. Adding the new amendment as Rule 611(c) would upset electronic searches regarding the rule on leading questions, which currently resides in Rule 611(c). And adding the new language as a new Rule 611(d) would mean that it is separated from the rule that essentially governs the same issue.

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