

**ADVISORY COMMITTEE
ON
RULES OF EVIDENCE**

**Los Angeles, California
October 21, 2016**

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ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Pepperdine Law School, Malibu, California

October 21, 2016

I. Opening Business

Opening business includes:

- Approval of the minutes of the Spring, 2016 meeting.
- A report on the June, 2016 meeting of the Standing Committee.
- Introduction of two new members: Justice James P. Bassett and Traci L. Lovitt.
- A tribute to Ken Broun, who is retiring from his position as consultant to the Committee.

II. Conference on Amendments to the Hearsay Exceptions and Developments under Rule 404(b)

The morning of the Fall meeting will be devoted to a conference in which the Committee will obtain input from members of the bench, bar, and academia on two of its proposals for amendment hearsay exceptions, as well as guidance on whether case law developments under Rule 404(b) might warrant consideration of any amendment to that Rule. The agenda book contains the Reporter's memorandum describing the topics to be discussed and setting forth the list of participants, as well as background information on case law developments under Rule 404(b).

III. Proposed Amendments Currently Under Review by the Supreme Court.

The Committee has two amendments that have been approved by the Judicial Conference and are currently under review by the Supreme Court. If the Supreme Court approves these amendments, they will become effective on December 1, 2017 absent Congressional intervention. The amendments are: 1) limitation of the ancient documents hearsay exception, Rule 803(16), to documents prepared before January 1, 1998; and 2) addition of new subdivisions (13) and (14) to Rule 902, allowing certain electronic information to be authenticated by way of certificate of a foundation witness.

These proposed amendments, together with Committee Notes, are set forth behind Tab 3 of the agenda book.

IV. Proposal to Expand Rule 807, the Residual Exception

At the last meeting, the Committee tentatively approved a proposal to amend Rule 807 that would expand the residual exception as well as rectify some conflicts in the cases about the application of that exception. The working draft of a proposed amendment will be the subject of discussion at the conference before the meeting. The Reporter's memorandum on the proposed amendment --- along with a discussion of state law differences and a case digest --- is behind Tab 4 of the agenda book.

V. Proposed Amendment to Rule 801(d)(1)(A)

For the last year the Committee has been working on a possible change to Rule 801(d)(1)(A) that would provide for broader substantive admissibility of prior inconsistent statements. The current working draft would allow substantive admission of a witness's prior inconsistent statement if it was videotaped. That proposal will be discussed at the conference before the meeting. The Reporter's memorandum on the proposed amendment to Rule 801(D)(1)(A) is behind Tab 5 of the agenda book.

VI. Public Suggestion for Amendment to Rule 702

A recent law review article suggests amendments to Rule 702 that would be designed to restore the "promise" of *Daubert* and the 2000 amendment to require regulation of expert testimony. The article suggests that a number of courts are not following the 2000 amendments to Rule 702 and proposes changes to make them do so. The Reporter's memorandum on the suggested changes is behind Tab 6 of the agenda book.

VII. Best Practices for Authenticating Certain Electronic Evidence

The manual on best practices for authenticating electronic evidence --- a project spurred by the Committee after its Symposium on Electronic Evidence --- has been completed. The Standing Committee determined that the Manual should not be attributed to the Committee, but rather as the individual work of those who prepared it. The Manual was submitted to the Federal Judicial Center for publication, but the FJC determined that it didn't wish to publish it in the form submitted. The authors then submitted the Manual to West Academic. West Academic is publishing the Manual as an Appendix to its yearly publication of the Federal Rules of Evidence. In addition, a digital copy of the Manual as published by West Academic has been sent to every Federal judge. Finally, every Federal judge will receive a hard copy, published at the expense of one of the authors.

The agenda book contains the Best Practices Manual in its final form, as published by West Academic. The Manual will be updated yearly.

VIII. Hearsay Exception for Recent Perceptions

The Committee has decided to defer action on an amendment that would add a "recent perceptions" exception to Rule 804(b) --- 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.

IX. Crawford Outline

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

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TAB 1A

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Advisory Committee on Evidence Rules

Minutes of the Meeting of April 29, 2016

Alexandria, Virginia

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on April 29, 2016 in Alexandria, Virginia.

The following members of the Committee were present:

Hon. William K. Sessions, Chair
Hon. Brent R. Appel
Hon. Debra Ann Livingston
Hon. John T. Marten (by telephone)
Hon. John A. Woodcock
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 Wesley, Liaison from the Standing Committee
Hon. Solomon Oliver, Liaison from the Civil Rules Committee
Hon. James Dever, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Timothy Lau, Federal Judicial Center
Rebecca A. Womeldorf, Chief, Rules Committee Support Office
Shelley Duncan, Rules Committee Support Office
Teresa Ohley, Esq., Liaison from the Joint Service Committee on Military Justice
Zoe Oreck, American Association for Justice
Susan Steinman, American Association for Justice
Michael Shepard, Hogan Lovells, American College of Trial Lawyers
Jayme Herschkopf, Supreme Court Fellow
Derek Webb, Law Clerk to Judge Sutton

I. Opening Business

Approval of Minutes

The minutes of the Fall, 2015 Committee meeting were approved.

January Meeting of the Standing Committee

Judge Sessions reported on the January, 2016 meeting of the Standing Committee. The Evidence Rules Committee had no action items at the meeting. Judge Sessions reported to the Standing Committee about the Hearsay Symposium that the Committee had sponsored in the Fall of 2015. Ideas from that Symposium will be part of the Committee's agenda for the near future.

Departure of Committee Members

Judge Sessions and the entire Committee expressed regret that the terms of two valued Committee members --- Brent Appel and Paul Shechtman --- were ending. Both Brent and Paul were thanked for their stellar service to the Committee. Both stated their appreciation for the work of the Evidence Rules Committee, the quality of its decisionmaking, and the collegiality of the members.

II. Proposed 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, a statement in the document is admissible under the exception for the truth of its contents. At the Spring, 2015 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. The Committee proposed to eliminate Rule 803(16), with the expectation that old documents that are reliable could still be admitted as business records or under the residual exception, and also with the recognition that many documents currently offered under Rule 803(16) could be admitted as party-opponent statements or for the non-hearsay purpose of notice.

The Committee's proposal to abrogate Rule 803(16) was unanimously approved by the Standing Committee for release for public comment. Over 200 public comments were received, and a public hearing was held. Almost all the comment was negative. Most of the comments were to the effect that without the ancient documents exception, important documents in certain

specific types of litigation would no longer be admissible --- or would be admissible only by expending resources that are currently not necessary under Rule 803(16). Examples of litigation cited by the public comment included cases involving latent diseases; disputes over the existence of insurance; suits against churches alleged to condone sexual abuse by their clergy; cases involving environmental cleanups; and title disputes. Many of the comments concluded that the business records exception and the residual exception are not workable alternatives for ancient documents. The commenters contended that the business records exception requires a foundation witness that may be hard to find, and that the residual exception is supposed to be narrowly construed. Moreover, both these exceptions would require a statement-by-statement analysis, which is not necessary under Rule 803(16), and which would lead to more costs for proponents.

Many of the comments were duplicative, and some were mistaken about the consequences of the change proposed. For example, some of the commenters argued that the amendment would make it impossible to authenticate ancient documents --- but there is no proposal to amend the rules on authentication. Other commenters stated that the amendment would make it harder to prove that a defendant knew about the dangers of a product --- but if a document is offered for notice, it is not covered by the hearsay rule in the first place. Yet on the whole, the public comment established that the proposed amendment raises substantial concerns about the elimination of the ancient documents exception in certain important types of cases.

At the meeting, the Committee was presented with three basic alternatives for responding to the public comment: 1) continue to propose the elimination of Rule 803(16), while adding to the Committee Note the Committee's expectation that the reliable hearsay in ancient documents would be admissible under the business records exception or the residual exception; 2) propose a limitation on, rather than elimination of, Rule 803(16); or 3) withdraw the amendment and try to find some way to monitor whether and when ESI is being offered under the ancient documents exception.

The Committee first decided that it was not appropriate to continue with the proposal to eliminate Rule 803(16) --- the public comment did raise concerns about the effect of the amendment and the costs of prosecuting certain important claims that currently rely on ancient documents. (The public comment also showed that looking at the reported cases does not give a sense of how often the ancient documents exception is actually used --- in part because with ancient documents, there is nothing to report, because there is currently no basis for any objection to the admission of such documents.) The DOJ representative added that there are a number of types of actions in which the government routinely uses ancient documents --- such as CERCLA cases and cases involving title dispute in "rails to trails" litigation --- and that elimination of the ancient documents exception would impose substantial burdens in these cases, because the documents would be difficult to qualify under the residual exception, given the particularized notice requirements of Rule 807. The Committee was sympathetic to the concerns about the costs that would be imposed in particular kinds of existing cases if the ancient documents exception were eliminated.

The Committee next decided that the "do nothing" approach was not acceptable. The Committee unanimously believed that the ESI problem was real --- because ESI can be easily and permanently stored, there is a substantial risk that the terabytes of emails, web pages, and

texts generated in the last 20 or so years could inundate the courts by way of the ancient documents exception. Computer storage costs have dropped dramatically --- that greatly expands the universe of information that could be potentially offered under the ancient documents exception. Moreover, the presumption of the ancient documents exception was that a hardcopy document kept around for 20 years must have been thought to have some importance; but that presumption is no longer the case with easily stored ESI. The Committee remained convinced that it was appropriate and necessary to get out ahead of this problem --- especially because the use of the ancient documents exception is so difficult to monitor. (The FJC representative outlined to the Committee in detail how difficult it would be to conduct a targeted survey of judges and litigants on the use of ancient documents in litigation.) Moreover, the Committee adhered to its position that Rule 803(16) was simply a flawed rule; it is based on the fallacy that because a document is old and authentic, its contents are reliable.

The Committee then moved to drafting alternatives that would limit rather than eliminate Rule 803(16). The alternatives provided by the Reporter, in response to the public comment, were:

- 1) “Grandfathering” – limiting the ancient documents exception to documents prepared before a certain date;
- 2) Adding a necessity requirement --- applying the exception only if the proponent shows that there is no other equally probative evidence to prove the point for which the ancient document is offered;
- 3) Limiting the exception to hardcopy;
- 4) Adding a provision that ancient documents would not be admissible if the opponent could show they were untrustworthy;
- 5) Extending the time period for ancient documents from 20 to 30 years; and
- 6) Adding a requirement, as in the California rule, that a statement in an ancient document would be admissible only if it has been acted on as true by someone with an interest in the matter (often referred to as a “reliance” requirement).

The Committee thoroughly discussed these alternatives. Some were easily rejected. Thus, limiting the exception to hardcopy was rejected because hardcopy might well be derived from ESI, while on the other hand, an old hardcopy document might be digitized --- and it would be nonsensical to provide that the old hardcopy would be admissible while the same document in digitized form would not. Extending the time period for ancient documents from 20 to 30 years amounted to “kicking the can down the road” because it would simply delay the inevitable decision for ten years --- resulting in two amendments to the same rule (or more than two as the can gets kicked further) where one should do. And adding a reliance requirement would limit the use of ancient documents in the very cases where they are now found necessary, because in many of these cases the plaintiff is introducing an old document precisely to show that a party

ignored the document; moreover, in many cases, the fact of reliance might well have to be *shown* by ancient documents.

Most of the discussion was about the remaining alternatives --- grandfathering, necessity, and trustworthiness burden-shifting. Ultimately the Committee decided that adding either a necessity requirement or a trustworthiness burden-shifting requirement to the rule would not sufficiently address the public concerns about additional costs in proving up old hardcopy documents. Adding either of these requirements would lead to challenges, *in limine* hearings, and difficult factual determinations about documents that were prepared long ago. The Committee concluded that the best result would be to turn back to its original concern --- the explosion of ESI --- and to leave the current use of ancient documents where it found it. That could only be done by an amendment that would allow the use of hearsay in ancient documents in all the cases in which they were currently being used, but to eliminate the exception going forward in order to prevent the use of Rule 803(16) as a safe harbor for unreliable ESI.

In discussions about the appropriate date for ending the ancient documents exception, the Committee considered several alternatives, and finally --- and unanimously --- decided that 1998 was a fair date. The Committee recognized, of course, that any cutoff date would have a degree of arbitrariness, but it also recognized that the ancient documents exception itself set an arbitrary time period for its applicability. The Committee determined that the cut-off date of January 1, 1998 would mean that the rule would not affect the admissibility of ancient documents in any of the existing cases that were highlighted in the public comment; also, 1998 was a fair date for addressing the rise of ESI.

The Committee considered the possibility that in the future, cases involving latent diseases, CERCLA, etc. would arise. But the Committee concluded that in such future cases, the ancient documents exception was unlikely to be necessary because, going forward from 1998, there was likely to be preserved (reliable) ESI that could be used to prove the facts that are currently proved by scarce hardcopy. If the ESI is generated by a business, then it is likely to be easier to find a qualified witness who is familiar with the electronic recordkeeping than it is under current practice to find a records custodian familiar with hardcopy practices from the 1960's. Moreover, the Committee determined that it would be useful in the Committee Note to emphasize that the residual exception remains available to qualify old documents that are reliable, and to state the Committee's expectation that the residual exception not only could, but *should* be used by courts to admit reliable documents prepared after January 1, 1998 that would have previously been offered under the ancient documents exception.

After extensive discussion, the Evidence Rules Committee unanimously approved the following amendment to Rule 803(16), to be submitted to the Standing Committee with the recommendation that it be forwarded to the Judicial Conference:

(16) *Statements in Ancient Documents.* A statement in a document ~~that is at least 20 years old~~ that was prepared before January 1, 1998 and whose authenticity is established.

The Committee determined that it was not necessary to send out the proposed amendment for a new round of public comment, as the amendment would not affect the application of the ancient documents exception in any of the cases discussed in any of the public comments. Moreover, a number of the public comments specifically suggested that a grandfathering provision would properly address the Committee's ESI-related concerns while not affecting the use of the exception in the cases in which it is needed and is currently being used.

Finally, the Committee reviewed and approved the proposed Committee Note, which emphasizes the following points:

- The amendment addresses the concern about ESI, and there is no effect on the current use of the exception for documents prepared before 1998.
- In cases involving matters such as latent diseases going forward --- i.e., using records prepared after January 1, 1998 --- the ancient documents exception should not be necessary because of the existence of reliable ESI, and the ability to admit the evidence under reliability-based exceptions such as Rules 803(6) and 807.
- The limitation of the ancient documents exception is not intended to provide a signal that old documents are somehow not to be admitted under other exceptions, particularly Rule 807.
- A document prepared before 1998 might subsequently be altered; to the extent that is so, the alterations would not qualify for admissibility under Rule 803(16).

The proposed Committee Note to the amendment to Rule 803(16), as unanimously approved by the Committee, reads as follows:

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information around the year 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Committee is aware that in certain cases --- such as cases involving latent diseases and environmental damage --- parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability --- which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that 20 year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807. Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of authenticating an old document under Rule 901(b)(8) --- or under any ground available for any other document --- remains unchanged.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the

original rule. See Committee Note to Rule 901(b)(8) (“Any time period selected is bound to be arbitrary.”).

Under the amendment, a document is “prepared” when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that --- the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is *itself* altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

III. Proposed Amendments to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence

At its Spring 2015 meeting, the Committee approved 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, medium 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.

The Committee’s proposal for an amendment adding new Rules 902(13) and (14) was unanimously approved at the June meeting of the Standing Committee, and the proposed

amendment was issued for public comment. The public comment was sparse, but generally favorable. A few of the comments provided suggestions for additions to the Committee Note. And one comment, by professors, made an argument that Rule 902(13) is in tension with the Confrontation Clause.

At the meeting, the Committee, in response to the public comments, unanimously agreed to three changes to the Committee Notes:

- A clarification, in both Committee Notes, that the reference to the certification requirements of Rule 902(11) was only to the procedural requirements for a valid certification, and not to the information being certified in that rule. Under Rule 902(11), the content of the certification is an attestation that the admissibility requirements of the business records exception have been met. But the new proposals do not require, or permit, the witness's certification to attest to any aspect of admissibility other than authenticity.

- A minor clarification of the description of "hash value" in the Committee Note to Rule 902(14).

- New language in both Committee Notes --- suggested by the Federal Magistrate Judges Association --- observing that a challenge to the authenticity of electronic evidence may require advance access to technical information and that the need for such access should inform the notice requirements.

The Committee then discussed the concern raised by some professors that a certification made pursuant to Rule 902(13) might violate the defendant's right to confrontation in criminal cases. 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 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 have uniformly held that certificates prepared under Rule 902(11) 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 --- a certification cannot render constitutional an underlying report that itself violates the Confrontation Clause.

The Committee noted that even the professors agreed that Rule 902(14) presented no constitutional issue, because the certificate would state only that the electronic data is a true copy --- a process clearly permitted by *Melendez-Diaz*. As to Rule 902(13), the certification is a bit more complicated, because the witness may be attesting that the process leads to an accurate result; but that is no different than certifications under Rule 902(11), under which the affiant states that the record meets the reliability requirements of the business records exception. And these certificates have been uniformly held to be constitutional by the lower courts. There is of course no intention or implication from the amendment that a certification could somehow be a means of bringing otherwise testimonial reports into court. But the Committee concluded that if

the underlying report is not testimonial, the certification of authenticity will not raise a constitutional issue under the current state of the law.

After full discussion, the Committee unanimously voted to approve proposed Rules 902(13) and (14), and their proposed Committee Notes, to be submitted to the Standing Committee with the recommendation that it be forwarded to the Judicial Conference. The proposed amendments and Committee Notes provide 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 of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

Committee Note

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 Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds --- including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable --- the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic

technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

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

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 Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

Committee Note

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 number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. 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.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds --- including hearsay, relevance, or in criminal cases the right to confrontation. 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.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

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

IV. Best Practices Manual on Authentication of Electronic Evidence

The Committee has determined that it can provide significant assistance to courts and litigants in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual. The Reporter has worked on preparing such a manual with Greg Joseph and Judge Paul Grimm. The pamphlet, in final form, was submitted to the Committee for its review and discussion.

The Committee reviewed the pamphlet and found that it would be very helpful to the bench and bar.

It was noted that there is still an issue as to whether the Advisory Committee should be listed as a co-author, or whether the attribution should be less direct --- such as some indication that it had been approved or supported by the Advisory Committee. Another possibility is that the Committee would not be referred to at all. The pamphlet will be submitted as an action item for the Standing Committee at its next meeting, so that the Standing Committee can determine how the Advisory Committee's role in the pamphlet should be described if at all.

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

For the past two meetings, the Committee has considered a project that would provide more uniformity to the notice provisions of the Evidence Rules, and that would also make relatively minor substantive changes to two of those rules.

The Committee at the Spring meeting agreed upon the following points:

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 especially important to allow for a good cause exception when it is a criminal defendant who fails to provide pretrial notice.

2) The request requirement in Rule 404(b) --- that the criminal defendant must request notice before the government is obligated to give it --- is an unnecessary limitation that serves as a trap for the unwary. 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.

3) The notice provisions in Rules 412-415 should not be changed. 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.

With this much agreed upon, the Committee considered other suggestions for amendment to the notice provisions of Rules 404(b), 609(b), 807 and 902(11). One possibility was a template that would require a proponent to provide “reasonable written notice of an intent to offer evidence under” the specific rule, and to “make the substance of the evidence available to the party -- 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 notice.” For a number of reasons, however, the Committee concluded that such a template would not work as applied to all four rules.

For one thing, the template would result in a change to Rule 404(b) that would require the defendant to provide notice for “reverse 404(b)” evidence in a criminal case --- such a change should not be made simply for uniformity’s sake. For another, the “substance” requirement would probably constitute a tightening of the government’s disclosure obligations under Rule 404(b), which currently requires a disclosure of the “general nature” of the evidence --- again, such a change should not be made purely for uniformity’s sake, especially given the fact that Rule 404(b) covers a different kind of evidence than Rule 807. Finally, two of the notice provisions (404(b) and 609(b)) require notice to be provided “before trial” while the other two (807 and 902(11)) require notice to be provided “before the trial or hearing.” That difference is justified because the notice provisions in Rules 404(b) and 609(b) are likely to be invoked only

in the context of a trial, whereas Rules 807 and 902(11) might be invoked on summary judgment as well. It would be counterproductive to change two of these rules simply to provide uniformity.

After discarding the template, the Committee moved to consideration of individual changes that might be made to improve one or more of the notice provisions. Committee members were in favor written notice requirements. Rules 404(b) and 807 currently do not provide for written notice. **Committee members unanimously agreed that a written notice requirement should be added to Rule 807.** But the DOJ representative argued that there was no need to add a requirement of written notice to Rule 404(b), because the Department (the only litigant subject to the Rule 404(b) notice requirement) routinely provides notice in writing. The Committee agreed that there was no need to amend Rule 404(b) if that amendment would have no effect.

The Committee next discussed the Rule 807 requirement that the proponent disclose “the statement and its particulars, including the declarant’s name and address.” After discussion, the Committee determined that --- independent of any uniformity project --- this phrase should be amended. For one thing, the term “particulars” has led in some cases to petty disputes about the details of the notice provided. For another, the requirement that the proponent disclose the address of the declarant is nonsensical when the declarant is unavailable; it is unnecessary when the declarant is a person or entity whose address is known or can easily be determined; and it is problematic in cases in which disclosure of the address might raise security or privacy issues. **The Committee concluded unanimously that the requirement of disclosing an address should be deleted from Rule 807, and that the term “substance” should replace “particulars.”**

The Chair then observed that the Committee has on its agenda the possibility of modest changes to Rule 807 that would make it somewhat easier to invoke. The Committee agreed that it would not be prudent to propose changes to the notice provisions of Rule 807 until the Committee has decided whether other changes to the rule, if any, should be proposed. In sum, it would be appropriate to propose all amendments to Rule 807 at one time.

The Committee further agreed that the proposed amendment to Rule 404(b) --- to delete the requirement that the defendant request notice --- should be held off until other amendments were ready for proposal. Holding off on that amendment is consistent with the intent of the Standing Committee --- that amendments should be packaged, in order to minimize disruption to the bench and bar. The change that would be made to Rule 404(b) is not so significant that it must be made immediately without regard to packaging.

The working proposal for amendment to the Rule 807 notice requirement, approved by the Committee, reads as follows:

(b) **Notice.** The statement is admissible only if, ~~before the trial or hearing~~ the proponent gives an adverse party reasonable written notice of ~~the~~ an intent to offer the statement ~~and its particulars, including the declarant’s name and address, -- including its~~

substance and the declarant's name -- so that the party has a fair opportunity to meet it.
The notice must be provided before the trial or hearing -- or during trial or hearing if the
court, for good cause, excuses a lack of earlier notice.

The working draft of the Committee Note provides as follows:

The notice provision has been amended to make three changes in the operation of the Rule.

First, the Rule requires the proponent to disclose the “substance” of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the “substance” of the evidence). Prior case law on the obligation to disclose the “particulars” of the hearsay statement may be instructive, but not dispositive, of the proponent’s obligation to disclose the “substance” of the statement under the Rule as amended. The prior requirement that the declarant’s address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant’s address was known or easily obtainable. If prior disclosure of the declarant’s address is critical and cannot be otherwise obtained by the opponent, then the opponent can seek relief from the court.

Second, the Rule now requires that the notice be in writing --- which includes notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually made.

Finally, 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 under Rule 807 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 hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent must then resort to residual hearsay. Where notice is made during the trial, the general requirement that notice must be in writing need not be met.

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.

VI. Proposal to Expand the Residual Exception

At previous meetings the Committee has had some preliminary discussion on whether Rule 807 --- the residual exception to the hearsay rule --- should be expanded to allow the admission of more hearsay, if it is reliable. Expansion of the residual exception might have the effect of providing more flexibility, and it could also be part of an effort to reassess some of the more controversial categorical hearsay exceptions, such as those for ancient documents, excited utterances and dying declarations. Limitations on those exceptions could be easier to implement if it could be assured that reliable hearsay currently fitting under those exceptions could be admitted under the residual exception. But currently, the residual exception is, by design, to be applied only in rare and exceptional circumstances.

The Committee discussed the possibilities of expanding the residual exception at the Spring meeting. The Committee recognized the challenge: the goal would be to allow the residual exception to be used somewhat more frequently, without broadening it so far that it would overtake the categorical exceptions entirely and lead to a hearsay system that was controlled by court discretion, with unpredictable outcomes. At the Hearsay Symposium, the Committee heard repeatedly from lawyers that they wanted predictable hearsay exceptions --- judicial discretion would lead to inconsistent results and lack of predictability would raise the costs of litigation and would make it difficult to settle cases.

Within these constraints, the Committee, after substantial discussion, preliminarily agreed on the following principles regarding Rule 807:

- The requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted. That standard is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. It is common ground that statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803; and it is also clear that the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to “equivalence” review --- Rule 804(b)(6) forfeiture --- is not based on reliability at all. Given the difficulty of the “equivalence” standard, a better approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy.

- Trustworthiness can best be defined as a consideration of both circumstantial guarantees and corroborating evidence. Most courts find corroborating evidence to be relevant to the reliability enquiry, but some do not. An amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception --- and substantively, that amendment should specifically allow the court to consider corroborating evidence, as corroboration is a typical source for assuring that a statement is reliable.

- The requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” have not served any purpose. The inclusion of the language “material fact” is in conflict with the studious avoidance of the term “materiality” in Rule 403 --- and that avoidance was well-reasoned, because the term “material” is so fuzzy. The courts have essentially held that “material” means “relevant” --- and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice because that guidance is already provided by Rule 102. These provisions were added to the residual exception to emphasize that the exception was to be used only in truly exceptional situations. Deleting them might change the tone a bit, to signal that while hearsay must still be reliable to be admitted under Rule 807, there is no longer a requirement that the use must be rare and exceptional.

- The requirement in the residual exception that the hearsay statement must be “more probative than any other evidence that the proponent can obtain through reasonable efforts” should be retained. This will preserve the rule that proponents cannot use the residual exception unless they need it. And it will send a signal that the changes proposed are modest --- there is no attempt to allow the residual exception to swallow the categorical exceptions, or even to permit the use the residual exception if the categorical exceptions are available.

What follows is the working draft of an amendment to Rule 807 that the Committee has tentatively approved and will be considered further at the next meeting (including the amendment to the notice provision discussed above).

Rule 807. Residual Exception

(a) **In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) ~~the statement has equivalent circumstantial guarantees of trustworthiness the court determines, after considering the pertinent circumstances and any corroborating evidence, that the statement is trustworthy; and~~

~~(2) — it is offered as evidence of a material fact;~~

~~(3) (2) it is more probative on the point for which it is offered than ~~any~~ other evidence that the proponent can obtain through reasonable efforts; and~~

~~(4) — admitting it will best serve the purposes of these rules and the interests of justice.~~

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

Finally, the Committee decided that it would be useful to convene a miniconference on the morning of the Fall 2016 meeting, to have judges, lawyers and academics provide commentary on the proposed changes to Rule 807.

VII. Proposal to Amend Rule 801(d)(1)(A)

Over the last few meetings, the Committee has been considering the possibility of expanding substantive admissibility of certain prior statements of testifying witnesses --- the rationale of that expansion being that unlike other forms of hearsay, the declarant is subject to cross-examination about the statement. At the Symposium on Hearsay in October, 2015, a panel was devoted to treatment of prior witness statements.

The Committee's discussions at the previous two meetings, and the presentations at the Symposium, have served to narrow the Committee's focus on any possible amendment that would expand admissibility of prior witness statements. Here is a synopsis of the Committee's prior determinations:

- While there is a good argument that prior witness statements should not be treated as hearsay at all, amending the hearsay rule itself (Rule 801(a)-(c)) is not justified. That rule is iconic, and amending it to exclude prior witness statements will be difficult and awkward. Therefore any amendment should focus on broadening the exemption provided by Rule 801(d)(1).

- The focus on Rule 801(d)(1) should be narrowed further to the subdivision on prior inconsistent statements: Rule 801(d)(1)(A). The current provision on prior consistent statements --- Rule 801(d)(1)(B) --- was only recently amended, and that amendment properly captures the statements that should be admissible for their truth. Any expansion of Rule 801(d)(1)(B) would untether the rule from its grounding in rehabilitating the witness, and would allow parties to strategically create evidence for trial. Likewise, the current provision of prior statements of identification --- Rule 801(d)(1)(C) --- has worked well and is not controversial; there is no reason, or even a supporting theory, to expand admissibility of such statements.

At the Spring meeting, the Committee considered two possible ways to amend Rule 801(d)(1)(A) to provide for broader substantive admissibility of prior inconsistent statements. The current provision provides substantive admissibility only in unusual cases --- where the declarant made the prior statement under oath at a formal proceeding. The two possibilities for expansion presented were: 1) allowing for substantive admissibility of *all* prior inconsistent statements, as is the case in California, Wisconsin, and a number of other states; and 2) allowing substantive admissibility only when there is proof --- other than a witness's statement --- that the prior statement was actually made, as is the procedure in Connecticut, Illinois, and several other states.

The Committee quickly determined that it would not propose an amendment that would provide for substantive admissibility of all prior inconsistent statements. The Committee was concerned about the possibility that a prior inconsistent statement could be used as critical substantive proof even if the witness denied ever making it and there was a substantial dispute that it was ever made. Several Committee members noted that it would often be costly and

distracting to seek to prove whether a prior inconsistent statement was made if there is no reliable record of it.

The Committee next turned its discussion to allowing substantive admissibility of prior inconsistent statements where there is in fact proof that it was made --- such as a statement that was recorded or was signed by the witness. Several members noted that where a statement is made at a police station, even if it is signed or audio recorded, the witness might have an argument that it was made under pressure --- and that many people who confess at the station do in fact repudiate their statements once they get a lawyer. Others responded that while audio recordings and signed statements are subject to argument as to how and perhaps even whether they were made, the same is not true for video recordings. A statement that is recorded on video might be explained away by the witness at trial --- which is perfectly suited to the trial context --- but it is all but impossible to deny that a statement was made when it has been video recorded. Moreover, any indication of police pressure or overreaching is likely to be presented in the video itself. Other members noted that allowing substantive admissibility of videotaped inconsistent statements could lead to more statements being videotaped in expectation that they might be useful substantively--- which is a good result even beyond its evidentiary consequences.

Finally, a number of Committee members noted that one of the major costs of the current rule is that a confounding limiting instruction must be given whenever a prior inconsistent statement is admissible for impeachment purposes but not for its substantive effect. That cost may be justified when there is doubt that a prior statement was fairly made, but it may well be unjustified when the prior statement is on video --- as there is easy proof of the statement and its circumstances if the witness denies making it or tries to explain it away.

The Committee took a straw vote and five members of the Committee voted in favor of an amendment to Rule 801(d)(1)(A) that would provide for substantive admissibility of a prior inconsistent statement if it was video recorded. Three members were opposed. The Committee resolved to take up the matter in the next two meetings to determine whether an amendment would be formally proposed for issuance for public comment in the Fall of 2017.

The working draft of an amendment that would allow substantive admissibility for videotaped prior inconsistent statements provides as follows:

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

(ii) was recorded on video and is available for presentation at trial;
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.

A working draft of the Committee Note provides as follows:

The amendment provides for greater substantive admissibility of inconsistent statements of a testifying witness, which is appropriate because the declarant is by definition testifying under oath and is subject to cross-examination about the statement. The requirement that the statement be made under oath at a former proceeding is unnecessarily narrow. That requirement stemmed mainly from a concern that it was necessary to regulate the possibility that the prior statement was never made. But as shown in the practice of some states, there are less onerous alternatives that can assure that what is introduced is exactly what the witness said. The best proof that the witness made the statement is that it is video recorded. That is the safeguard provided by the amendment.

While the amendment expands the substantive admissibility for prior inconsistent statements, it does not affect the use of any prior inconsistent statement for impeachment purposes. A party may wish to introduce an inconsistent statement not to show that the witness's testimony is false and prior statement is true, but rather to show that neither is true. Rule 801(d)(1)(A) does not apply if the proponent is not seeking to admit the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

VIII. Proposals to Amend Rule 803(2)

Four separate proposals have been made by academics for amending Rule 803(2), the hearsay exception for excited utterances (in addition to Judge Posner's suggestion that the exception be eliminated, which the Committee has previously considered and rejected). The Committee considered all four proposals at the Spring meeting.

One proposal was to add the word "continuous" to the rule --- requiring the declarant to be in a continuous state of excitement for the period between the startling event and the statement. The Committee found no need to make this change. The text and the case law already requires the statement to be made while under the continuous influence of the startling event. The single case cited as problematic – *United States v. Napier* --- is one in which there is a new startling event, and the declarant made a statement that related not only to that new event but also to a previous startling event. Adding the word "continuous" would not change the result in that case. More importantly, the case is correctly decided because the statement was in fact made while the declarant was under the effect of the second startling event. Finally, even if the case were problematic, the fact that it is the only federal case cited as raising the so-called problem, in 40 years of litigation under Federal Rule 803(2), is indicative that there is no serious problem worth addressing.

Other proposals were made in response to the allegation that the excited utterance exception does not provide a sufficient guarantee that evidence admitted under the exception will be reliable. One proposal was to add language --- derived from the 2014 amendment to Rule 803(6) --- that would allow the court to exclude the statement if the opponent could show that the excited utterance was in fact untrustworthy. Another proposal was to add language --- derived from Rule 804(b)(3) --- that would require the proponent to show corroborating circumstances

clearly indicating that the excited utterance was trustworthy. And a third proposal was to transfer the exception to Rule 804, so that excited utterances would not be admissible unless the declarant is shown to be unavailable to testify.

The Committee decided not to proceed on any of these proposals. For one thing, the proposals would have consequences beyond Rule 803(2) --- consideration would have to be given to similar treatment for other exceptions that have been found controversial, such as the exceptions for present sense impressions and state of mind. Thus, proposing an amendment to Rule 803(2) at this point would be contrary to a systematic approach to amending the Federal Rules of Evidence. Second, and more importantly, the Committee relied on a lengthy report prepared by the FJC representative, who analyzed the social science studies that have been conducted regarding the premises of Rules 803(1) (the present sense impression exception) and 803(2) --- specifically whether there is support for the propositions that immediacy and excitedness tend to guarantee reliability. The FJC representative concluded that there is significant empirical data supporting both of these premises. That is, social science data support the premises that 1) it takes time to make up a good lie, and 2) startlement makes it more difficult to make up a good lie. Consequently, the Committee determined that there was no need at this point to amend Rule 803(2) --- or Rule 803(1), for that matter --- due to any reliability concerns.

IX. Consideration of a Change from Categorical Hearsay Exceptions to Guidelines

At the Hearsay Symposium in Fall 2015, Judge Shadur argued that the hearsay rule might be usefully changed to parallel the sentencing guidelines --- i.e., a list of factors, which guide discretion, but which allow the judge to depart in various circumstances. The existing hearsay exceptions might be reconstituted as standards or guidelines rather than hard rules. Similarly, a Committee member suggested that the rule might be structured as allowing for discretion to admit hearsay, with the existing exceptions set forth as illustrations --- that is, it could be structured in the same way as Rule 901(a). The Committee directed the Reporter to prepare a memorandum for the Spring meeting that would evaluate the viability of replacing the current rule-based system with a system of guided discretion that would include a list of standards or illustrations taken from the existing exceptions.

The Reporter prepared the report for the Spring meeting. The report suggested that at this point, 40 years into the Federal Rules of Evidence, any perceived advantages in switching to a guidelines system (in terms of adding flexibility) would be outweighed by the costs (including substantial disruption; the uncertainty created by greater judicial discretion in ruling on hearsay; increased motion practice; and increased discovery cost because virtually any hearsay statement would be potentially admissible). The Committee, after deliberation, agreed with this assessment.

In the memorandum for the Committee, the Reporter raised as a lesser alternative a system in which the categorical hearsay exceptions were retained, but two changes could be made: 1) add a safety valve applicable to all the exceptions allowing a judge to exclude

otherwise admissible hearsay if the opponent could show that it was untrustworthy; and 2) amend Rule 807 to allow for more frequent and easier use. Such a system would attempt to address two oft-stated critiques about the hearsay exceptions: 1) that many of them admit unreliable evidence; and 2) that the categorical system does not adapt well to hearsay that is reliable but doesn't fit into exceptions.

But the Committee unanimously rejected the proposed alternative, on the ground that it would inject too much discretion into the system. At the Hearsay Symposium, the Committee heard loud and clear from the lawyers that rules were needed to provide guidance, stability and consistency. Allowing more discretion for the court to admit or exclude hearsay which it happened to find reliable or unreliable would add substantial uncertainty and inconsistency, making it more difficult to settle, obtain summary judgment, and prepare for trial. Moreover, adding so much more discretion would provide a "home team advantage" in that local counsel would learn over time the personal inclinations of a local judge in treating a hearsay problem.

Instead of an across-the-board increase of discretion to exclude and admit hearsay, the Committee opted to consider modest changes to the residual exception, discussed above --- with the goal being to make that exception somewhat more useful, without injecting too much discretion into the system. Committee members recognized that the change to the residual exception would be in the nature of a tightrope walk, which is one of the reasons that a miniconference on the possible change would be so useful.

X. Consideration of a Possible Amendment to Rule 803(22)

Rule 803(22) is a hearsay exception that allows judgments of conviction to be offered to prove the truth of the facts essential to the conviction. The exception carves out two kinds of convictions that are not covered: 1) convictions resulting from a *nolo contendere* plea; and 2) misdemeanor convictions.

Judge Graber, a member of the Standing Committee, asked the Advisory Committee to consider whether these two limitations on the exception were justified --- if not, the proposal would be to eliminate those carve-outs and treat *nolo contendere* and misdemeanor convictions the same as other convictions under the Rule.

The Reporter prepared a memorandum, suggesting that the two limitations in Rule 803(22) were in fact justified. The Committee agreed with the Reporter's assessment as to both those limitations. The Committee's rationales were as follows:

1. The reason for the *nolo contendere* carve-out is that Rule 410 provides that evidence of a *nolo plea* is not admissible in a subsequent civil or criminal case. As the Ninth Circuit has stated, "Rule 410's exclusion of a *nolo contendere* plea would be meaningless if all it took to prove that the defendant committed the crime charged was a certified copy of the inevitable judgment of conviction resulting from the plea." *United States v. Nguyen*, 465 F.3d 1128, 1131 (9th Cir. 2006). It might be argued that allowing *nolo* pleas is bad policy, but consideration of that question is beyond the scope of

evidence rulemaking. Assuming that allowing nolo pleas is substantively correct, then the decision made to protect them as a means of encouraging compromise in Rule 410 is valid, and that policy should not be undermined by allowing admission of the facts supporting the conviction under Rule 803(22).

2. The reason for the misdemeanor carve-out is that misdemeanors, as a class, are less likely to be contested than felonies, and therefore there is less likely to be a reliable determination (or concession) that would justify admitting the underlying facts for their truth. One Committee member pointed out that in many jurisdictions, indigent defendants plead guilty to misdemeanors simply because they cannot make cash bail. Another member pointed out that if the defendant is indigent and a misdemeanor does not lead to jail time, the state is not required to provide counsel; thus a fair number of misdemeanor convictions are imposed without the defendant having a lawyer. Committee members recognized that some misdemeanor convictions might be highly contested, but noted that when that is so, courts have employed the residual exception to allow admission of the underlying facts for their truth. Thus, adding misdemeanor convictions to Rule 803(22) is not necessary to cover cases where the facts were truly contested, and would on the other hand lead to admission of facts that have clearly not been contested.

The Committee voted unanimously not to proceed with an amendment to Rule 803(22).

XI. Consideration of a Suggestion That Rule 704(b) Be Eliminated

The Reporter informed the Committee of a law review article that advocated elimination of Rule 704(b), which provides that in a criminal case, an expert may not testify that the defendant did or did not have the requisite mental state to commit the crime charged. The Reporter stated that before writing up a memorandum on the subject for the next meeting, he wished to get the Committee's preliminary reaction to eliminating the subdivision, as it presented a question of process: because Rule 704(b) was directly enacted by Congress, would it be appropriate to propose its elimination?

The Committee determined that two special circumstances applied that should counsel caution: 1) The proposal was to eliminate the exception entirely, as opposed to making changes that might improve the rule; and 2) Rule 704(b) was part of the Insanity Defense Reform Act --- a broad statutory overhaul of the insanity defense; because Rule 704 (b) was part of an integrated approach, it is possible that deleting the provision would have an effect on Congressional objectives beyond the Federal Rules of Evidence.

Consequently, the Committee unanimously concluded that it would not proceed with the proposal to eliminate Rule 704(b).

XII. Recent Perceptions (eHearsay)

The Committee has decided not to proceed on 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 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’s decision not to proceed with the recent perceptions exception was mainly out of the concern that the exception would lead to the admission of unreliable evidence. That decision received support from the study conducted by the FJC representative on social science research. The studies indicate that lies are more likely to be made when outside another person’s presence --- for example, by a tweet or Facebook post.

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.

For the Spring meeting, the Reporter 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 routinely excluded, nor that it is being admitted by misapplying the existing 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. At most there was only one or two reported cases in which hearsay was excluded that might have been admitted under a recent perceptions exception.

The reporter will continue to monitor cases involving eHearsay and will keep the Committee apprised of developments.

XIII. Consideration of a Possible Amendment to Rule 611(b)

A professor asked the Committee to consider an amendment to Rule 611(b) that would prohibit the government from cross-examining an accused about crimes that are different from the crime charged. 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 in dispute. The professor recognized that Rule 611(b) already provides protection because it limits cross-examination to matters within the scope of direct. But he argued that protection of criminal defendants specifically might be necessary in case Rule 611(b) were changed in a way that would lift the limit on the scope of cross-examination.

The Advisory Committee unanimously agreed that it would not proceed with a proposal to amend Rule 611(b). The following points were made in Committee discussion:

1. Rule 611(b) already provides (together with Rule 608(b)) 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.

XIV. *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 last term decided *Ohio v. Clark*, in which statements made by a child his teachers --- about a beating he received from the defendant --- were found not testimonial, even though the teacher was statutorily required to report such statements to law enforcement. The new decision in *Clark*, 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. And the fact that a new appointment to the Court might affect the development of the law of confrontation is another reason for adopting a wait-and-see approach. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

XV. Next Meeting

The Fall meeting of the Evidence Rules Committee will be held at Pepperdine Law School on October 21st.

Respectfully submitted,

Daniel J. Capra

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 6, 2016 | Washington, D.C.

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ATTENDANCE

The Judicial Conference on Rules of Practice and Procedure held its fall meeting in Washington, D.C., on June 6, 2016. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair	Professor William K. Kelley
Associate Justice Brent E. Dickson	Judge Patrick J. Schiltz
Roy T. Englert, Jr., Esq.	Judge Amy St. Eve
Daniel C. Girard, Esq.	Judge Richard C. Wesley
Judge Neil M. Gorsuch	Judge Jack Zouhary
Judge Susan P. Graber	

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules – Judge Steven M. Colloton, Chair Professor Gregory E. Maggs, Reporter	Advisory Committee on Criminal Rules – Judge Donald W. Molloy, Chair Professor Sara Sun Beale, Reporter Professor Nancy J. King, Associate Reporter
Advisory Committee on Bankruptcy Rules – Judge Sandra Segal Ikuta, Chair Professor S. Elizabeth Gibson, Reporter Professor Michelle M. Harner, Associate Reporter	Advisory Committee on Evidence Rules – Judge William K. Sessions III, Chair Professor Daniel J. Capra, Reporter
Advisory Committee on Civil Rules – Judge John D. Bates, Chair Professor Edward H. Cooper, Reporter Professor Richard L. Marcus, Associate Reporter	

The Honorable Sally Quillian Yates, Deputy Attorney General, represented the Department of Justice, along with Diana Erbsen, Joshua Gardner, Elizabeth J. Shapiro, and Natalia Sorgente.

Other meeting attendees included: Judge David G. Campbell; Judge Robert M. Dow; Judge Paul W. Grimm; Sean Marlaire, staff to the Court Administration and Case Management Committee (CACM); Professor Bryan A. Garner, Style Consultant; Professor R. Joseph Kimble, Style Consultant; and Professor Joseph F. Spaniol, Jr., Consultant.

Providing support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Julie Wilson	Attorney Advisor, RCSO
Scott Myers	Attorney Advisor, RCSO
Bridget M. Healy	Attorney Advisor, RCSO
Shelly Cox	Administrative Specialist
Hon. Jeremy D. Fogel	Director, FJC
Emery G. Lee	Senior Research Associate, FJC
Tim Reagan	Senior Research Associate, FJC
Derek A. Webb	Law Clerk, Standing Committee
Amelia G. Yowell	Supreme Court Fellow, AO

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order. He first acknowledged a number of imminent departures from the Standing Committee effective October 1, 2016: Justice Brent Dickson, Roy Englert, Judge Neil Gorsuch, and Judge Patrick Schiltz are ending their terms as members of the Standing Committee and Judge Steve Colloton is ending his term as Chair of the Appellate Rules Advisory Committee, a position that will be assumed by Judge Gorsuch. Judge Sutton offered remarks on the contributions each has made to the Committee over the years and warmly thanked them for their service.

Judge Sutton recognized three individuals for reaching milestones of service to the Committee. Rick Marcus has served for twenty years as the Associate Reporter to the Advisory Committee on Civil Rules. Dan Capra has served for twenty years as the Reporter to the Advisory Committee on Evidence Rules. And Joe Spaniol has served twenty-five years as a style consultant to the Standing Committee.

Finally, Dan Coquillette took a moment to thank Judge Sutton, whose tenure as Chair of the Standing Committee comes to an end October 1, 2016.

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the January 7, 2016 meeting.**

VISIT OF CHIEF JUSTICE ROBERTS

Chief Justice Roberts and Jeffrey Minear, the Counselor to the Chief Justice, visited the Standing Committee. Chief Justice Roberts made some brief remarks. He thanked the members of the Committee for their service and acknowledged, as an alumnus of the Appellate Rules Committee himself, that such service could be a significant commitment of time. And he congratulated the Committee on the new discovery rules that went into effect on December 1, 2015, rule amendments he highlighted in his 2015 Year-End Report on the Federal Judiciary.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions and Professor Capra provided the report on behalf of the Advisory Committee on Evidence Rules, which met on April 29, 2016, in Washington, D.C. Judge Sessions presented two action items and a number of information items.

Action Items

RULE 803(16) – The first matter for final approval was an amendment to Rule 803(16), the ancient documents exception to the hearsay rule, to limit its application to documents prepared before January 1, 1998. The version of Rule 803(16) published for comment would have eliminated the exception entirely. After hearing from many lawyers who continue to rely on the ancient documents exception, the Advisory Committee decided against eliminating the exception. Instead, the Advisory Committee revised its proposal to provide a cutoff date for the application of the exception. The Advisory Committee decided against leaving the exception in its current form because, unlike certain “ancient” hard copy documents, the retention of electronically-stored information beyond twenty years does not by itself suggest reliability. Judge Sessions acknowledged that any cutoff date will have a degree of arbitrariness, but also observed that electronically-stored information (known as “ESI”) first started to explode around 1998 and that the ancient documents exception itself set an arbitrary time period of twenty years for its applicability.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 803(16), as amended after publication, for submission to the Judicial Conference for final approval.**

RULE 902 (13) & (14) – The second matter for final approval was an amendment to Rule 902 to add two new subdivisions ((13) and (14)) that would allow for the authentication of certain electronic evidence through certification by a qualified person without requiring that person to testify in person. The first provision would allow self-authentication of machine-generated information upon a submission of a certification prepared by a qualified person. The second provision would provide a similar certification procedure for a copy of data taken from an electronic device, medium, or file. The proposals for new Rules 902(13) and 902(14) would have the same effect as current Rules 902(11) and 902(12), which permit a foundation witness to establish the authenticity of business records by way of certification. One Committee member suggested providing instructions on the application of the rule with the inclusion of examples in the Committee Note. After discussion, Professor Capra agreed to do that.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 902 (13) and (14) for submission to the Judicial Conference for final approval.**

Information Items

Judge Sessions highlighted several information items on behalf of the Advisory Committee.

GUIDE FOR AUTHENTICATING ELECTRONIC EVIDENCE – The Standing Committee discussed the use and dissemination of the draft Guide for Authenticating Electronic Evidence. Written by Judge Grimm, Gregory Joseph, and Professor Capra, the manual would be for the use of the bench and bar and can be amended as necessary to keep pace with technological advances. The manual will be published by the Federal Judicial Center (FJC). The manual is not an official publication of the Advisory Committee itself. The members of the Standing Committee discussed the manual, noting its great value to judges and practitioners who regularly deal with the issue of authenticating electronic evidence, and expressed deep gratitude to its three authors for their work creating it and to the FJC for its assistance with publication.

POSSIBLE AMENDMENTS TO THE NOTICE PROVISIONS IN THE EVIDENCE RULES – The Advisory Committee has been considering ways to amend and make more uniform several notice provisions throughout the Federal Rules of Evidence. For the notice provision of Rule 807(b), the Residual Exception to the hearsay rule, the Advisory Committee is inclined to add a good cause exception to excuse lack of timely notice of the intent to offer statements covered under this exception. The Advisory Committee is also inclined to require that notice under 807(b) be written and not just oral. For the notice provision of Rule 404(b), the Advisory Committee is inclined to remove the requirement that the defendant in a criminal case must first specifically request that the government provide notice of their intent to offer evidence of previous crimes or other bad acts against the defendant. The Advisory Committee concluded that this requirement in Rule 404 was an unnecessary trap for the unwary lawyer and differs from most local rules. Finally, the Advisory Committee has concluded that the notice provisions in Rules 412, 413, 414, and 415 should not be changed through the Rules Enabling Act process as those rules were congressionally enacted and, in any event, are rarely used.

RESIDUAL EXCEPTION: RULE 807 – Judge Sessions reported on the symposium held in connection with the Advisory Committee’s fall 2015 Chicago meeting regarding the potential elimination of the categorical hearsay exceptions (excited utterance, dying declaration, etc.) in favor of expanding the residual hearsay exception. The lawyers who testified before the Advisory Committee unanimously opposed the elimination of the hearsay exceptions. The Advisory Committee agrees that the exceptions should not be eliminated. But the Advisory Committee continues to consider expansion of the residual exception to allow the admission of reliable hearsay even absent “exceptional circumstances.” The Advisory Committee included a working draft of amended Rule 807 in the agenda materials. It is planning a symposium in the fall to continue to discuss possible amendments to Rule 807, to be held at Pepperdine School of Law.

TESTIFYING WITNESS’S PRIOR INCONSISTENT STATEMENT: RULE 801(D)(1)(A) – The Advisory Committee is considering an expansion beyond what Rule 801(d)(1)(A) currently allows, which

are prior inconsistent statements made under oath during a formal proceeding. The Advisory Committee has rejected the idea of expanding the rule to cover all prior inconsistent statements, but continues to consider inclusion of prior inconsistent statements that have been video recorded.

EXCITED UTTERANCES: RULE 803(2) – The Advisory Committee considered four separate proposals to amend or eliminate Rule 803(2) on the grounds that “excited utterances” are not necessarily reliable. It determined not to take up any of the suggestions given the impact on other rules, as well as an FJC report regarding various social science studies on Rule 803(2) which provided some empirical support for the proposition that immediacy and excitedness tend to guarantee reliability.

CONVERTING CATEGORICAL HEARSAY EXCEPTIONS INTO GUIDELINES – At the suggestion of Judge Milton Shadur, the Advisory Committee considered reconstituting the categorical hearsay exceptions as standards or guidelines rather than binding rules. The Advisory Committee ultimately decided against doing so.

CONSIDERATION OF A POSSIBLE AMENDMENT TO RULE 803(22) – At the suggestion of Judge Graber, the Advisory Committee considered eliminating two exceptions to Rule 803(22): convictions from nolo contendere pleas and misdemeanor convictions. The Advisory Committee concluded that retaining each of these exceptions was warranted.

RULE 704(B) – Similarly, the Advisory Committee determined not to proceed with suggestions to eliminate Rule 704(b) or to create a specific rule regarding electronic communication and hearsay.

IMPLICATIONS OF *CRAWFORD* – The Advisory Committee continues to monitor case law developments after the Supreme Court’s decision in *Crawford v. Washington*, in which the Court held that the admission of “testimonial” hearsay violates the accused’s right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Maggs provided the report on behalf of the Advisory Committee on Appellate Rules, which met on April 5, 2016, in Denver, Colorado. Judge Colloton advised that Judge Gorsuch will be the new chair of the Advisory Committee as of October 2016.

Judge Colloton reported that the Advisory Committee had four action items in the form of four sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

CONFORMING AMENDMENTS TO RULES 8, 11, AND 39(E)(3) – The first set of amendments recommended for publication were amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to conform to the amendment to Rule of Civil Procedure 62 by revising any clauses that use the antiquated term “supersedeas bond.” The language would be changed to “bond or other

security” as appropriate in each of the rules. Judge Colloton noted that the Civil Rules Committee would discuss the amendment to Rule 62 later in the meeting. He added that the Style Consultants suggested a minor edit to proposed Rule 8(b) (adding the word “a” before “stipulation” on line 16) after the publication of the agenda book materials, and that the Advisory Committee accepted the edit. The Standing Committee discussed the phrase “surety or other security provider” and whether “security provider” contained within it the term “surety” and made minor edits to the proposed amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed conforming amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3), contingent on the Standing Committee’s approval of the proposed amendment to Civil Rule 62 later in the meeting.**

LIMITATIONS ON THE FILING OF AMICUS BRIEFS BY PARTY CONSENT: RULE 29(A) – The proposed amendment to Rule 29(a) would allow a court to prohibit or strike the filing of an amicus brief based on party consent where the filing of the brief might cause a judge’s disqualification. This amendment would ensure that local rules that forbid the filing of an amicus brief when the filing could cause the recusal of one or more judges would be consistent with Rule 29(a). Professor Coquillette observed that, as important as preserving room for local rules may be, congressional committees in the past have responded to the proliferation of local rules by urging the Rules Committee to allow them only if they respond to distinctive geographic, demographic, or economic realities that prevail in the different circuits. Judge Colloton explained that this proposed amendment is particularly relevant to the rehearing en banc process which traditionally has been decentralized and subject to local variations. He further explained that the Advisory Committee discussed and rejected expanding the exception to other types of amicus filings. The Advisory Committee made minor stylistic edits to the proposed amended rule.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 29(a).**

APPELLATE FORM 4 – Litigants seeking permission to proceed in forma pauperis are currently required by Appellate Form 4 to provide the last four digits of their Social Security number. Given the potential security and privacy concerns associated with Social Security numbers, and the consensus of the clerks of court that the last four digits of a Social Security number are not needed for any purpose, the Advisory Committee proposes to amend Form 4 by deleting this question.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Appellate Form 4.**

REVISION OF APPELLATE RULE 25 TO ADDRESS ELECTRONIC FILING, SIGNATURES, SERVICE, AND PROOF OF SERVICE – In conjunction with the publication of the proposed amendment to Civil Rule 5, and in an effort to achieve an optimal degree of uniformity, the Advisory Committee

proposes to amend Appellate Rule 25 to address electronic filing, signatures, service, and proof of service. The proposed revision generally requires all parties represented by counsel to file electronically. The Standing Committee discussed the use of “person” versus “party” throughout the proposed amended rule, as well as the use of these phrases in the companion Criminal and Civil Rules. One minor stylistic amendment was proposed. The Standing Committee decided to hold over the vote to approve publication of the proposed amendment to Rule 25 until the discussion regarding Civil Rule 5.

Information Item

Judge Colloton discussed whether Appellate Rules 26.1 and 29(c) should be amended to require additional disclosures to provide further information for judges in determining whether to recuse themselves. It is an issue that the Advisory Committee will consider at its fall meeting.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report on behalf of the Advisory Committee on Civil Rules, which met on April 14, 2016, in Palm Beach, Florida. The Advisory Committee had four action items in the form of three sets of proposed amendments to be published this upcoming summer and the pilot project proposal.

Action Items

RULE 5 – The Advisory Committees for Civil, Appellate, Bankruptcy, and Criminal Rules have recently worked together to create uniform provisions for electronic filing and service across the four sets of rules to achieve an optimal degree of uniformity. Professor Cooper explained that the Advisory Committee for Criminal Rules wisely decided to create their own stand-alone rule, proposed Criminal Rule 49.

With regard to filing, the proposed amendment to Rule 5 requires a party represented by an attorney to file electronically unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. It allows unrepresented parties to file electronically if permitted by court order or local rule. And it provides that an unrepresented party may be required to file electronically only by court order or by a local rule that includes reasonable exceptions. Under the amended rule, a paper filed electronically would constitute a written paper for purposes of the rules.

With regard to service, the amended rule provides that a paper is served by sending it to a registered user by filing it with the court’s electronic filing system or by sending it by other electronic means if that person consents in writing. In addition, service is complete upon filing via the court’s electronic filing system. Rule 5(b)(3), which allows electronic service only if a local rule authorizes it, would be abrogated to avoid inconsistency with the amended rule.

The Standing Committee discussed the use of the terms “person” and “party” throughout Rule 5 and across other sets of rules and agreed to consider this issue further after the meeting.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Civil Rule 5 for publication for public comment.**

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved for publication for public comment the proposed amendment to Appellate Rule 25 that conforms to the amended Civil Rule 5.**

RULE 23 – Judge Bates detailed six proposed changes to Rule 23, many of which concern settlements in class action lawsuits. Rule 23(c)(2)(B) extends notice consideration to a class proposed to be certified for settlement. Rule 23(e) applies the settlement procedural requirements to a class proposed to be certified for purposes of settlement. Rule 23(e)(1) spells out what information parties should give the courts prior to notice and under what circumstances courts should give notice to the parties. Rule 23(e)(2) lays out general standards for approval of the proposed settlement. Rule 23(e)(5) concerns class action objections, requiring objectors to state to whom the objection applies, requiring court approval for any payment for withdrawing an objection or dismissing an appeal, and providing that the indicative ruling procedure be used if an objector seeks approval of a payment for dismissing an appeal after the appeal has already been docketed. Finally, Rule 23(f) specifies that an order to give notice based on a likelihood of certification under Rule 23(e)(1) is not appealable and extends to 45 days the amount of time for an appeal if the United States is a party. Judge Robert Dow, the chair of the Rule 23 Subcommittee, explained the outreach efforts by the subcommittee and stated that many of the proposed changes would provide more flexibility for judges and practitioners. The Rule 23 Subcommittee, under Judge Dow’s leadership and with research support from Professor Marcus, has devoted years to generating these proposed amendments, organized multiple conferences around the country with class action practitioners, and considered many other possible amendments.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed package of amendments to Civil Rule 23 for publication for public comment.**

RULE 62 – Judge Bates reported that a subcommittee composed of members of the Appellate and Civil Rules Committees and chaired by Judge Scott Matheson laid the groundwork for amendments to Rule 62. The proposed amendment includes three changes to the rule. First, Rule 62(a) extends the automatic stay from 14 days to 30 days in order to eliminate the “gap” between the 14-day automatic stay and the 28 days allowed for various post-judgment motions. Second, it recognizes the court’s authority to dissolve the automatic stay or replace it with a court-ordered stay for a longer duration. Third, Rule 62(b) clarifies that security other than a bond may be posted. Another organizational change is a proposed new subsection (d) that would include language from current subsections (a) and (c). Judge Bates added that the word “automatic” would be removed from the heading of Rule 62(c) and that conforming edits will be made to the proposed rule to accommodate changes made to the companion Appellate Rules. Professor Cooper stated that Rule 65.1 would be conformed to Appellate Rules 8, 11, and 39 after the conclusion of the meeting.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Civil Rule 62 for publication for public comment. It also approved granting to the Civil Rules Advisory Committee the authority to make amendments to Rule 65.1 to conform it to Appellate Rules 8, 11, and 39 with the goal of seeking approval of the Standing Committee in time to publish them simultaneously in August 2016. Finally, with the amendment to Civil Rule 62 officially approved for publication, it also approved for publication the proposed amendments to Appellate Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) which all conform to the amended Civil Rule 62.**

PILOT PROJECTS – Judge Campbell provided the report of the Pilot Projects Subcommittee, which included participants from the Standing Committee, CACM, and the FJC. The Subcommittee has collected and reviewed a lot of information, including working with focus groups of lawyers with experience with these types of discovery regimes. As a result of this work, the Advisory Committee seeks approval to forward the Mandatory Initial Discovery Pilot Project and Expedited Procedures Pilot Project to the Judicial Conference for approval. The first project would test a system of mandatory initial discovery requests to be adopted in each participating court. The second would test the effectiveness of court-wide adoption of practices that, under the current rules, have proved effective in reducing cost and delay.

Judge Campbell proceeded to detail each pilot project and asked for comments and suggestions on the proposals. For the first pilot project, Judge Campbell explained the proposed procedures. The Standing Committee then discussed whether or not all judges in a district would be required to participate in the pilot project, how to choose the districts that should participate, and how to measure the results of the pilot studies. Judge Bates noted the Advisory Committee's strong support of the project. Several Standing Committee members voiced their support as well.

For the second pilot project, many of the procedures are already available, and the purpose of the pilot project is to use education and training to achieve greater use of available procedures. Judge Campbell advised the Committee that CACM has created a case dashboard that will be available to judges via CM/ECF, and that judges will be able to use this tool to monitor the progress of their cases. The pilot would require a bench/bar meeting each year to monitor progress.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the recommendation to the Judicial Conference of the (i) Mandatory Initial Discovery Pilot Project and (ii) Expedited Procedures Pilot Project, with delegated authority for the Advisory Committee and the Pilot Projects Subcommittee to make refinements to the projects as discussed by the Committee.**

Information Items

EDUCATIONAL EFFORTS REGARDING 2015 CIVIL RULES PACKAGE – Judge Bates outlined some of the efforts undertaken by the Advisory Committee and the FJC to educate the bench and the bar about the 2015 discovery reforms of the Rules of Civil Procedure. Among other efforts, he mentioned the production of several short videos, a 90-minute webinar, plenary sessions at

workshops for district court judges and magistrate judges, segments on the discovery reforms at several circuit court conferences, and other programs sponsored by the American Bar Association.

Judge Bates advised that a subcommittee has been formed, chaired by Judge Ericksen, to consider possible amendments to Rule 30(b)(6). Professor Cooper stated that the Advisory Committee is considering amending Rule 81(c) in light of a concern that it may not adequately protect against forfeiture of the right to a jury trial after a case has been removed from state court.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King provided the report for the Advisory Committee on Criminal Rules, which met on April 18, 2016, in Washington, D.C. He reported that the Advisory Committee had three action items in the form of three proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

RULE 49 – Judge Molloy explained the proposed new stand-alone rule governing electronic service and filing in criminal cases. The Advisory Committee determined to have a stand-alone rule for criminal cases rather than to continue the past practice of incorporating Civil Rule 5 by reference. The proposed amendments to Rule 49 track the general order of Civil Rule 5 rule and much of its language. Unlike the civil rule, Rule 49's discussion of electronic filing and service comes before nonelectronic filing and service in the new criminal rule. Both rules provide that an unrepresented party must file nonelectronically unless allowed to file electronically by court order or local rule. But one substantive difference between the two rules is that, under Civil Rule 5, an unrepresented party may be required to file electronically by court order or local rule. A second substantive difference is that all nonparties must file and serve nonelectronically in the absence of a contrary court order or local rule. This conforms to the current architecture of CM/ECF which only allows the government and the defendant to file electronically in a criminal case. Third, proposed Rule 49 contains language borrowed from Civil Rule 11(a) regarding signatures.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rules 49 for publication for public comment.**

RULE 45(C) – The proposed amendment to Rule 45(c) is a conforming amendment. It replaces the reference to Civil Rule 5 with a reference to Rule 49(a)(4)(C),(D), and (E).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rules 45(c) for publication for public comment.**

RULE 12.4 – The proposed amendment to Rule 12.4, changes the required disclosures for statements under Rule 12.4 regarding organizational victims. It permits a court, upon the showing of good cause, to relieve the government of the burden of filing a statement identifying any organizational victim. The proposed amendments reflect changes to the Code of Judicial Conduct and require a party to file the Rule 12.4(a) statement within 28 days after the defendant’s initial appearance. The Standing Committee briefly discussed similar potential changes to the Appellate Rules regarding disclosure of organizational victims. And the Advisory Committee discussed removing the word “supplemental” from the title and body of Rule 12.4(b) in order to avoid potential confusion.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 12.4 for publication for public comment.**

Information Items

Judge Molloy reviewed several of the pending items under consideration by the Advisory Committee. The Cooperator Subcommittee continues to consider the problem of risk of harm to cooperating defendants and the kinds of procedural protections that might alleviate this problem. The Subcommittee includes representatives from the Advisory Committee, Standing Committee, CACM, and the Department of Justice. The Advisory Committee has formed subcommittees to consider suggested amendments to Criminal Rule 16 dealing with discovery in complex criminal cases and Rule 5 of the Rules Governing Section 2255 Proceedings regarding petitioner reply briefs. And in response to an op-ed by Judge Jon Newman, the Advisory Committee will consider the wisdom of reducing the number of peremptory challenges in federal trials.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Sandra Ikuta and Professors Gibson and Harner presented the report on behalf of the Advisory Committee on Bankruptcy Rules, which met on March 31, 2016, in Denver, Colorado. The Advisory Committee had nine action items, and sought final approval for three of the items: Rule 1001; Rule 1006, and technical changes to certain official forms.

Action Items

RULE 1001 – The first item was a request for final approval of Rule 1001, dubbed the “civility rule” by Judge Ikuta, which was published in August 2015 to track changes to Civil Rule 1. Judge Ikuta explained that the Advisory Committee considered the comments submitted, but made no changes to the published version of the amended rule.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 1001 for submission to the Judicial Conference for final approval.**

RULE 1006 – The second item was a proposed change to Rule 1006(b), also published for comment in August 2015. The rule explains how a person filing a petition in bankruptcy can pay

the filing fee in installments, as allowed by statute. The proposed amendment clarified that courts may not refuse to accept petitions or summarily dismiss a case because the petitioner failed to make an initial installment payment at the time of filing (even if such a payment was required by local rule). Judge Ikuta said that the Advisory Committee considered the comments submitted, but made no changes to the published version of the amended rule.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 1006 for submission to the Judicial Conference for final approval.**

TECHNICAL CHANGES TO OFFICIAL FORMS – Judge Ikuta next described the Advisory Committee’s recommendation for retroactive approval of technical changes to nine official forms. She explained that the Judicial Conference at its March 2016 meeting approved a new process for making technical amendments to official bankruptcy forms. Under the new process, the Advisory Committee makes the technical changes, subject to retroactive approval by the Committee and report to the Judicial Conference. Judge Sutton thanked Judge Ikuta for developing the new streamlined approval process for technical changes to official bankruptcy forms.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed technical changes to Official Forms 106E/F, 119, 201, 206, 206E/F, 309A, 309I, 423, and 424, for submission to the Judicial Conference for final approval.**

Judge Ikuta reported that the Advisory Committee had six additional action items in the form of six sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Committee.

Before focusing on these specific recommendations, however, Judge Ikuta first suggested that the Committee adopt a procedure for more systematically coordinating publication and approval of amendments that affect multiple rules across different advisory committees. The chair recommended that the Rules Committee Support Office lead the coordination effort over the next year and that the Committee then evaluate whether further refinement of the process is needed. Judge Ikuta next explained and sought approval for a package of conforming amendments:

RULE 5005(A)(2) – Judge Ikuta said that the proposed amendments to Rule 5005(a)(2) would make the rule consistent with the proposed amendment to Civil Rule 5(d)(3).

RULES 8002(C), 8011(A)(2)(C), OFFICIAL FORM 417A, RULE 8002(B), RULES 8013, 8015, 8016, 8022, OFFICIAL FORM 417C, PART VIII APPENDIX, AND RULE 8017 – Judge Ikuta next discussed proposed changes to Rules 8002(c), 8011(a)(2)(C), and Official Form 417A; Rule 8002(b) (regarding timeliness of tolling motions); Rules 8013, 8015, 8016, 8022, Official Form 417C, and Part VIII Appendix (regarding length limits), and Rule 8017 (regarding amicus filings). The rule and form changes were proposed to conform to pending and proposed changes to the Federal Rules of Appellate Procedure.

RULE 8002(A)(5) – The new subdivision (a)(5) to Rule 8002 includes a provision similar to FRAP 4(a)(7) specifying when a judgment or order is “entered” for purposes of appeal.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the package of conforming amendments to Rules 5005(a)(2), 8002(C), 8011(a)(2)(C), Official Form 417C, Part VIII Appendix, Rule 8017, and Rule 8002(a)(5) for publication for public comment.**

RULES 3015 AND 3015.1 – Judge Ikuta explained that the Advisory Committee published the first version of the plan form and nine related rule amendments in August 2013. The Advisory Committee received a lot of comments, made significant changes, and republished in 2014. During the second publication, the Advisory Committee again received many comments, including one comment signed by 144 bankruptcy judges who opposed a national official form for chapter 13 plans. Late in the second comment period, the Advisory Committee received a comment proposing that districts be allowed to opt out of the national plan if their local plan form met certain requirements. Many of the bankruptcy judges who opposed a national plan form supported the “opt-out” proposal.

At its fall 2015 meeting, the Advisory Committee approved the national plan form and related rule amendments, but voted to defer submitting those items for final approval pending further consideration of the opt-out proposal. The Advisory Committee reached out to bankruptcy interest groups, made refinements to the opt-out proposal, and received support from most interested parties, including many of the 144 opposing judges.

The proposed amendment to Rule 3015 and new Rule 3015.1 would implement the opt-out provision. Rule 3015 would require that the national chapter 13 plan form be used unless a district adopts a local district-wide form plan that complies with requirements set forth in proposed new Rule 3015.1. The Advisory Committee determined that a third publication period would allow for full vetting of the opt-out proposal, but it recommended a shortened three-month public comment period because of the narrow focus of the proposed change. To avoid confusion, the Advisory Committee recommended that opt-out rules be published in July 2016, a month earlier than the rules and forms to be published in August 2016.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 3015 and 3015.1 for publication for public comment.**

RULE 8006 – The Advisory Committee proposed to amend subdivision (c) of Rule 8006 to allow a bankruptcy court, bankruptcy appellate panel, or district court to file a statement in support of or against a direct appeal certification filed by the parties.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 8006 for publication for public comment.**

RULE 8018.1 – This new rule would help guide district courts in light of the Supreme Court’s *Stern v. Marshall* trilogy of cases (*Stern*, *Arkison* and *Wellness*). Proposed Rule 8018.1 would address a situation where the bankruptcy court has mistakenly decided a *Stern* claim by allowing the district court to treat the bankruptcy court’s erroneous final judgment as proposed findings of fact and conclusions of law to be decided de novo without having to remand the case to the bankruptcy court.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed Rule 8018.1 for publication for public comment.**

RULE 8023 – The proposed amendment to Rule 8023 would add a cross-reference to Rule 9019 to remind the parties that when they enter a settlement and move to dismiss an appeal, they may first need to obtain the bankruptcy court’s approval of the settlement first.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 8023 for publication for public comment.**

OFFICIAL FORM 309F – Judge Ikuta said that the Advisory Committee recommended publication of amendments to five official bankruptcy forms. The first of the five forms was a proposed amendment to Official Form 309F. The form currently requires that a creditor who wants to assert that certain corporate and partnership debts are not dischargeable must file a complaint by a specific deadline. A recent district court decision evaluated the relevant statutory provisions and concluded that the form is incorrect and that no deadline should be imposed. The Advisory Committee agreed that the statute is ambiguous, and therefore proposed that Official Form 309F be amended to avoid taking a position.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Official Form 309F for publication for public comment.**

OFFICIAL FORMS 25A, 25B, 25C, AND 26 – Four forms, Official Forms 25A, 25B, 25C (the small business debtor forms), and 26 (Periodic Report Regarding Value, Operations, and Profitability) were renumbered as 425A, 425B, 425C and 426 to conform with the remainder of the Forms Modernization Project, and revised to be easier to understand and more consistent with the Bankruptcy Code.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Official Forms 25A, 25B, 25C, 26 for publication for public comment.**

Information Items

Judge Ikuta, Professor Elizabeth Gibson, and Professor Michelle Harner discussed the Advisory Committee’s two information items. The first item was about the status of the Advisory Committee’s proposal to add a new subdivision (h) to Rule 9037 in response to a suggestion

from CACM. Judge Ikuta and Professor Gibson explained that although the Advisory Committee approved an amendment, it decided to delay its recommendation for publication until the Advisory Committees for Appellate, Criminal and Civil Rules can decide whether to add a similar procedure to their privacy rules. Professor Harner summarized the second information item regarding the Advisory Committee’s decision not to recommend any changes at this time to Rule 4003(c) in response to a suggestion.

REPORT OF THE ADMINISTRATIVE OFFICE

STRATEGIC PLAN FOR THE FEDERAL JUDICIARY – Rebecca Womeldorf discussed the Executive Committee’s *Strategic Plan for the Federal Judiciary* which lays out various goals and priorities for the federal judiciary. She invited members to review this report and offer any input or feedback that they might have to her or Judge Sutton for inclusion in communications back to the Executive Committee.

LEGISLATIVE REPORT – There are bills currently pending in the House of Representatives and Senate intended to prevent proposed Criminal Rule 41 from becoming effective. Members of the Rules Committee have discussed this proposed rule with various members of Congress to respond to their concerns and explain the purpose and limited scope of the proposed rule.

CONCLUDING REMARKS

Judge Sutton thanked the Reporters for all their impressive work and Rebecca Womeldorf and the Rules Committee Support Office for helping to coordinate the meeting. Professor Coquillette thanked Judge Sutton again for all of his work as Chair of the Standing Committee over the past four years. Judge Sutton concluded the meeting. The Standing Committee will next meet in Phoenix, Arizona, on January 3–4, 2017.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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FORDHAM

University School of Law

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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: Conference on Evidentiary Developments: The Residual Exception, Rule 801(d)(1)(A), and Rule 404(b)
Date: October 1, 2016

This memorandum provides some background on the conference that is going to be held before the Committee's Fall 2016 meeting. The conference is designed for Committee members to obtain input from, and discuss issues with, a panel of experts from the judiciary, practice, and academia. Previous conferences were structured as individual presentation to the Committee. For this conference, the goal is to have a discussion and interchange of ideas among conference participants.

We are very thankful to Pepperdine Law School and Dean Tacha for hosting this conference and Committee meeting. And we would like to give special thanks to Professor Carol Chase of Pepperdine Law School, and to Committee member Daniel Collins, for all their help in putting together our outstanding panel.

Conference Participants

The conference participants are:

Judges

Hon. David Hamilton, United States Court of Appeals for the Seventh Circuit

Hon. Nora M. Manella, California Court of Appeal

Hon. Virginia A. Phillips, Chief Judge, United States District Court for the Central District of California

Practitioners

Mary Carter Andruess, Arent Fox

James Asperger, Quinn, Emanuel, Urquhart & Sullivan

Wendy Coats, Fisher & Phillips

Philip Kent Cohen, Esq.

Christopher Dybwad, Federal Public Defender, Los Angeles

Brandon Fox, AUSA, Los Angeles

Mark Holscher, Kirkland & Ellis

Alan Jackson, Werksman Jackson Hathaway & Quinn

Virginia Milstead, Skadden, Arps, Slate, Meagher & Flom

Kelly Zusman, AUSA, Portland

Academics

Carol Chase, Professor of Law, Pepperdine University School of Law

Kevin Cole, Professor of Law, University of San Diego School of Law

Kenneth Graham, Professor of Law Emeritus, UCLA School of Law

Victor Gold, William H. Hannon Professor of Law, Loyola Law School, Los Angeles

Laurie Levenson, Professor of Law, David W. Burcham Chair of Ethical Advocacy, Loyola Law School, Los Angeles

Eileen Scallen, Associate Dean and Professor of Law, UCLA School of Law

Conference Topics

The three topics chosen by the Chair and Reporter for discussion and review are:

1. The Committee's working draft of an amendment that would expand the coverage of the residual exception, Rule 807. The background materials for the Conference discussion on this topic are found in the Reporter's memorandum and accompanying attachments, behind Tab IV of the agenda book.

2. The Committee's working draft of an amendment to Rule 801(d)(1)(A), that would provide for substantive admissibility of prior inconsistent statements that have been video-recorded. The background materials for the Conference discussion are found behind Tab V of the agenda book.

3. Developments in the application of Rule 404(b). Unlike the other topics, there is no action item or working draft for an amendment to Rule 404(b). The reason that Rule 404(b) is included in the Conference agenda is that there have been important case law developments in applying the rule in the last five years. This case law development, described below, is essentially seeking to assure that Rule 404(b) arguments are scrutinized so that the rule is not used as a device to admit evidence offered for propensity. The fact that some courts --- mainly the Seventh and Third Circuits --- are taking a fresh look at the scope and meaning of Rule 404(b) raises questions about whether the rule can or should be amended to accommodate these new developments. It also raises questions about what, if anything should be done about the conflict between the circuits that are looking more closely at Rule 404(b) and those who are still taking the traditional approach.

The conference discussion of Rule 404(b) is within the Committee's responsibility under 28 U.S.C. § 331, which provides that the Judicial Conference must "carry on a continuous study of the general rules of practice and procedure." As Judge Sutton stated at the Symposium on hearsay reform, "you never fail when you examine these broader issues because even if it turns out that it does not lead to the promulgation of a new rule, the minutes and the work that is done in the course of those deliberations is going to establish why it did not make sense to put together a rule at that time. That is very useful information to have. And it may lead to a later change."¹ And when it comes to the importance of monitoring developments, the recent innovations in applying Rule 404(b) are probably the most important evidentiary developments in the last ten years --- to one of the most important rules in the Federal Rules of Evidence.

¹ Symposium on Hearsay Reform, Introductory Remarks, 84 Ford.L.Rev. at 1328 (2016).

Background Information on Case Law Developments Under Rule 404(b)

What follows is designed to assist Conference participants and Committee participants in assessing and discussing the meaning and import of some major case law developments under Rule 404(b). Rule 404(b) provides as follows:

(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

(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 defendant³ 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.

There are three major case law developments that have challenged what could be considered the “traditional” evaluation of other bad act evidence that most courts have employed. They are:

1. Requiring the proponent to demonstrate how the evidence's probative value for the asserted proper purpose for the evidence actually proceeds through an inference other than propensity.
2. Conditioning admissibility of bad act evidence offered to prove a mental state (most often intent) on the defendant actively contesting the mental state --- beyond simply pleading guilty.

² California Evidence Code §1101 served as the model for Federal Rule 404(b), and is substantially similar, with the exception that it contains no notice requirement.

³ The Committee has unanimously agreed that the requirement that a defendant must request notice should be abrogated. The Committee has decided not to go forward with an amendment at this point, but rather to wait until the amendment can be packaged with other amendments to the Evidence Rules.

3. Limiting the scope of the “intextricably intertwined” doctrine --- under which bad acts are not evaluated under Rule 404(b) if they are “inextricably intertwined” with the acts charged.

While these developments are probably the most notable, Conference participants and Committee members should not feel constrained by them. Any issue regarding Rule 404(b) is on the table for discussion. The rule is of such critical importance that any development in the case law or problem in applying the rule is more than worthy of discussion.

This memo now provides some background information on each of the three Rule 404(b) topics.

1. Requiring a showing that the probative value for a proper purpose proceeds through a non-propensity inference.

Under Rule 404(b), uncharged misconduct evidence is inadmissible if offered to prove that the defendant committed the charged conduct because he has the propensity to do so. But the evidence “may be admissible” if offered for a non-character purpose. Once the prosecution articulates a proper purpose, then the court assesses whether the probative value for the proper purpose is substantially outweighed by the risk of prejudicial effect, i.e., that the jury will impermissibly use the evidence for the propensity purpose or that the jury will convict the defendant for being a bad person regardless of propensity to do the crime charged.

It is fair to state that there is a dispute in the courts about how to assess the probative value of bad acts offered for a proper purpose. Some circuits have recently pointed out that in assessing probative value for the non-character purpose, the court must assure itself that the inferences to be derived from the act are *independent of any propensity inference*. The leading example is the Seventh Circuit’s decision in *United States v. Gomez*, 763 F.3d 845, 862-63 (7th Cir. 2014) (en banc). In *Gomez*, The government had evidence that someone nicknamed “Guero” was a reseller of drugs. The government claimed that Gomez was Guero. Gomez claimed that it was his brother-in-law who was the drug dealer Guero. The trial court admitted evidence of the defendant’s prior cocaine possession, ostensibly for the proper, non-character purpose of proving identity. The court of appeals instructed that it was not enough for the bad act evidence to be relevant for a non-character purpose. Rather, “the district court should not just ask whether the proposed other-act evidence is relevant to a non-propensity purpose but how exactly the evidence is relevant to that purpose—or more specifically, how the evidence is relevant without relying on a propensity inference. Careful attention to these questions will help identify evidence that serves no permissible purpose.” The *Gomez* court concluded that the cocaine possession was improperly admitted to prove identity. It explained as follows:

Because the proponent of the other-act evidence must explain how it is relevant to a non-propensity purpose, the government needed a rationale for connecting the cocaine found in Gomez's bedroom to his identity as Guero *without relying on the forbidden propensity inference*. * * * Gomez's mistaken-identity defense singled out another person—his brother-in-law and housemate Victor Reyes—as the “real” Guero. The government introduced the user quantity of cocaine found in Gomez's bedroom for the purpose of showing that as between the two, it was more likely that Gomez was Guero. * * * [But] the evidence of the defendant's history of drug dealing tended to prove his identity as a participant in the charged drug deal only by way of a forbidden propensity inference: Once a drug dealer, always a drug dealer. * * *

In the end, the government offers no theory other than propensity to connect the cocaine found in Gomez's bedroom to his identity as Guero, Romero's coconspirator. The government's sole theory is that Gomez's possession of a user quantity of cocaine 26 days *after* the conspiracy ended shows that he, rather than Reyes, was Guero. That argument is extraordinarily weak, but the more important point is that it rests on pure propensity: Because Gomez possessed a small quantity of cocaine at the time of his arrest, he must

have been involved in the cocaine-distribution conspiracy. The district court should not have admitted this evidence.

Another illustration of a case holding that prior misconduct must be excluded where its probative value for the expressed purpose proceeds through the propensity inference is the Third Circuit's decision in *United States v. Smith*, 725 F.3d 340, 342 (3d Cir. 2013). Smith was charged with threatening a federal officer with a gun and possessing a firearm during a crime of violence. The trial court admitted evidence that two years before Smith allegedly committed the charged crimes, he had been observed dealing drugs at the same location. The court of appeals found that the prior bad act evidence "violates our long standing requirement that, when seeking to introduce evidence of prior bad acts under Rule 404 (b), the proponent must set forth 'a chain of logical inferences, *no link of which* can be the inference that because the defendant committed ... offenses before, he therefore is more likely to have committed this one.'" *United States v. Sampson*, 980 F.2d 883, 887 (3d Cir. 1982) (emphasis added)." The government argued that the prior drug dealing at the location was probative of the defendant's motive to commit the charged crime, i.e., it was evidence that he was protecting his turf. The court rejected that argument because, "for the evidence of the 2008 drug sale to speak to Smith's motives in 2010, one must necessarily (a) assume something about Smith's character based on the 2008 evidence (that he was a drug dealer) and (b) infer that Smith acted in conformity with that character in 2010 by dealing drugs and therefore had a motive to defend his turf." Thus, the mere fact that the government *articulated* a non-character purpose was not enough to admit the evidence for that purpose—that was because the evidence was only probative of motive under the assumption that the defendant had a bad character. The government was proceeding through a propensity inference.

But it is fair to state that many courts simply look to find probative value for the proper purpose cited by the prosecution without investigating whether the probative value for that purpose relies on a propensity inference. Exemplary is *United States v. Mathews*, 431 F.3d 1296, 1311 (11th Cir. 2005), a case in which the defendant's prior uncharged drug transaction was held properly admitted to prove his intent to conspire to commit drug transactions. The court stated its approach as follows:

This circuit's test for admissibility of 404(b) evidence was announced in *United States v. Beechum*, 582 F.2d 898 (5th Cir.1978) (en banc), and later elaborated upon in *United States v. Miller*, 959 F.2d 1535 (11th Cir.1992) (en banc):

First, the evidence must be relevant to an issue other than the defendant's character; Second, the act must be established by sufficient proof to permit a jury finding that the defendant committed the extrinsic act; Third, the probative value of the evidence must not be substantially outweighed by its undue prejudice, and the evidence must meet the other requirements of Rule 403. * * *

The * * * question is whether the 1991 arrest is relevant to the intent at issue in the current conspiracy charge. In *United States v. Butler*, 102 F.3d 1191 (11th Cir.1997), this court held that a three-year-old prior conviction for possession of cocaine for personal use was relevant and admissible for purposes of demonstrating defendant's intent in the charged conspiracy for possession with intent to distribute. * * * It must follow then that, at least in this circuit, Matthews's 1991 arrest for distribution of cocaine was relevant to the intent at issue in the charged conspiracy to distribute cocaine.

Judge Tjoflat, in dissent in *Matthews*, argued that the majority had failed to explain how the probative value of the evidence of prior drug activity to show intent actually proceeded through a non-propensity inference:

I concede that the line between evidence admitted to demonstrate intent and evidence admitted to demonstrate propensity is hardly clear. It is difficult to argue that a person had an intention to do something on a similar occasion because he or she demonstrated that intention previously without implicitly suggesting that the person has a proclivity towards the intent. * * * [But] the rules distinguish between the two and so must we. * * * At the very least, where the evidence sought to be admitted demonstrates nothing more than a criminal intent ... it must be excluded as propensity evidence. If the inferential chain must run through the defendant's character—and his or her predisposition towards a criminal intent—the evidence is squarely on the propensity side of the elusive line. Where, on the other hand, an inference can be drawn that says nothing about the defendant's character—for example, based on the “improbability of coincidence”—the evidence is more properly permissible for non-propensity purposes.

See also United States v. Smith, 741 F.3d 1211 (11th Cir. 2013) (prior convictions for possession of cocaine were properly admitted to show conspiring to distribute cocaine; no analysis of how the bad act was probative of intent independent of any propensity inference); *United States v. Logan*, 121 F.3d 1172 (8th Cir. 1997) (evidence of prior possession of drugs was probative of knowledge and intent to distribute, with no analysis of how the bad act was probative for those purposes independent of any propensity inference); *United States v. Gadison*, 8 F.3d 186 (5th Cir. 1993) (same). *See generally* Rinaldo, *Is Every Drug User a Dealer?: Federal Courts are Split in Applying Fed.R.Evid. 404(b)*, 8 Fed. Cts. L.Rev. 147 (2014) (noting the dispute in the courts on whether prior acts of possession are probative of intent to distribute, and characterizing the difference as whether or not the court is considering whether the probative for intent proceeds through a propensity inference).

Most of the cases involving bad acts that proceed through the propensity inference are, like *Matthews*, cases involving use of prior drug activity in drug cases, with the prosecution arguing that the prior drug activity is offered for intent. Many have argued that when bad acts are offered, “intent” cannot be readily separated from the propensity inference. See Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 Creighton L.Rev. 215, 218 (2011) (“What chain of reasoning can link the prior drug history to the charged crime other than

one that infers that the defendant has a drug-related propensity * * *? The earlier drug use, which is behavioral evidence, can be relevant only if we assume that the defendant's behavior forms an unchanging pattern.”).

But the problem of using propensity inferences for so-called proper purposes occurs for other purposes as well, such as identity (*Gomez, supra*), and motive (the Third Circuit's decision in *Smith, supra*). Examples of arguable abuse of the “motive” proper purpose can arise in both civil and criminal cases. As to civil cases, one commentator has noted the following problem of motive shown through propensity inferences in Title VII cases:

[W]hen plaintiffs offer evidence of an employer's “motive” they overwhelmingly do so based on the following logic; The employer's prior acts reveal that the employer has some discriminatory mindset; ipso facto, the employer was motivated to discriminate [by that mindset in taking the adverse action.] Nothing more than semantics differentiates this “motive” from character propensity.

Marshall, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 Yale L.J. 1063, 1076 (2005).

As to criminal cases, another example of the propensity problem with offers to prove motive is *United States v. Roux*, 715 F.3d 1019 (7th Cir. 2013): The court affirmed the defendant's conviction for coercing a minor to create sexually explicit images. It held that the trial judge did not abuse discretion in admitting testimony from the victim's minor sisters that they too had been sexually abused by the defendant. The court reasoned that “[t]he district court properly determined that the acts of abuse described by CC and SH [minor sisters] were probative of Roux's motive to commit the charged child pornography offense” because “prior instances of sexual misconduct with a child victim may establish a defendant's sexual interest in children and thereby serve as evidence of the defendant's motive to commit a charged offense involving the exploitation of children.” But the court's use of “motive” is really nothing but “propensity”: a defendant who has a “sexual interest in children” has the *propensity* “to commit a charged offense involving the exploitation of children.”

In sum, there is conflict in the courts, and significant difficulty, in how and even whether to determine if the probative value of the bad act to prove the proper purpose actually proceeds through a non-propensity inference.

Here are some questions that might be addressed on establishing probative value of the bad act for a proper purpose:

- Using a bad act for a propensity purpose is prohibited by Rule 404(b); therefore articulating a “proper” purpose should not be enough to admit the evidence where the probative value for that purpose proceeds through a propensity inference. But if that is so, why do so many courts allow bad act evidence for such purposes? Are there guidelines that can be provided to courts to assist in this inquiry?

- Is there any textual amendment that will assist (or regulate) the courts from admitting bad act evidence for an articulated proper purpose, where the probative value for that purpose proceeds through a propensity inference? What about this:

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. The evidence may not be admitted for such purpose, however, if the probative value of the evidence for that purpose depends on a propensity inference.

- Would a Committee Note be useful? (This assumes, of course, that there would be an amendment to which the Note could be appended.)

2. Conditioning admissibility of bad act evidence offered to prove a mental state on the defendant actively contesting the mental state --- beyond simply pleading guilty.

As discussed in the previous section, there is difficulty and confusion in trying to figure out the line between state of mind and propensity: and this is especially so with respect to the proper purposes of intent or knowledge.⁴ One recent innovation in dealing with the possible abuse of bad acts offered for these mental states is to prohibit the prosecution from admitting such evidence until it is apparent that the defendant is *actively contesting* the mental state. The court in *Gomez, supra*, explains this “active contest” approach, apparently placing it in Rule 403, i.e., once a court has determined that there is a proper purpose for which the evidence is relevant without proceeding through a propensity inference:

One important issue in Rule 403 balancing in this context is the extent to which the non-propensity factual proposition actually is contested in the case. For example, if a defendant offers to concede or stipulate to the fact for which the evidence is offered, additional evidence may have little probative value. *See, e.g., Old Chief v. United States*, 519 U.S. 172, 191–92, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) (holding that a defendant's stipulation to a prior felony conviction removes its probative value in a prosecution for unlawful possession of a firearm by a felon). Of course, there are various degrees of factual disagreement in a trial, and stipulations are at one end of that spectrum. * * * The general guiding principle is that the degree to which the non-propensity issue actually is disputed in the case will affect the probative value of the other-act evidence. *See United States v. Causey*, 748 F.3d 310, 318 (7th Cir.2014); *Lee*, 724 F.3d at 976; *Miller*, 673 F.3d at 696–97.

* * *

Our circuit also requires special caution when other-act evidence is offered to prove intent, which though a permissible non-propensity purpose is nonetheless “most likely to blend with improper propensity uses.” *Miller*, 673 F.3d at 698. In cases involving general-intent crimes—e.g., drug-distribution offenses (as distinct from drug conspiracies or possession of drugs with intent to distribute)—we have adopted a rule that other-act evidence is not admissible to show intent unless the defendant puts intent “at issue” beyond a general denial of guilt. * * * The critical point is that for general-intent crimes, the defendant's intent can be inferred from the act itself, so intent is not “automatically” at issue. The paradigm case involves a charge of distribution of drugs, * * * a general-intent crime for which the government need only show that the defendant physically transferred the drugs; the jury can infer from that act that the defendant's intent

⁴ Professor Sonenshein, in , *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 Creighton L.Rev. 215, 275 (2011), reviews social science on the effect of prior experience on conduct, and suggests that “[b]ecause social science is essentially united in rejecting even the logical relevance of similar acts evidence on intent, Rule 404(b) should be amended to exclude intent from its list of permissible proffers.” He recognizes, however, that “this seemingly radical proposal” might be “unacceptable to those who draft and approved amendments to the rules.”

was to distribute them. Hence our rule that “[b]ecause unlawful distribution [of drugs] is a general intent crime, in order for the government to introduce prior bad acts to show intent, the defendant must put his intent at issue first.”

In contrast, we have repeatedly rejected a similar rule for specific-intent crimes because in this class of cases “intent is automatically at issue.” *United States v. Conner*, 583 F.3d 1011, 1022 (7th Cir.2009) (collecting cases). Unfortunately, this line of precedent too frequently has been seen as a rule of automatic admission for other-act evidence in cases of specific-intent crimes. We firmly rejected that notion in *Miller*, emphasizing that other-act evidence is always subject to Rule 403 balancing. 673 F.3d at 696–98. We explained that although “[i]ntent can be ‘automatically at issue’ because it is an element of a specific intent crime,” other-act evidence offered to prove intent “can still be completely irrelevant to that issue, or relevant only in an impermissible way.” *Id.* at 697–98. We have reiterated these themes in other recent cases. See, e.g., *Lee*, 724 F.3d at 976 (“Simply because a subject like intent is formally at issue when the defendant has claimed innocence and the government is obliged to prove his intent as an element of his guilt does not automatically open the door to proof of the defendant’s other wrongful acts for purposes of establishing his intent.”) * * *.

To summarize then, when intent is not “at issue”—when the defendant is charged with a general-intent crime and does not meaningfully dispute intent—other-act evidence is not admissible to prove intent because its probative value will always be substantially outweighed by the risk of unfair prejudice. In contrast, when intent is “at issue”—in cases involving specific-intent crimes or because the defendant makes it an issue in a case involving a general-intent crime—other-act evidence may be admissible to prove intent, but it must be relevant without relying on a propensity inference, and its probative value must not be substantially outweighed by the risk of unfair prejudice. And again, the degree to which the non-propensity issue actually is contested may have a bearing on the probative value of the other-act evidence.

See also United States v. Miller, 673 F.3d 688, 697-98 (7th Cir. 2012) (Hamilton, J.), where the court provided instruction on both the Rule 404(b) and Rule 403 steps and the importance of the defendant’s actively contesting the mental state:

It is helpful to distinguish between two aspects of the relevance inquiry. The first aspect concerns whether a Rule 404(b) exception, like intent, is “at issue”—that is, whether the issue is relevant to the case. For example, knowledge may not be at issue at all where the charge is a strict liability offense, so that knowledge is not even an element of the crime. Similarly, while intent is at least formally relevant to all specific intent crimes, intent becomes more relevant, and evidence tending to prove intent becomes more probative, when the defense actually works to deny intent, joining the issue by contesting it. When, as in this case, the drugs in question were clearly a distribution quantity, the packages had price tags, and the defendant did not deny they were intended for distribution by someone, intent was “at issue” in only the most attenuated sense.

The second aspect of relevance is not concerned with whether the government must prove intent or how difficult that proof might be. This second inquiry assumes intent is relevant to the case and asks whether the bad acts evidence offered is relevant to and probative of intent, without being too unfairly prejudicial by invoking a propensity inference. In other words, can the government fairly use *this* evidence to meet its burden of proof on this issue? Intent can be “automatically at issue” because it is an element of a specific intent crime, but the prior bad acts evidence offered to prove intent can still be completely irrelevant to that issue, or relevant only in an impermissible way. Here, even though the purpose of proving “intent” was invoked, the bad acts evidence was not probative of intent except through an improper propensity inference. * * *

The government argues that Miller's prior conviction [for drug activity] is relevant to prove intent here, but has not satisfactorily explained why this is true. Miller's defense, that the drugs were not his, has nothing to do with whether he intended to distribute them. He did not argue that he intended to consume rather than sell the drugs, or that he lacked knowledge of cocaine or how to sell it. Either argument would have better joined a genuine issue of intent or knowledge. Rather, the only conceivable link between the defense and intent here would also be true of almost any defense Miller might raise; by pleading not guilty, Miller necessarily contradicted the government's belief that he intended to distribute the drugs. But * * * if merely denying guilt opens the door wide to prior convictions for the same crime, nothing is left of the Rule 404(b) prohibition.

The Third Circuit also imposes the requirement that bad acts evidence offered to prove a mental state is only permissible if the mental state is actively contested. The leading case in the Third Circuit is *United States v. Caldwell*, 760 F.3d 267 (3rd Cir. 2014), a felon-firearm prosecution where the government alleged that the defendant actually (not constructively) possessed a gun, and the defendant flatly denied it. Because the defendant was not alleging lack of mens rea, but rather was denying the conduct entirely, the court held that prior convictions for weapons possession could not be admitted to prove knowledge. The court's analysis placed the active context requirement in Rule 404(b) itself. The court elaborated as follows:

We first consider whether the government offered Caldwell's prior convictions for an acceptable, non-propensity purpose—i.e., one that is “at issue” in, or relevant to, the prosecution. * * * Because “knowledge” was the only purpose mentioned by both the Government and the Court, we focus on whether that was a permissible purpose under Rule 404(b). * * *

Because the Government proceeded solely on a theory of actual possession, we hold that Caldwell's knowledge was not at issue in the case. Although 18 U.S.C. § 922(g)(1) criminalizes the “knowing” possession of a firearm by a convicted felon, a defendant's knowledge is almost never a material issue when the government relies exclusively on a theory of actual possession. * * *

Finally, we believe it necessary to address the District Court's suggestion that Caldwell “put his knowledge at issue by claiming innocence.” It is unclear whether the District Court understood Caldwell to have “claimed innocence” by testifying at trial, or more broadly by pleading not guilty. Either way, we believe this line of reasoning is improper.

Situations may indeed arise where the content of a defendant's trial testimony transforms a previously irrelevant 404(b) purpose into a material issue in a case. For example, if Caldwell had testified that he thought the object in his hand was something other than a gun, then it would immediately become critical for the prosecution to rebut his claim of mistake and to show his knowledge of the true nature of the thing possessed. We disagree, however, with the proposition that, merely by denying guilt of an offense with a knowledge-based mens rea, a defendant opens the door to admissibility of prior convictions of the same crime. Such a holding would eviscerate Rule 404(b)'s protection and completely swallow the general rule against admission of prior bad acts. See *United States v. Miller*, 673 F.3d 688, 697 (7th Cir.2012) (explaining that “if a mere claim of innocence were enough to automatically put intent at issue, the resulting exception would swallow the general rule against admission of prior bad acts”). Accordingly, we reject the suggestion that “claiming innocence” is sufficient to place knowledge at issue for purposes of Rule 404(b).

See also United States v. Sampson, 385 F.3d 183 (2nd Cir. 2004) (evidence of uncharged drug activity was not admissible to prove intent because the defendant “unequivocally” relied on a defense that he did not do the act at all).

Yet many courts consider a dispute over the mental state to be joined when the defendant simply pleads not guilty. The rationale is that when the defendant pleads not guilty, the government is required to prove the mental state beyond a reasonable doubt, regardless of whether the defendant fails to actively contest that element at trial. See, e.g., *United States v. Smith*, 741 F.3d 1211 (11th Cir. 2013) (“There is ample precedent in this circuit that a not guilty plea in a drug conspiracy case make intent a material issue and opens the door to admission of prior drug offenses as highly probative, and not overly prejudicial, evidence of intent.”); *United States v. Smith*, 789 F.3d 923 (8th Cir. 2015) (in a prosecution for cocaine trafficking, the court holds that a prior drug distribution conviction was properly admitted: “a general-denial defense places intent or state of mind into question and allows the admission of prior criminal convictions to prove both knowledge and intent”); *United States v. Douglas*, 482 F.3d 591 (D.C. Cir. 2007) (no error in admitting prior possession with intent to distribute crack cocaine in a prosecution for the same offense; the fact that the defendant was not disputing the elements of intent and knowledge did not preclude admission of the bad act, because the government has the burden of proving the mental elements beyond a reasonable doubt); *United States v. Olguin*, 643 F.3d 384 (5th Cir. 2011) (“a defendant’s guilty plea intuitively puts his intent and knowledge into issue”); *United States v. Hardy*, 643 F.3d 143 (6th Cir. 2011) (where a crime requires proof of specific intent, the government is entitled to offer bad acts to prove that intent regardless of the defendant’s defense); *United States v. Jones*, 982 F.2d 380 (9th Cir. 1992), *amended* (1993) (prior

marijuana smuggling was properly admitted to prove intent; while the defendant did not contest intent at trial, the government retained the burden of proving intent beyond a reasonable doubt).

In sum, there is a split of authority over whether prior bad acts can be offered to prove the defendant's mental state where the defendant does not actively contest that mental state.

Here are some questions that can be addressed about the admissibility of bad acts to prove a mental state where the defendant does not actively contest the mental state:

- Which view is correct? On the one hand, without an active contest requirement, similar bad acts are almost automatically admissible to prove state of mind. On the other hand, precluding bad act evidence simply because the defendant has not actively contested intent may put the government at a disadvantage because it still retains the obligation to prove the mental element beyond a reasonable doubt.
- Is there something short of exclusion that might ameliorate the government's dilemma? Maybe the court could allow the government to establish necessity as a condition for admitting the bad act, i.e., a showing that evidentiary alternatives do not exist.
- Should it matter that the crime charged is one of specific or general intent? If so, how should that distinction play out?
- There would appear to be a number of procedural challenges in applying an "active contest" requirement. For example:

How does a court determine whether the mental state is being actively contested?

Can a court require a statement on the record at an *in limine* hearing --- and then bind the defendant to that statement?

It would appear that a defense lawyer's opening argument might raise an active contest of the mental element. But what if the lawyer's statement is subject to argument on whether the mental element in specific is being actively contested?

What if the active contest is not raised until the defendant's case-in-chief? Does the government get an automatic right of rebuttal?

What if the active contest is only made evident at defense counsel's closing argument?

- Is the active contest requirement properly placed in Rule 404(b), Rule 403, or both? Does it make any difference? (Certainly it would for rulemaking).
- Assuming that an active contest should be required, how would it best be implemented? By text, Committee Note, or in some other way?
- The active contest issue usually comes up when evidence is offered for a mental state. But could it also be an issue for questions of identity, motive, context, etc.?
- How about this as a text amendment?

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 --- where such an issue is actively contested.

- What if the defendant offers to *stipulate* to the mental element? In *Old Chief v. United States*, 519 U.S. 172, 190 (1997), the Court held that a defendant's offer to stipulate the felony element of felon-gun-possession rendered proof of that felony inadmissible under Rule 403. In the course of its discussion, however, the Court emphasized that the government ordinarily has the authority to prove its case by way of evidence. And specifically, as to Rule 404(b), the Court stated in dictum that "if there were a justification for receiving evidence of the nature of prior acts on some issue other than status (i.e., to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,' Fed. Rule Evid. 404(b)), *Rule 404(b) guarantees the opportunity to seek its admission.*" (Emphasis added.)

The *Old Chief* Court in this dictum distinguished between stipulations to the status element of a crime, which can be forced upon the prosecution, and stipulations to other elements of a crime, which the prosecution should remain free to reject under Rule 404(b). The rationale for the distinction was "that proof of the defendant's status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense." In contrast, the intent and knowledge

elements go directly to what the defendant was thinking and doing to commit the charged offense.

Does this mean that a defendant's offer to stipulate the mental element is *not* a means for keeping out bad acts offered to prove that element? And if so, why should the defendant be allowed to keep bad acts out simply by not actively contesting the element? It would seem that stipulation would be the stronger indication of no active contest.

Is this just making too much of the Rule 404(b) dictum in *Old Chief*? It is notable that the *Gomez* court, *supra*, cites *Old Chief* apparently for the proposition that a defendant's stipulation on the mental element means that the element is no longer actively disputed and therefore bad acts would not be admissible. The Court does not discuss the *Old Chief* Court's Rule 404(b) dictum, however.⁵

⁵ Compare *United States v. Crowder*, 141 F.3d 1202, 1209 (D.C. Cir. 1998) (en banc), where the court relied on the *Old Chief* dictum stating that the government would have the right to prove Rule 404(b) purposes despite the defendant's offer to stipulate:

[W]e hold that a defendant's offer to stipulate to an element of an offense does not render the government's other crimes evidence inadmissible under Rule 404(b) to prove that element, even if the defendant's proposed stipulation is unequivocal.

3. Limiting the “inextricably intertwined” doctrine:

Rule 404(b) requires that “crimes, wrongs, or other acts” cannot be offered as proof of character when character evidence is offered to prove conduct. But it is sometimes difficult to determine which acts are “other acts” as opposed to acts that are part of the offense charged, and which are uncharged acts subject to Rule 404(b). The test used by most courts is whether the acts that are the subject of the proof are “inextricably intertwined” with the basic elements of the crime charged. If so, Rule 404(b) is considered inapplicable and there is no need to articulate a “not-for-character” purpose for the evidence. Nor is there any need to give prior notice of the intent to use the evidence, as is required if the evidence is covered by Rule 404(b). Of course, Rule 403 will still apply to the evidence.⁶ However, it would be the rare case in which proof of an inextricably intertwined act could be considered so prejudicial as to justify exclusion under Rule 403.

Sometimes it is pretty clear that bad act evidence is part of the charged misconduct. Consider *United States v. Pace*, 981 F.2d 1123, 1135 (10th Cir. 1992). Three defendants—Pace, Leonard, and Carter—were charged in a four-count indictment alleging violations of the federal drug laws. Pace claimed on appeal that the trial judge erred under Rule 404(b) in admitting evidence concerning codefendant Leonard’s distribution of methamphetamine on October 26, 1990. According to Pace, the evidence should have been excluded because the transaction occurred after some conspirators were arrested. The problem for Pace was that the indictment charged Pace with a conspiracy to attempt to manufacture and distribute methamphetamine/amphetamine that ended on or about October 26, 1990. Thus, even though some conspirators were arrested before October 26, the other coconspirators remained free to carry on the objectives of the conspiracy. The court of appeals reasoned as follows:

Rule 404(b) only applies to evidence of acts extrinsic to the charged crime. Evidence of Leonard’s sale was direct evidence of the conspiracy, which the indictment charged as occurring between July 1 and October 26, 1990. Conduct during the life of a conspiracy that is evidence of the conspiracy is not Rule 404(b) evidence. *United States v. Merida*, 765 F.2d 1205, 1221 (5th Cir. 1985).

Pace is fairly easy because any act that was part of the conspiracy would seem to be sufficiently related to the conduct that the government alleged in the indictment so that there is no concern that it is primarily used to prove propensity. This would be true whether or not the act was specifically alleged as an overt act.

The notion of “inextricably intertwined” evidence becomes more complicated when it is examined in cases such as *United States v. Hilgefurd*, 7 F.3d 1340, 1346 (7th Cir. 1993). Hilgefurd suffered what the court described as “hard times.” He had borrowed over one million dollars from a bank and the Farmer’s Home Administration using the two farms he owned as

⁶ See *United States v. Hilgefurd*, 7 F.3d 1340, 1344 (7th Cir. 1993):

When deciding if the other acts evidence was admissible without reference to Rule 404(b), we must determine whether such evidence was intricately related to the facts of the case at hand. If we find the evidence is so related, the only limitation on the admission of such evidence is the balancing test required by Rule 403.

security for the debt. When he suffered financial difficulties, the bank foreclosed on the mortgage it held on one of his farms. The bank then bought the farm at the foreclosure sale and evicted Hilgeförd. The United States foreclosed on his other farm.

Hilgeförd retaliated by sending bills to employees of the bank and the FHA and then taking deductions on his tax return for the unpaid bills. Among the charges brought against him were counts alleging willful filing of false tax returns. To prove the tax counts, the government offered evidence that in the years prior to the challenged tax returns, Hilgeförd had generated “a blizzard of complicated and groundless litigation, primarily involving his fruitless attempts to regain his two farms.” Hilgeförd objected at trial under Rule 404(b). The court held that Rule 404(b) was not applicable to this evidence, because it was “intricately related to the fact of the case at hand.”

Cases such as *Hilgeförd* are more difficult than a conspiracy case like *Pace*, where the bad acts offered occurred while the conspiracy was ongoing. The bad acts in *Hilgeförd* did not occur in the time period covered by the indictment. The fact that the groundless litigation was probative of an element of the prosecution’s case (the willfulness in the tax return filings) does not distinguish it from bad act evidence covered by Rule 404(b); presumably all evidence offered by the prosecution in a criminal trial must be somehow probative of an element of the crime. The court’s statement that the groundless litigation concerning the farm was “intricately related” to the tax counts is vague and conclusory.

Hilgeförd is hardly the only case in which courts have been a bit vague and conclusory in applying the rule that evidence of acts “inextricably intertwined” with the charge are exempt from Rule 404(b). Part of the problem is that courts often use different phrases to capture the concept. Examples include acts that are “intrinsic” to the crime charged; acts that form part of a “single criminal episode”; acts that are an “integral part” of the crime; and acts that “complete the story” or “explain the context” of the crime.

One noted commentator has summed up the “inextricably intertwined” doctrine as follows:

“Inextricably intertwined” is the modern de-Latinized version of *res gestae*, and it has been savaged by a similar critique. The standard has been described as “lacking character” and “obscure” because it does not embody a clear principle. * * * The vacuous nature of the test’s wording gives courts license to employ sloppy analysis and allows them quickly to slip from a conclusory analysis to a desired conclusion. Simply stated, the indefinite phrasing of the doctrine is a virtual invitation for abuse.”

Imwinkelried, *The Second Coming of Res Gestae: A Procedural Approach to Untangling the “Inextricably Intertwined” Theory for Admitting Evidence of an Accused’s Uncharged Misconduct*, 59 Cath. U. L.Rev. 719, 724 (2010) (citations omitted).

Several Circuits have now questioned whether there should even be an exception from Rule 404(b) for acts that are inextricably intertwined with charged offenses. For example, in *United States v. Green*, 617 F.3d 233, 246–247 (3rd Cir. 2010), a defendant charged with drug crimes challenged evidence that he threatened to kill the person who turned him over to authorities. The trial court admitted this evidence as inextricably intertwined with the charged crime. The court affirmed, but in an extensive and detailed analysis it rejected any broad use of the “inextricably intertwined” doctrine. The court noted three problems with the “inextricably intertwined” test:

The first is that the test creates confusion because, quite simply, no one knows what it means. Such an impediment stands as an obstacle to helpful analysis. Indeed, we have criticized the “inextricably intertwined” standard as “a definition that elucidates little.” * * * Whether evidence qualifies as intrinsic in a particular case may well depend on which version of the test one employs. For example, *Green*’s threat to kill A.G. would qualify as intrinsic if the test is whether it “pertain[s] to the chain of events explaining the context” of the crime * * * . The same threat would not be intrinsic, however, if the test were whether that threat was “an integral part of the immediate context of the crime charged.” * * * We see no principled way to choose among these competing incarnations of the test, yet that choice could well be determinative. * * *

The second problem with the inextricably intertwined test is that resort to it is unnecessary. The most common justification for admitting evidence of “intertwined” acts is to allow a witness to testify freely and coherently; we do not want him to have to tiptoe around uncharged bad acts by the defendant, and thereby risk distorting his narrative. This is a worthy goal, but it can be accomplished without circumventing Rule 404(b). * * * [T]he same evidence would also be admissible within the framework of that rule because allowing the jury to understand the circumstances surrounding the charged crime—completing the story—is a proper, non-propensity purpose under Rule 404(b). * * * All that is accomplished by labeling evidence “intrinsic” is relieving the government from providing a defendant with the procedural protections of Rule 404(b).

The third problem with the inextricably intertwined test is that some of its broader formulations, taken at face value, classify evidence of virtually any bad act as intrinsic.

The *Green* Court declared that the “inextricably intertwined” standard “is not our test for intrinsic evidence. Like its predecessor *res gestae*, the inextricably intertwined test is vague, overbroad, and prone to abuse, and we cannot ignore the danger it poses to the vitality of Rule 404(b).”

But the *Green* court did not “reject the concept of intrinsic evidence entirely.” It explained as follows:

[W]e will reserve the “intrinsic” label for two narrow categories of evidence. First, evidence is intrinsic if it “directly proves” the charged offense. This gives effect to Rule

404(b)'s applicability only to evidence of "other crimes, wrongs, or acts." If uncharged misconduct directly proves the charged offense, it is not evidence of some "other" crime. Second, uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime. But all else must be analyzed under Rule 404(b).

Applying the narrowed test of "intrinsic" evidence to the defendant's threat to kill the witness, the court held that it was not intrinsic and so was covered by Rule 404(b). First, it did not directly prove that Green attempted to possess cocaine with intent to distribute (it created an inference, but that was circumstantial, not direct). Additionally, it was not performed contemporaneously with the crime itself and did not facilitate the commission of the crime charged. Notably, though, the court affirmed the conviction, because the evidence was properly admitted under Rule 404(b), as providing context to the jury and as proof of motive.

The Seventh Circuit, in *United States v. Gorman*, 613 F.3d 711, 719 (7th Cir. 2010), appears to have discarded the "inextricably intertwined" doctrine. Gorman was charged with lying to a grand jury when he testified that he did not store a particular car in the parking garage of his condominium; the car was owned by his cousin and was related to drug activity. At trial the government offered evidence that the defendant had the car towed from his garage after police inquired about its location, and took two bags of money from the car. The trial court admitted this theft-related evidence as "inextricably intertwined" with the perjury charge. The court affirmed the conviction but stated that "[h]enceforth, resort to inextricable intertwinement is unavailable when determining a theory of inadmissibility." The court explained as follows:

There traditionally have been subtle distinctions between direct evidence of a charged crime, inextricable intertwinement evidence, and Rule 404(b) evidence, but our case law has not often focused on these fine distinctions. We have often lumped together these kinds of evidence, and this has only served to further cloud the already murky waters of the inextricable intertwinement doctrine.

There is now so much overlap between the theories of admissibility that the intertwinement doctrine often serves as the basis for admission even when it is unnecessary [because the act is direct evidence of the crime]. Thus, although this fine distinction has traditionally existed, the inextricable intertwinement doctrine has since become overused, vague and quite unhelpful. To ensure that there are no more doubts about the court's position on this issue—the inextricable intertwinement doctrine has outlived its usefulness.

As applied to the facts, the court found that the theft-related evidence was admissible, without the need to invoke the intertwinement doctrine. "Because the basis for the perjury charge was that [the defendant] denied 'having' the car in his garage, his theft of the car and extrication of the money from within were direct evidence of his false testimony. The fact that [the defendant] removed the Bentley from the garage demonstrated that he 'had' a Bentley in the garage in the first instance. Therefore, this evidence was properly admitted, albeit as direct evidence rather

than under the inextricable intertwinement doctrine.” The court noted that “any confusion of the proper channel of admissibility” was “insignificant” to the ultimate outcome of admissibility.⁷

Relatedly, in *United States v. Bowie*, 232 F.3d 923, 927 (D.C. Cir. 2000), the court rejected the “inextricably intertwined” rule where evidence was offered to “complete the story” of a charged crime. The court found the doctrine unnecessary.

As a practical matter, it is hard to see what function this interpretation of Rule 404(b) performs. If the so-called “intrinsic” act is indeed part of the crime charged, evidence of it will, by definition, always satisfy Rule 404(b). * * * So far as we can tell, the only consequences of labeling evidence “intrinsic” are to relieve the prosecution of Rule 404(b)’s notice requirement and the court of its obligation to give an appropriate limiting instruction upon defense counsel’s request.

In the end, the *Bowie* Court concluded that “there is no general ‘complete the story’ or ‘explain the circumstances’ exception to Rule 404(b) in the D.C. Circuit. Such broad exclusions have no discernible grounding in the ‘other crimes, wrongs, or acts’ language of the rule. Rule 404(b), and particularly its notice requirement, should not be disregarded on such a flimsy basis.”

But other circuits still employ the “inextricably intertwined” doctrine to find that Rule 404(b) is inapplicable. In these circuits, evidence used to “complete the story” is not pretty much the same as evidence admitted for “context” --- and yet “context” is a Rule 404(b) purpose while “complete the story” is not. And evidence found “intrinsic” often could also be characterized as evidence of state of mind or consciousness of guilt and so covered by Rule 404(b). *See, e.g., United States v. Ali*, 799 F.3d 1008 (8th Cir. 2015) (evidence that one defendant supported a terrorist group before it was designated as a terrorist organization was “intrinsic” to the crime charged because it explained how the fundraising began); *United States v. Ford*, 784 F.3d 1386 (11th Cir. 2015) (common methods used by the defendant to commit fraud were “intrinsic” because they were similar to the charged offenses); *United States v. Castleman*, 795 F.3d 904 (8th Cir. 2015) (in a drug prosecution, evidence of death threats against witnesses, offered to prove consciousness of guilt, were “direct evidence of the crime charged” and so “not subject to a Rule 404(b) analysis”). *See also* Imwinkelried, *supra*, at 726 (“In many of the cases in which the courts have invoked the [inextricably intertwined] doctrine, they could just as easily have relied on a recognized noncharacter theory, such as motive.”).

⁷ For further discussion of the Seventh Circuit’s position, see Padgett, *How Less is More: The Unraveling of the Inextricable Intertwinement Doctrine under United States v. Gorman*, 6 Seventh Circuit Review 196 (2010). The author applauds the court for abandoning the “inextricably intertwined” doctrine and concludes as follows:

This area of the law is contentious enough, with Rule 404(b) being the most litigated rule in the Federal Rules of Evidence. Compounding the complexities of this Rule by continuing to have a vague and misused doctrine was wasteful of the judiciary’s already scarce time and dangerous for defendants.

Here are some issues that might be discussed regarding the “inextricable intertwinement” doctrine:

- Can the doctrine ever be truly abolished? Won't there always be some line-drawing required between the acts that are charged in an indictment and those that are not but yet appear pretty “close” to the charged acts or covered by the indictment?
- If the doctrine is abolished, how does a court craft a Rule 404(b) jury instruction for an act that is closely related to the crime? Should a limiting instruction be given under current law when the evidence is “properly offered” as inextricably intertwined?
- Is the direct/indirect distinction posited by the courts in *Gorman* and *Green* a better and clearer line to draw?
- Is the dispute in the courts over the breadth or existence of the doctrine something that can be regulated by a rule amendment? Is there any textual change of the rule that could appropriately limit the doctrine and provide sufficient guidance so that the case law would not just devolve into another mass of conflicting decisions?
- Is there anything useful that can be done in a committee note?

Another Issue to Discuss Regarding Rule 404(b)

Ken Graham suggests another topic to discuss regarding Rule 404(b):

I would like to get something done about the “smorgasbord exception”; that is where the trial judge simply lists all of the uses specified in the rule—presumably hoping that the judges of the appellate court will think one of them applies. One way to remedy this might be to add a requirement that the trial judge specify exactly how the evidence is relevant for the specified purpose without use of a propensity inference.

This is certainly a worthwhile topic for discussion and I will raise it at the conference. I note that the Seventh Circuit in *Gomez* states that trial courts must instruct juries as to the specific proper purpose for which the evidence can be used. Laundry lists won’t do. *See also United States v. Sampson*, 980 F.3d 883 (3rd Cir. 1992) (conviction reversed where the trial judge fails to articulate the particular proper purpose for the evidence); *United States v. Edwards*, 540 F.3d 1156 (10th Cir. 2008) (error where the government articulates all the purposes set forth in Rule 404(b) and the trial court had not required the government to clarify how the evidence was relevant for all these purposes).

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This is certainly a worthwhile topic for discussion and I will raise it at the conference. I note that the Seventh Circuit in *Gomez* states that trial courts must instruct juries as to the specific proper purpose for which the evidence can be used. Laundry lists won’t do. *See also United States v. Sampson*, 980 F.3d 883 (3rd Cir. 1992) (conviction reversed where the trial judge fails to articulate the particular proper purpose for the evidence); *United States v. Edwards*, 540 F.3d 1156 (10th Cir. 2008) (error where the government articulates all the purposes set forth in Rule 404(b) and the trial court had not required the government to clarify how the evidence was relevant for all these purposes).

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prepared before January 1, 1998. The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information since 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Committee is aware that in certain cases—such as cases involving latent diseases and environmental damage—parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability—which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that 20 year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807. Finally, many old documents

can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of authenticating an old document under Rule 901(b)(8)—or under any ground available for any other document—remains unchanged.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the original rule. See Committee Note to Rule 901(b)(8) (“Any time period selected is bound to be arbitrary.”).

Under the amendment, a document is “prepared” when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that—the subsequent

scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is *itself* altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

1 **Rule 902. Evidence That Is Self-Authenticating**

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

5 * * * * *

6 **(13) Certified Records Generated by an Electronic**

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

Committee Note

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 Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely

limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable—the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

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

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1 **Rule 902. Evidence That Is Self-Authenticating**

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

5 * * * * *

6 **(14) Certified Data Copied from an Electronic**

7 **Device, Storage Medium, or File.** Data copied
8 from an electronic device, storage medium, or
9 file, if authenticated by a process of digital
10 identification, as shown by a certification of a
11 qualified person that complies with the
12 certification requirements of Rule 902(11) or
13 (12). The proponent also must meet the notice
14 requirements of Rule 902(11).

Committee Note

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 number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. 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.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. 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.

A challenge to the authenticity of electronic evidence may require technical information about the system or

process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

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

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Expanding the residual exception to the hearsay rule
Date: October 1, 2016

At its last meeting the Committee resolved to pursue an amendment to Rule 807 --- the residual exception to the hearsay rule --- that would allow the admission of more hearsay, if it is reliable. The Committee's working draft of amendments to Rule 807 will be discussed at the Conference held on the morning of the Fall 2016 meeting, and is also an agenda item for the meeting.

This memo on the possible amendments to Rule 807 is in five parts. Part One discusses the Committee's considerations to date. Part Two presents the working draft tentatively approved by the Committee, and adds a draft Committee Note for the Committee's consideration. Part Three provides research and analysis of two important questions raised by members of the Rules Committees: 1) can anything be learned from state versions of Rule 807?; and 2) is an expansion of Rule 807 necessary? Part Four asks for reconsideration of a proposal to amend the "more probative" requirement of Rule 807. And Part Five considers whether an amendment to Rule 807 might be appropriate even if expanding the rule is not necessary.

In its current form, Rule 807 provides as follows:

Rule 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1)** the statement has equivalent circumstantial guarantees of trustworthiness;
- (2)** it is offered as evidence of a material fact;
- (3)** it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(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.

I. Introduction

Congress intended that the residual exception would be used “very rarely, and only in exceptional circumstances.”¹ The reason for that limit was a concern that an unfettered residual exception would provide courts with too much discretion, “injecting too much uncertainty in the law of evidence and impairing the ability of practitioners to prepare for trial.”² There was also a concern that a broad residual exception would erode the limitations provided in the standard hearsay exceptions.³ On the other hand, there was a recognition of a need for the residual exception, for at least two reasons: 1) there will be trustworthy statements that won't fit under the standard exceptions, and it would hurt the search for truth to exclude a reliable statement simply because it did not fit into a standard exception; and 2) without a residual exception, courts might seek to shoehorn such reliable statements into the standard exceptions, which would improperly change the meaning and breadth of those exceptions. *See United States v. Popenas*, 780 F.2d 545, 547 (6th Cir.1985) (Congress ultimately included the residual exceptions “fearing that without these provisions the more established exceptions would be unduly expanded in order to allow otherwise reliable evidence to be introduced.”).

The minutes of the Spring 2016 meeting recount the Committee's deliberation and tentative agreement regarding the expansion of the residual exception:

The Committee discussed the possibilities of expanding the residual exception at the Spring meeting. The Committee recognized the challenge: the goal would be to allow the residual exception to be used somewhat more frequently, without broadening it so far that it would overtake the categorical exceptions entirely and lead to a hearsay system that was controlled by court discretion, with unpredictable outcomes. At the Hearsay Symposium, the Committee heard repeatedly from lawyers that they wanted predictable hearsay exceptions --- judicial discretion would lead to inconsistent results and lack of

¹ Report of Senate Committee on the Judiciary on Rules 803(24) and 804(b)(5), S.Rep. No. 1277, 93d Cong., 2d Sess., p. 18 (1974).

² Report of House Committee on the Judiciary on Rules 803(24) and 804(b)(5), H.R. Rep. No. 650, 93d cong., 1st Sess., p.5 (1973).

³ See Sonenshein & Fabens-Lassen, *Has the Residual Exception Swallowed the Hearsay Rule?* 64 Kan.L.Rev. 715 (2016)(stating the concern in Congress and elsewhere that the residual exception will be used as a way to get around limitations set forth in the standard exceptions).

predictability would raise the costs of litigation and would make it difficult to settle cases.

Within these constraints, the Committee, after substantial discussion, preliminarily agreed on the following principles regarding Rule 807:

- The requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted. That standard is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. It is common ground that statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803; and it is also clear that the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to “equivalence” review --- Rule 804(b)(6) forfeiture --- is not based on reliability at all. Given the difficulty of the “equivalence” standard, a better approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy.

- Trustworthiness can best be defined as a consideration of both circumstantial guarantees and corroborating evidence. Most courts find corroborating evidence to be relevant to the reliability enquiry, but some do not. An amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception --- and substantively, that amendment should specifically allow the court to consider corroborating evidence, as corroboration is a typical source for assuring that a statement is reliable.

- The requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” have not served any purpose. The inclusion of the language “material fact” is in conflict with the studious avoidance of the term “materiality” in Rule 403 --- and that avoidance was well-reasoned, because the term “material” is so fuzzy. The courts have essentially held that “material” means “relevant” --- and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice because that guidance is already provided by Rule 102. These provisions were added to the residual exception to emphasize that the exception was to be used only in truly exceptional situations. Deleting them might change the tone a bit, to signal that while hearsay must still be reliable to be admitted under Rule 807, there is no longer a requirement that the use must be rare and exceptional.

- The requirement in the residual exception that the hearsay statement must be “more probative than any other evidence that the proponent can obtain through reasonable efforts” should be retained. This will preserve the rule that proponents cannot use the residual exception unless they need it. And it will send a signal that the changes proposed are modest --- there is no attempt to allow the

residual exception to swallow the categorical exceptions, or even to permit the use of the residual exception if the categorical exceptions are available.

Besides the proposed changes to the substantive requirements of Rule 807, the Committee has been reviewing the notice provisions in the Federal Rules of Evidence, and that project impacts Rule 807. The Committee has voted unanimously to propose the following changes to the notice provisions of Rule 807:

1. Add the requirement that the notice be in writing.
2. Add a good cause exception for failure to provide timely pretrial notice.
3. Change the language governing the details that must be provided in the notice.

The Committee has decided to hold off on formally proposing these changes to the notice provisions until it finalizes any changes to be made to the substantive provisions of Rule 807.

II. Working Draft of a Proposed Amendment to Expand Rule 807

What follows is the working draft of an amendment to Rule 807 that the Committee has tentatively approved---including the amendment to the notice provision that has been independently approved.

Rule 807. Residual Exception

(a) **In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~ the court determines, after considering the pertinent circumstances and any corroborating evidence, that the statement is trustworthy; and

~~(2) it is offered as evidence of a material fact;~~

~~(3)~~ 2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

~~(4) admitting it will best serve the purposes of these rules and the interests of justice.~~

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

Draft Committee Note

[This draft Committee Note has not been reviewed by the Committee.]

The amendment has two goals: 1) to permit somewhat greater use of the residual exception than is currently the case in many courts; and 2) to amend the notice requirements to include a good cause exception as well as some procedural details.

The amendment is not intended to replace the categorical hearsay exceptions with a case-by-case approach to hearsay. But it is intended to allow trial courts somewhat more discretion to admit hearsay that the court finds to be trustworthy and that is not admissible under other exceptions. This greater flexibility is found in the following changes:

- Untethering the reliability inquiry from the categorical exceptions that had been required by the original rule's reference to "equivalent" circumstantial guarantees of trustworthiness. The "equivalence" standard is unduly constraining, as well as difficult to apply, given the varied and different guarantees of reliability found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). Experience has shown that residual hearsay often cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy.
- Specifically allowing the court to considering corroborating evidence in the reliability enquiry. Most courts do allow consideration of corroborating circumstances, though some do not. This provision provides for a more uniform and flexible approach and recognizes that the existence or absence of corroboration is relevant to whether the hearsay statement is true.
- Deleting the requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of

justice. These requirements are essentially superfluous in that they are also found in other rules (e.g. 102, 401). They have served, if anything, as tone-setters to indicate that the rule is to be employed only in rare and exceptional circumstances. The amendment is intended to allow the use of the exception somewhat more frequently.

The legislative history of the original rule indicated that use of the residual exception should be left for “rare and exceptional” cases. That phrase in the legislative history has led some courts to exclude proffered hearsay because it is not “exceptional.” The word “exceptional” is not in the text of the rule, and it should not be a word that is used to exclude otherwise trustworthy hearsay. At any rate the “rare and exceptional” language is no longer descriptive of the rule as amended.

The rule requires the court to determine whether the hearsay statement is trustworthy. In doing so, the court should not consider the credibility of a witness who relates the declarant’s hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness’s credibility would usurp the jury’s role of determining the credibility of testifying witnesses.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that can be reasonably obtained. This necessity requirement will continue to serve to prevent the residual exception being used as a device to erode the categorical exceptions.

The notice provision has been amended to make three changes in the operation of the Rule:

- First, the Rule requires the proponent to disclose the “substance” of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule

103(a)(2) (requiring the party making an offer of proof to inform the court of the “substance” of the evidence). Prior case law on the obligation to disclose the “particulars” of the hearsay statement may be instructive, but not dispositive, of the proponent’s obligation to disclose the “substance” of the statement under the Rule as amended. The prior requirement that the declarant’s address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant’s address was known or easily obtainable. If prior disclosure of the declarant’s address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.

- Second, the Rule now requires that the notice be in writing --- which includes notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

- Finally, 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 under Rule 807 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 hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent must then resort to residual hearsay. Where notice is provided during the trial, the general requirement that notice must be in writing need not be met.

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 argument that is necessary to counter hearsay offered under the residual exception.

III. Two Further Questions That Might Affect an Amendment to Rule 807

The above working draft is one of the matters that will be considered at the conference scheduled to take place on the morning of the Fall 2016 meeting. This memo makes no attempt to pre-structure or pre-suppose any input that will be provided at the mini-conference. But besides setting forth the Committee's determination to date, this memo takes on two further issues regarding the expansion of the residual exception --- both raised in Rules Committee discussion of the proposal. Those issues are:

- ***Can anything be learned from State variations?*** Before the Committee issues an amendment, it considers whether any state variations have made improvements that might be incorporated into the Federal Rule. Accordingly, this memo evaluates all the state law variations of Rule 807.

- ***Is expansion of the residual exception really necessary?*** This question was asked by a Standing Committee member during discussion of the Advisory Committee's proposal. Necessity presumably would be determined by instances in which hearsay that is actually reliable and offered under Rule 807 gets excluded by the court, because the exception is either too narrowly drawn, or the court reads the exception as being too narrow because of the legislative history indicating that the rule was only to be used in "rare and exceptional circumstances."

A. *State Variations*

At the outset it should be noted that the most predominant state variation is a complete rejection of a residual hearsay exception. Nineteen states have refused to adopt a residual exception to the hearsay rule: Alabama, California,⁴ Florida,⁵ Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Missouri, New Jersey, Ohio,⁶ Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia and Washington.

The reason most often given for rejecting the residual exception is exemplified by the statement of the Washington Task Force on Evidence:

There is a serious risk that trial judges would differ greatly in applying the elastic standard of equivalent trustworthiness. The result would be a lack of uniformity which

⁴ California has residual-like exceptions limited to statements by child-victims of sexual abuse and statements by victims of elder abuse. Cal. Ev. Code §§ 1228, 1380.

⁵ Florida has a so-called "tender years" exception permitting admissibility of reliable statements by child-victims of sexual abuse. Fla. Ev. Code §90.803.23.

⁶ Ohio has a tender years exception like Florida's. Ohio R.Evid. 807(A).

would make preparation for trial difficult. Nor would it be likely that an appellate court could effectively apply corrective measures. There would be doubt about whether an affirmance or admission of evidence under the catchall provision amounted to the creation of a new exception with the force of precedent or merely a refusal to rule that the trial court had abused its discretion.

So once again, the concern over judicial discretion in applying the hearsay rule, and the concern about unpredictability, rears its head. One can hope that there is a sweet spot somewhere between outright rejection of a residual exception --- which could result either in the loss of a good deal of reliable evidence or an unwelcome expansion and misshaping of the standard exceptions --- and an all-out discretion fest as championed by Judge Posner. The goal of the Committee's efforts is to find that sweet spot.

Let's proceed to state variations on, as opposed to rejection of, the residual exception.⁷

1. Connecticut Code of Evidence §8-9

A statement that is not admissible under any of the foregoing exceptions is admissible if the court determines that (1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by equivalent circumstantial guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule.

Reporter's comments on advantages:

The language "reasonable necessity" is arguably preferable to "more probative than any other evidence reasonably available." It is less convoluted and gives the court more discretion. It is certainly the kind of test that courts and litigants are more likely to be familiar with than "more probative than any other evidence that is reasonably available." Using the word "probative" in the context of admitting hearsay on grounds of reliability is confusing to start. Reasonable necessity is a straightforward term that is used in a variety of contexts.

Reporter's comments on defects:

- There is no notice requirement.
- A reference to "traditional exceptions to the hearsay rule" is confusing. Which ones are those? It is especially problematic because the rule has already referred to the "foregoing exceptions." So is there a difference between the foregoing exceptions and traditional ones?

⁷ Only variations that make a difference are considered here.

2. Louisiana Code. Evid. Art. 804(b)(6):

Louisiana’s residual exception applies only in civil cases. It is a single sentence with over 100 words, so not a model of great drafting. The trustworthiness and necessity requirements are set forth as follows:

* * * if the court determines that considering all pertinent circumstances in the particular case the statement is trustworthy, and the proponent of the evidence has adduced or made a reasonable effort to adduce all other admissible evidence to establish the fact to which the proffered statement relates * * *

The Louisiana provision also requires notice to be in writing, and provides for a good cause exception for late notice.

Reporter’s comments on advantages:

It eschews the “equivalent circumstances of trustworthiness” language that can’t easily or predictably be applied given the varied and variable circumstances supporting admissibility under the categorical exceptions. The focus on the “particular case” and “all pertinent circumstances” seems useful to indicate that the enquiry is both wide and specific.

Reporter’s comments on defects:

- There is no specific mention of whether corroborating evidence can or cannot be considered by the court.
- The requirement that the proponent make an effort to “adduce all other admissible evidence” is a stricter requirement than even that imposed by Rule 807. Rule 807 requires an attempt to obtain evidence that is equally or more probative than the hearsay. Louisiana requires an attempt to obtain all “admissible” evidence even if it is less probative than the hearsay.

3. Montana Rules of Evidence 803(24) and 804(b)(5):

A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.⁸

⁸ Wisconsin’s residual exception is identical to Montana’s. Wisconsin adopted the Federal model before it went to Congress. So the Advisory Committee’s proposals became the rules in Wisconsin, making Wisconsin a kind of laboratory for how the Federal Rules would have worked if Congress hadn’t messed around with them.

Reporter's Comment:

This is identical to the Advisory Committee's original version of the residual exceptions that was submitted to Congress. The Montana drafters remark that the "more probative" requirement added by Congress is misguided because the restriction "would have the effect of severely limiting the instances in which the exception would be used and would be impractical in the sense that a party would generally offer the strongest evidence available regardless of the existence of the requirement." There is much to be said for that comment. It is odd to allow a court under an evidence rule to tell the litigant that "there is other evidence that is as strong or stronger than what you have presented to me, so go and get that." Shouldn't the litigant have the autonomy to figure out what evidence it wants to put in, so long as it is probative and reliable?

The Montana drafters rejected the requirement of materiality because it is "redundant in requiring relevance as defined in Rule 401." And it rejected the interests of justice requirement because it was "unnecessarily repetitive in view of Rule 102."

The Montana Committee also preferred the Advisory Committee's word "comparable" to Congress's word "equivalent." The former was considered more flexible than the latter. And there is something to that, because it is difficult to say, for example, that a bystander's trustworthy statement made an hour after an event is "equivalent" to an excited utterance or present sense impression, because by definition it is neither. But it might be easier to find such a statement "comparable" with those standard exceptions.

All in all, Montana did a pretty good job of critiquing Congress's changes to the Advisory Committee's proposal.

4. Nevada Stat. Ann. 51.075 and 51.315:

Availability Immaterial Exception:

1. A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though the declarant is available.
2. The provisions of [the categorical hearsay exceptions for which availability is immaterial] are illustrative and not restrictive of the exception provided by this section.

Unavailability Exception:

1. A statement is not excluded by the hearsay rule if:
 - (a) Its nature and the special circumstances under which it was made offer strong assurances of accuracy; and
 - (b) The declarant is unavailable as a witness.

2. The provisions of [the categorical exceptions conditioned on unavailability] are illustrative and not restrictive of the exception provided by this section.

Reporter's comments:

1. Nevada still uses the “Rule 803(24)/Rule 804(b)(5)” dual residual exception. The Federal Rules originally had two identically worded residual exceptions; the “more probative” requirement applied to both. The way the Nevada rules work is less limiting than the federal rule; it is an improvement on the problematic “more probative” language. Assuming reliability, if the declarant is unavailable, that is the end of the inquiry --- the court is not required to determine whether the hearsay is more probative than other evidence from someone other than the declarant. If the declarant is available, once again the focus is on alternative evidence coming from the declarant only --- the question is whether it is worth it to call the declarant to the stand, not whether there is other evidence that can prove the point. As discussed in a previous memo, the Federal “more probative” requirement is problematic because it requires assessment of all reasonably available evidence even from sources outside the declarant.

2. The Nevada provision is less tethered to the standard exceptions than the federal model. There is no requirement of finding “equivalent” circumstantial guarantees of trustworthiness. The standard hearsay exceptions are merely “illustrations.” Arguably this can lead to a more flexible use of the residual exception. Experience under the Nevada residual exception does not appear to indicate overuse --- there are only a handful of reported cases in which a Nevada court found a statement admissible under the exception. But there are some interesting cases in which the residual exception is used to admit hearsay that cannot be admitted under other exceptions. See, e.g., *McDermott v. State*, 2015 WL 1879764 (Nev. App.) (inventory list not admissible as a business record because it was prepared for purposes of litigation; but it was admissible as residual hearsay because it was reliable and corroborated).

3. The Nevada trustworthiness language would not appear to allow the court to consider corroborative evidence, as it refers to the special circumstances under which the statement was made (i.e., the circumstantial guarantees surrounding the statement). But as seen in *McDermott*, *Id.*, Nevada courts appear to be considering corroborating circumstances anyway.

5. Oklahoma Stat. Ann. Tit 12 section 2804.1:

Hearsay Exception --- Exceptional Circumstances

A. In exceptional circumstances, a statement not covered by [the standard exceptions, referred to by number] but possessing equivalent, though not identical, circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the court determines that:

1. The statement is offered as evidence of a fact of consequence;
2. The statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and
3. The general purposes of this Code and the interests of justice will best be served by the admission of the statement into evidence.

B. The court shall state on the record the circumstances that support its determination of the admissibility of the statement offered pursuant to subsection A of this section.

C. A statement is not admissible under this exception unless its proponent gives to all parties reasonable notice in advance of trial, or during trial if the court excuses pretrial notice for good cause shown, of the substance of the statement and the identity of the declarant.

Reporter's comment:

1. Oklahoma tries to make it clear in the text that the rule is to be used only in exceptional circumstances --- unlike the federal model, where the courts rely on legislative intent for a narrow application of the residual exception. If anything, this is worse than the Federal Rule because it actually requires the court, by the text of the rule, to figure out whether, say, a bystander's statement, or a report to a police officer, or a consumer complaint, is "exceptional." Does "exceptional" mean it rarely happens? Does it mean that the statement must be amazing? It seems to be content-free except for a general caution to construe the exception narrowly.

2. The Oklahoma notice requirement specifically provides for a good cause exception.⁹

6. Puerto Rico R. Evid. 64(B)(5):

Other exceptions. --- A statement having circumstantial guarantees of trustworthiness, if it is determined that:

(i) the statement is more probative on the point for which it is offered than any other evidence which the proponent may procure through reasonable efforts; and

(ii) the proponent notified the adverse party sufficiently in advance his intention to offer the statement, and the particulars of it, including the name and address of the declarant.

⁹ Oregon also provides for a good cause exception, requiring notice "sufficiently in advance of the trial or hearing, or as soon as practicable after it becomes apparent that such statement is probative of the issues at hand, to provide the adverse party with a fair opportunity to meet it." Ore. R. Evid. 803(28).

Reporter's comments:

1. The Puerto Rico rule has the virtue of rejecting the equivalence analysis and simply requiring circumstantial guarantees of trustworthiness. But it is problematic in that it does not mention corroboration.

2. The notice requirement is written flexibly so that the triggering point is not the trial, but whether it is “sufficiently in advance.” This seems vague and may well be subject to disputes by the parties.

What is to be learned from the states?

There are at least three useful takeaways from the state experience.

1. There is a concern in many states that *any* allowance of residual hearsay will lead to unwarranted discretion, unpredictability, and erosion of the standard exceptions. Similar concerns may well arise at the Federal level in response to any attempt to promote and *expand* the use of residual hearsay.

2. The states have found various ways to improve upon the “more probative” language used in Federal Rule 807. The problem with the “more probative” language is that it requires a comparison of the hearsay statement to all other evidence that can be reasonably obtained to prove the point. Thus the court must compare statements from other people, records, videos, etc. to the hearsay statement, which is often like comparing apples and oranges. Some of the states limit the comparison to other evidence coming from the *declarant* --- such as production of the declarant at trial. Other states dispense with the “more probative” requirement entirely. The state versions indicate that work might usefully be done in amending the federal “more probative” requirement.

3. Some states have rejected the other comparison-based language in the rule --- equivalent circumstantial guarantees of trustworthiness. The Advisory Committee has already tentatively approved a similar departure. The benefit of rejecting an “equivalence” standard is that the court can proceed directly to what should be the fundamental inquiry --- whether the hearsay statement is trustworthy --- and not get distracted by having to refer to standard exceptions that are not only variant but often in no way comparable to the proffered hearsay statement. Abandoning equivalence might send a signal that the court’s trustworthiness analysis can be more freeform and less restricted than in the past.

B. Is Reliable Hearsay Offered Under Rule 807 Being Excluded?

When the Advisory Committee's working draft of an expansion to Rule 807 was presented to the Standing Committee, a member asked "Is this necessary?" The answer would be yes if reliable hearsay offered under Rule 807 is being rejected by the courts --- either because the court is setting too high a standard of trustworthiness, or is applying some other requirement in Rule 807 that is getting in the way of admitting reliable and necessary hearsay. So one way to try to figure out whether an expansion is needed is to review how courts in reported cases have treated hearsay proffered under Rule 807.

It must be recognized, though, that a review of reported cases provides a skewed database. This is so for a number of reasons. Many if not most court exclusions of evidence at trial go unreported. Also, the issue might be decided in an unpublished order in response to a motion for summary judgment or a motion in limine. Appellate court decisions are a particularly skewed set, because they will not show instances in which the government in a criminal case offers evidence under Rule 807 and is rebuffed by the trial court. Moreover, even if the exclusion is reviewed in a reported appellate decision, the abuse of discretion standard skews the outcome because the appellate court is not holding that the evidence could not be admitted, but only that the trial court was not egregiously wrong in excluding it.

Finally, it is often difficult to assess, in reading a case, whether the proffered hearsay is actually reliable or not. There will be easy cases showing *unreliability*, such as a diary prepared by a party once litigation has begun. But often the description of the hearsay in an opinion does not provide enough about the circumstances or the strength of the corroborating evidence to draw a sound conclusion on whether the hearsay was reliable enough to be admitted.

The fact that case law provides at best a fuzzy picture of how a rule is operating is one of the most difficult challenges of rulemaking. Are there alternative sources of empirical data? Here are some possibilities:

- In some cases, it might be appropriate to resort to surveys of courts and litigants to try to see how a rule is working, and also to see from survey participants how a proposed amendment might play out. The Advisory Committee did have the FJC conduct a survey before it proposed an amendment to Rule 801(d)(1)(B) --- but the survey questions and answers were pretty abstract and, frankly, the results were ambiguous enough so that they could have been (and were) used to support or attack the proposed amendment.
- Another source of empirical information comes from public comment --- but that comes after the rule is proposed (and so is not ideal) and also is often skewed by commenters whose interest is not good rulemaking but rather on how the amendment will affect their practice, client base, or interest group.
- Another source is the miniconference, which operates as a kind of focus group of experts, whose only agenda is to develop workable and useful rules. The Civil Rules Committee conducted many of these miniconferences as it worked to propose

amendments to the discovery rules. That model as developed by the Civil Rules Committee has now been taken up by the Evidence Rules Committee and has proved very useful in helping the Committee determine when rule amendments are warranted and when they are not.

In any case, while case law is not a perfect indicator of the need for a rule change, the reported cases are undeniably relevant to the enterprise.

And so I have read and summarized all reported cases in the past ten years in which a court has reviewed, with some analysis, a claim that hearsay is admissible under Rule 807.¹⁰ The results of my research are set forth in two case digests, which are appended to this Memorandum. One digest covers cases in which the proffered hearsay is admitted, and the other covers cases in which the proffered hearsay is excluded.¹¹

What are the takeaways from a review of all these cases?

1. That's a lot of cases: It's surprising how many times Rule 807 has been invoked. There are 114 reported cases in which the court seriously addressed a Rule 807 question and excluded the evidence. There are 71 cases in which the hearsay was found admissible under Rule 807. The fairly high volume of cases in which Rule 807 has been invoked indicates that it is an important rule, and so raises the level of necessity for an amendment if the Rule is not operating properly. It's not like a backwater rule for which error might be tolerated.

2. Courts are excluding more than admitting: It is not a scientific sample, but the case digest does go through about 200 cases over a 10-year period --- and the difference between numbers of exclusions versus admissions is pretty notable. Obviously there are a lot of possible causes for this disparity, but it provides at least relevant information that, by and large: 1) the residual exception is not being abused; 2) a good number of litigants with at least colorable claims that their hearsay is reliable are being rebuffed.

As the Reporter's notes to the cases indicate, there are a number of exclusions in which the courts impose very high standards: *clear* trustworthiness, *significantly* more probative, *truly exceptional*, *must compare favorably to a standard exception*, etc. There are a number of cases where the evidence as described looks quite trustworthy and yet the court, applying these strict and sometimes undefinable standards, excludes the evidence. And there are a number of cases in which the "more probative" requirement is used to exclude reliable hearsay that would actually

¹⁰ The search was limited to the last ten years because: 1) I have a life, of sorts; and 2) the search should be sometime post-*Crawford* because *Crawford* limited the use of the residual exception, at least in criminal cases.

¹¹ If the Committee wishes, I can keep updating these digests as I do for the *Crawford* line of cases. There is value in staying on top of this case law even if the Rule does not end up getting amended.

be helpful and even necessary to the proponent's case. So while more can be learned in public comment, it might be tentatively concluded that the residual exception in most courts is written and applied in such a way as to exclude reliable and necessary hearsay. What can at least be said is that there is no evidence that the residual exception is being used widely to undermine the standard hearsay exceptions on a regular basis. Contrary to the belief of some law professors, the residual exception is not being applied broadly and it is definitely not swallowing the hearsay rule.

3. *The equivalence standard is troublesome:* The cases indicate that the Committee was correct in tentatively agreeing to scrap the equivalence language in Rule 807. As seen in the case digest, the equivalence standard has resulted in serious problems of application, and has taken many courts away from the task of determining whether the proffered hearsay is actually reliable. And it is outcome-determinative. If the court wants to reject a statement, it compares the hearsay to an exception which is based on different guarantees of trustworthiness than those provided in the proffered hearsay, and then hold that there is no "equivalence." If on the other hand the court wants to admit a statement, it compares the hearsay to the lamest exceptions, such as Rule 803(16), and concludes that the hearsay is at the very least equivalent to that. Some courts compare the proffered hearsay to exceptions that the Rule does not itself list as a comparable (because not located in Rules 803 or 804), such as an agency-statement. Thus, the equivalence test complicates and obfuscates the goal of the enterprise, which is to determine whether the proffered hearsay is actually reliable.

4. *The more probative standard is troublesome:* The more probative standard has led to all sorts of weird outcomes, allowing some courts to exclude the hearsay if there is any evidence from any reasonably available source that might prove the point, even if the evidence is different in character, and even if it has *not yet been obtained* and so can't really be assessed for trustworthiness or "probativeness." The more probative language switches control from the party, who should have the autonomy to decide which of two pieces of reliable evidence it should present --- or whether to present both. Besides this transfer of power to pick among sources of valid evidence, the more probative language allows the court to tell the party when he has enough other evidence to prove a point --- and that point is not when the other evidence becomes cumulative, but rather when one piece of evidence is "more probative" than the other. The more probative requirement cannot be justified as grounded in necessity, because counsel will often need the so-called less probative hearsay to submit it together with the more probative evidence in order to make an evidentiary whole that is greater than the sum of its parts. The presumptuousness of the "more probative" analysis is remarkable in some of the cases in the case digest.

Essentially, the case review supports the Reporter's argument made at the last meeting that the "more probative" requirement be cut back. As a result, the Reporter is making a "motion to reconsider" the proposal to amend the "more probative" language. The discussion on amending the more probative requirement is set forth in Part IV, below.

5. The “rare and exceptional” language from the legislative history is troublesome: To a number of courts, the phrase “rare and exceptional” is part of the text of the rule rather than just legislative history. The case digest shows a number of cases in which the court essentially ignored the language of the rule and proceeded to the question of whether the proffered hearsay was “exceptional” --- whatever that means. To say something like “a bystander’s statement about an event is not exceptional” totally misses the point --- which is to determine whether the statement is trustworthy. “Exceptional” was never intended to be a substitute for a trustworthiness analysis.

One question might be how to prevent courts from using an “exceptionalist” test instead of reviewing for trustworthiness. It seems odd to amend the text of the rule to solve this problem, because the language is not even in the rule. Perhaps the loosening up of the standards that the amendment would provide, including the Committee Note indicating an interest in expanding, would be enough to stop courts from applying an “exceptionalist” standard. But it may be worth being more direct, and adding something to the Committee Note that shows an intent to reject an “exceptionalist” review of the proffered hearsay. The draft Committee Note, set forth above, makes such an attempt.

6. There is a dispute about whether the trustworthiness of the in-court witness should be taken into account: Assume that a witness is going to be called to relate a hearsay statement that the proponent proffers as residual hearsay. In the Third Circuit, the court will be required to consider whether the *witness* relating the statement is trustworthy. So for example, if the witness is a party, the court would consider that the witness has a motive to falsify, and so might relate a statement different from what the declarant actually said --- if the declarant actually said anything at all.

An example of a focus on the reliability of the witness is found in *United States v. Manfredi*, 2009 WL 3823230 (W.D.Pa. 2009). In a tax prosecution, the defendant sought to show that he had a tax-free source of income --- monetary gifts from his father. To prove this he sought to introduce testimony from his aunt that she spoke to the father when he was hospitalized, and the father said that he had given his son and daughter-in-law “more money than they would ever need.” The court found that the father’s statement was not admissible as residual hearsay. In so holding, the court stated that the trustworthiness evaluation requires consideration of who the *witness* is, and here the aunt was biased in favor of her nephew and so may have been lying about whether the statement was ever made. The district court in *Manfredi* relied on *United States v. Bailey*, 581 F.2d 341, 349 (3rd Cir. 1978), in which the court directed district courts to consider “the reliability of the reporting of the hearsay by the witness” in determining trustworthiness under Rule 807.

This focus on the witness is misguided. The testifying witness’s credibility is a question for the jury, not the judge. The hearsay question is whether the out-of-court statement is reliable. The reliability of the in-court witness is not a hearsay problem because that witness is testifying under oath and subject to cross-examination about what they heard. That point has been recognized by most courts. See, e.g., *Rivers v. United States*, 777 F.3d 1306 (11th Cir. 2015) (“The fundamental question [for residual hearsay] is not the trustworthiness of the witness

reciting the statements in court, but of the declarant who originally made the statements.”); *Huff v. White Motor Co.*, 609 F.2d 286, 293 (7th Cir. 1979) (noting that the “witness can be cross-examined and his credibility thus tested in the same way as that of any other witness. It is the hearsay declarant, not the witness who reports the hearsay, who cannot be cross-examined.”). It appears that the Third Circuit is alone in requiring an assessment of the reliability of the in-court witness under Rule 807.

If Rule 807 is to be amended, it might be useful to address the conflict in the courts about whether the reliability of the witness should be considered in the trustworthiness enquiry. It would of course be useful to have a uniform approach --- and it would be also useful on the merits to correct the Third Circuit’s misconception that the trustworthiness of the witness is part of the hearsay analysis. If such a change is to be made, it should probably be in the Committee Note. Adding a sentence of text (“But the trustworthiness of a witness relating the hearsay statement is not to be considered.”) might be problematic because the same question arises under *any* hearsay exception, and the same answer is given for every one --- the trustworthiness of the witness is a question for the jury, the trustworthiness of the declarant is the hearsay question for the court.

The “reliability of the witness” issue has been encountered by the Committee previously. During the amendment process for Rule 804(b)(3), the Committee found that a few courts were evaluating the “corroborating circumstances” requirement under that rule as requiring a review of the reliability of the witness. The Committee concluded that the focus on the witness was misguided, and decided that the question was best addressed in the Committee Note --- because addressing it in the text would raise a negative inference as to other exceptions where such language is not included. The pertinent passage in the 2010 Committee Note reads as follows:

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a statement on the witness’s credibility would usurp the jury’s role of determining the credibility of testifying witnesses.

As the case digest shows, the courts have generally treated the corroborating circumstances requirement of Rule 804(b)(3) as mandating the same analysis as the trustworthiness requirement of Rule 807. That is, if a statement satisfies one it satisfies the other and if it fails one it fails both. It would follow that the same caution --- don’t consider the trustworthiness of the witness - -- should apply to both. And if that caution is in the Committee Note for one rule, it seems to make sense to include it in the other. Therefore, the proposed Committee Note above includes a statement that the credibility of the witness should not be considered.

7. *There is a dispute about using corroboration:* The case digests bears out what was discussed in a previous memo --- the courts are in dispute about whether to consider corroborating evidence in the trustworthiness enquiry. The cases show that most courts do rely

on corroboration; and they also show that *no* courts are holding that a hearsay statement is trustworthy *solely* because it is corroborated. This view, that corroboration is a factor but not the sole factor, is surely the correct result --- we rely on corroboration to determine trustworthiness virtually every day, there is no reason to disregard corroboration when it comes to residual hearsay.

It has been argued that relying on corroboration to find a statement trustworthy is nonsensical, because if the hearsay is corroborated it is unlikely to be more probative than any other evidence reasonably available --- the corroborating evidence would be equally probative as the hearsay.¹² But surely this is too simplistic. It is likely to be the case that the hearsay statement is fortified by the corroboration and the corroboration becomes stronger because of the hearsay statement. That is precisely what occurred in *Bourjaily v. United States*, 483 U.S. 171 (1987): a hearsay statement gave color to corroborating evidence and the corroborating evidence supported the reliability of the hearsay statement. As the Court put it: “The sum of an evidentiary presentation may well be greater than its constituent parts.” Moreover, it could well be that while corroborating evidence exists, the hearsay is in fact more probative. For example, assume a child reports an act of sexual abuse and identifies her father as the perpetrator. This statement is corroborated by medical evidence indicating that the child was abused. The medical evidence supports the truthfulness of the child’s statement, but the child’s statement is more probative on the point for which it is offered: that the father sexually abused the child. The corroboration is only partial; in that situation it is just silly to say that because you have corroboration, you don’t need the residual hearsay. And it is equally wrong to say that the corroboration should not be considered in the reliability inquiry --- the simple fact is that because we found out she is right about one fact, it makes it more likely that she is right about other asserted facts.

8. *The materiality requirement is useless:* The case review validates the Committee’s tentative decision to delete the materiality requirement of Rule 807. Out of the almost 200 cases reviewed, there wasn’t a single one in which the materiality requirement made a difference. Rather, it is little but a bureaucratic check-off, and tracks the relevance requirement exactly. There is no reason at all why a court must write an opinion in which it analyzes two admissibility requirements in exactly the same way.

9. *The interests of justice requirement is either useless or pernicious:* The case digest indicates that for the most part, the interest of justice requirement is superfluous, because it is found to be met when another requirement in the rule is met: for instance, admission is found to be within the interests of justice because the hearsay is trustworthy, or is more probative than any other evidence. See, e.g., *Royal & Sun Alliance Ins. PLC v. UPS Supply Chain Solutions*, 2011 WL 3874878 (S.D.N.Y.) (“The inclusion of the statement best serves the interest of justice, as the unfortunate fact that Crews succumbed to his injuries should not preclude IMSCO from introducing statements from the only available eyewitness.” --- but this is only to say that the

¹² See Sonenshein & Fabens-Lassen *supra*, at 728 (“if there is corroboration, then there is no significant need for the purported residual hearsay since there is other evidence on point”). Note that this argument becomes irrelevant if the “more probative” requirement is deleted, and diminished if the more probative requirement is limited to comparing the hearsay with other evidence from the declarant.

statement is more probative than any other available evidence). Or, admission is contrary to the interests of justice because the hearsay is unreliable and the opponent never got a chance to cross-examine.

If the interests of justice factor is simply superfluous, then it should be deleted for the same reason as the materiality requirement. But it turns out that in some cases, courts have invoked the interests of justice language to exclude residual hearsay that might be trustworthy. For example, in *Lakah v. UBS AG*, 996 F.Supp.2d 250 (S.D.N.Y. 2014), the court held that foreign bank records were not admissible under Rule 807. The proponents could not qualify the records under Rule 803(6) because they could not obtain a foundation witness or a certificate. The court held that it would be against “the interests of justice” for the court to use the residual exception to “end-run” the foundation requirements of Rule 803(6). The interests of justice language is being used by the court as a means to explain an exclusion without the court having to resort to an actual investigation of whether the hearsay is trustworthy. This led the court to a different result than other courts that have admitted foreign bank records under Rule 807. See *United States v. Turner*, 718 F.3d 226 (3rd Cir. 2013); *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362 (S.D.N.Y. 2014). In some courts, then, the interests of justice language might be used as a way for judges to apply their discretion independent of the reliability and necessity of the hearsay statement. All the more reason why the Committee’s decision to delete the interests of justice requirement appears to be justified.

IV. Motion to Reconsider: More Probative Than Any Other Evidence Reasonably Available

As discussed in the previous section, the “more probative” requirement is problematic because it requires the court to compare the hearsay to all available evidence that might exist; and then exclude if any of that evidence could be presented, even though it might be important for the proponent to present the hearsay together with that evidence to present an evidentiary whole.

Many problematic cases are found in the case digest excluding hearsay for failure to meet the more probative requirement. For example, in *Draper v. Rosario*, 2016 WL 4651407 (9th Cir.), a prisoner alleged that he had been beaten up by a prison guard. A witness to the event refused to testify because he feared reprisal. Counsel moved for the witness’s prior sworn statement to be admitted under the residual exception. The court of appeals found no error in its exclusion. It concluded that the district court properly found that the witness’s statement was not more probative than the testimony that would be provided by two *other* prisoners. The defendant argued that the residual hearsay was more probative because that prisoner had a better vantage point. The court explained and responded as follows:

Draper's counsel argued that Doe's testimony was unique because he “saw Mr. Draper put his foot against the bars to try to prevent his head and body from hitting the bars, [and] the witness was distinct that the foot move was defensive.” While the other prisoner witnesses (Shepard and Thompson) did not provide this exact account, they both testified that Draper was at no time resisting Rosario and that Rosario was the aggressor. On this record, the district court reasonably concluded that Doe's statement about Draper's defensive foot move was not significantly more probative than the testimony already presented.

Let’s pass by the court’s holding that the residual hearsay was not *significantly* more probative than the statements from the other prisoners --- the word *significantly* is not in the rule, and the more probative requirement is hard enough to satisfy as written. The court is holding that the residual hearsay is not more probative even though the statement is more detailed and the declarant had a better vantage point.

But the problem of having courts weigh the strength of alternative evidence after the party has presumably done so is troubling. But the more serious problem presented by the more probative requirement is that the court is expected to compare the hearsay statement with *all* other reasonably available evidence on the point. That problem is shown in *Nance v. Ingram*, 2015 WL 5719590 (E.D.N.C.), a case in which the plaintiff alleged that a sheriff interfered with the plaintiffs’ business after the plaintiffs’ contributed to the sheriff’s opponent in a campaign. The plaintiffs offered a hearsay statement from an official (now deceased) who attended a department meeting and told one of the plaintiffs about a directive issued by the sheriff that would harm their business. The court held that the hearsay statement was not admissible under Rule 807, because “there are a number of other witnesses from whom plaintiffs could obtain

similar evidence with reasonable efforts. For example, plaintiffs could have deposed or sought affidavits from other attendees of the BCSO department meeting or from any one of the former patients who allegedly left plaintiffs' healthcare practice due to defendant Ingram's directive.”

The problem with the “more probative” requirement here is that the court is allowed to hypothesize other sources of evidence that can be used to prove the point. Who’s to say that these witnesses, if they exist, would have the same account of that directive when interviewed years later? Who’s to say if the people affected by the directive --- who didn’t even hear the statement --- would provide useful information in proving the sheriff’s culpability? It’s as if the more probative requirement allows the court to tell the lawyer how to try her case.

All this is not to challenge the point that the residual exception should contain a necessity requirement. But the question is, to what should the residual hearsay be compared in order to assess necessity? Surely the most straightforward test is the one used in the necessity-based hearsay exceptions found in Rule 804 --- is the *declarant* available to give testimony that is better evidence than their hearsay statement? It gets complicated, intrusive, and harsh when the inquiry is taken further --- as it is in Rule 807 --- and necessity is based not only on declarant availability but also on availability of any other evidence from any source.

The hearsay rule is concerned about live testimony from the *declarant*, not testimony from alternative sources on the same subject matter. (An excited utterance is not excluded because there is other evidence that can be presented). Thus, if the other evidence available comes from other witnesses or documents, there is a lot to be said for a rule allowing the proponent to elect whether to offer reliable hearsay in lieu of that other evidence. Forcing the proponent to seek out that other evidence, or to establish that it is not as probative as the residual hearsay, seems outside the concerns of the hearsay rule --- and runs contrary to the basic principle that the parties get to choose which admissible evidence to present.

Prior Committee decision:

At the last meeting, as discussed above, the Committee decided to retain the more probative requirement of Rule 807, because it would preserve the rule that proponents cannot use the residual exception unless they need it. But while there was a consensus that a more probative requirement should be retained, there was not a detailed discussion on whether it should be *modified*. In light of the case law found in the digest in which the more probative requirement leads to harsh results, the Committee may wish to consider, or reconsider, the possibility of amending the more probative language so that necessity is focused on whether there is any other evidence that can be obtained *from the declarant*. That would mean that Rule 807 could be used if the declarant were unavailable, even though there are other alternatives to proving the point for which the hearsay is offered. It would also mean that the hearsay could be introduced even if the declarant was available but, for some reason, the residual hearsay would be better evidence than the declarant’s in-court testimony. A possible example would be a residual hearsay statement from a child; the child’s trustworthy out-of-court statement concerning sexual abuse, for

example, is often considered under current law to be more probative because the child may not be able to communicate as well on the stand as he or she did out of court.¹³

An amendment that would focus on the declarant, rather than all other available evidence, might look like this:

(3) it is more probative on the point for which it is offered than any ~~other evidence-~~ testimony from the declarant that the proponent can obtain through reasonable efforts;

The Committee Note for that alteration of the “more probative” requirement might look like this:

The rule has been amended to narrow the “more probative” requirement. Under the original rule, the proponent was required to show that there was no reasonably available evidence from any source that was as probative as the proffered hearsay. Under the amendment, the only source that needs to be assessed is the declarant. This narrowing avoids an often “apples and oranges” comparison of evidence, and allows the residual exception to be used somewhat more freely, but without sacrificing the basic preference of the rule against hearsay for live testimony from the declarant.

Under the amendment, the proffered hearsay will usually be inadmissible under Rule 807 if the declarant is available to testify. In some cases however, the proponent may be able to establish that the hearsay is more probative than in-court testimony from the available declarant. For example, if the declarant is a child who has made a trustworthy statement about a traumatic event, that statement might be more probative than subsequent in-court testimony from the child.

¹³ See, e.g., *United States v. St. John*, 851 F.2d 1096 (8th Cir. 1988) (child-witness was hampered by developmental problems, and his verbal abilities were overcome by the courtroom setting and the delicate nature of the material to which he was attesting; “Under these circumstances, we are unwilling to hold that a child victim’s testimony is always more probative than the prior hearsay statements he or she may have made in the more relaxed environs of a doctor’s or social worker’s office.”).

V. Might an Amendment be Justified Even in the Absence of Strong Empirical Showing that Reliable Hearsay is Being Excluded?

As suggested above, the case digests can be read to support the proposition that the residual exception is being applied in such a way that reliable hearsay is being excluded --- even though the goal of the exception was to admit reliable hearsay. But even if the case digest does not fully answer the question of whether an expansion of the residual exception is “necessary,” an amendment might well be supportable on the basic grounds of good rulemaking.

The following changes to the rule could be justified as improving the operation of the rule and providing uniformity:

1. Deleting the equivalence requirement, for all the reasons stated above. That change does not necessarily result in an “expansion” of the exception. Rather it just allows courts to tackle the trustworthiness question head-on, without trying to compare what is often incomparable.

2. Amending the trustworthiness requirement to specify that corroboration must be considered. This change would provide uniformity and would not necessarily result in any expansion of the exception.

3. Deleting the requirements of materiality and interests of justice, for all the reasons stated above. Of course, one reason for deleting these requirements is that they were added by Congress to give a signal, and deleting them would give the opposite signal. But independently of that, there is every justification for deleting them because they are superfluous and, in the case of the interests of justice requirement, a possible invitation to unwarranted judicial discretion instead of a meaningful review of the hearsay’s trustworthiness.

4. Adding a paragraph to the Committee Note to instruct that the credibility of the witness is not part of the reliability inquiry. This would promote uniformity and is not particularly related to any expansion of the residual exception.

5. Adding a paragraph to the Committee Note instructing that the “rare and exceptional” language is not part of the rule itself and is not intended as a test to substitute for trustworthiness. This would help to prevent courts from getting trying to use “exceptional” as an admissibility requirement, when the test should be whether it is trustworthy. (But unlike the other possible changes discussed, it must be admitted that a negative comment on this iconic phrase might be interpreted as a signal that the exception is expanded).

6. Amending the more probative requirement to focus on the declarant, not on all other evidence. This could be supported as good rulemaking because a broader inquiry has been shown to lead to unsatisfactory results that overlook the fact that the proponent often needs the hearsay for an effective presentation despite the existence of available evidence from third parties. (Though again this will mean that more hearsay will be admissible so it would look like an expansion).

7. Amending the notice provision --- which has nothing to do with expanding the exception itself.

In sum, the Committee may wish to go forward with most or all of the proposed amendments to Rule 807 even if the case for expanding the exception to cover more hearsay is still subject to argument. The difference would be in the Committee Note.

A “non-expansion” “good rulemaking” Committee Note might look something like this:

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying the rule.

Courts have had difficulty with the requirement that the proffered hearsay carry “equivalent” circumstantial guarantees of trustworthiness. The “equivalence” standard is difficult to apply, given the varied and different guarantees of reliability found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). Experience has shown that residual hearsay often cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been abrogated. Under the amendment, the court is to proceed directly to a determination of whether the hearsay is trustworthy under the particular circumstances.

The amendment specifically allows the court to considering corroborating evidence in the reliability enquiry. Most courts do allow consideration of corroborating circumstances, though some do not. This provision provides for a more uniform approach, and recognizes that the existence or absence of corroboration is relevant to whether a statement is true.

The legislative history of the original rule indicated that use of the residual exception should be left for “rare and exceptional” cases. That phrase in the legislative history has led some

courts to exclude proffered hearsay because it is not “exceptional.” The word “exceptional” is not in the text of the rule, and it should not be used to exclude otherwise trustworthy hearsay.

The rule requires the court to determine whether the hearsay statement is trustworthy. In doing so, the court should not consider the credibility of a witness who relates the declarant’s hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness’s credibility would usurp the jury’s role of determining the credibility of testifying witnesses.

The rule has been amended to refine the “more probative” requirement. Under the original rule, the proponent was required to show that there was no reasonably available evidence from any source that was as probative as the proffered hearsay. Under the amendment, the only source that needs to be assessed is the declarant. This narrowing avoids an often “apples and oranges” comparison of evidence, and allows the residual exception to be used somewhat more freely, but without sacrificing the basic preference of the rule against hearsay for live testimony from the declarant.

Under the amendment, the proffered hearsay will usually be inadmissible under Rule 807 if the declarant is available to testify. In some cases however, the proponent may be able to establish that the hearsay is more probative than in-court testimony from the available declarant. For example, if the declarant is a child who has made a trustworthy statement about a traumatic event, that statement might be more probative than subsequent in-court testimony from the child.

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proven to be essentially superfluous in that they are also found in other rules (e.g. 102, 401).

The notice provision has been amended to make three changes in the operation of the Rule:

- First, the Rule requires the proponent to disclose the “substance” of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the “substance” of the evidence). Prior case law on the obligation to disclose the “particulars” of the hearsay statement may be instructive, but not dispositive, of the proponent’s obligation to disclose the “substance” of the statement under the Rule as amended. The prior requirement that the declarant’s address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant’s address was known or easily obtainable. If prior disclosure of the declarant’s address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.

- Second, the Rule now requires that the notice be in writing --- which includes notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

- Finally, 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 under Rule 807 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 hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent must then resort to residual hearsay. Where notice is provided during the trial, the general requirement that notice must be in writing need not be met.

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 argument that is necessary to counter hearsay offered under the residual exception.

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APPENDIX 1

Case Digest: Hearsay Proffered Under Rule 807 Excluded 2006-Present

By Daniel J. Capra

Note: The cases are grouped by which admissibility requirement was predominantly discussed by the court. Within those subject matters the cases are listed by date, with the exception of multiple cases discusses a common point, which are grouped together.

I attempted to include all reported cases with a meaningful discussion of a Rule 807 admissibility requirement, in which the proffered hearsay was excluded by a trial court or was found by an appellate court to be excludible.

Cases involving notice are generally not included as they have already been reviewed when the Committee worked through a proposal to modify the notice requirements of Rule 807.

I. TRUSTWORTHINESS

Trustworthiness: Corroboration irrelevant

United States v. Stoney End of Horn, 2016 WL 3853808 (8th Cir.): In an aggravated assault prosecution, the trial court allowed the victim's former husband to testify that the defendant had beat her up. The court held that the hearsay statement was admissible under Rule 807, but the court of appeals reversed, holding that the trial court had not sufficiently explained what guarantees of trustworthiness supported the statement. The government defended the ruling by arguing that other evidence at trial corroborated the hearsay statement, but the court contended that corroboration has no place in the Rule 807 trustworthiness enquiry. It argued as follows:

Statements admitted under the firmly rooted hearsay exceptions enumerated in Rule 803 and 804—for example, dying declarations, excited utterances, or statements made for medical treatment—are “so trustworthy that adversarial testing would add little to their reliability.” *Idaho v. Wright*, 497 U.S. 805, 821 (1990), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004). According to the theory of the hearsay rule, this trustworthiness must be gleaned from circumstances that surround the making of the statement and that render the declarant particularly worthy of belief, not by bootstrapping on the trustworthiness of other evidence at trial.

Reporter's comment: Most courts *do* consider corroboration as relevant to trustworthiness under Rule 807, and for good reason. Corroboration tends to assure that the declarant is telling the truth, which is the basic enquiry for residual hearsay (indeed any hearsay). The Court's reliance on *Idaho v. Wright* is questionable because *Wright* dealt with the Confrontation Clause

and not Rule 807. Finally, to the extent the court is concerned about “equivalence” with the standard exceptions, there are in fact other exceptions that rely on corroboration for admissibility --- most importantly Rule 804(b)(3). This is not to say that a statement can or should be admitted under Rule 807 *solely* on the basis of corroboration --- a largely academic question because if corroboration is the sole support of the statement it is likely to be excluded as not being more probative than any other evidence anyway.

Trustworthiness: Product tests by consultants made in anticipation of litigation

World Kitchen LLC v. American Ceramic Society, 2016 WL 3568723 (N.D.Ill.): In a case alleging misrepresentations regarding the heating capacity of certain cookware, the plaintiff sought to admit reports prepared by consultants who tested the cookware. The court held that the reports failed the trustworthiness requirement of the residual exception, because they were “prepared in anticipation of litigation and at the direction of Plaintiff’s counsel.”

Trustworthiness: Litigation affidavit

Cohen v. Cohen, 2016 WL 2946194 (S.D.N.Y.): In a case involving alleged fraudulent hiding of assets, a party sought to prove certain transfers by offering an affidavit made in a prior litigation by a party to that litigation. The court held that the affidavit was not admissible under the residual exception because “the Lurie Affidavits are internally inconsistent litigation documents authored by a fraud felon at a time when he had a motive to falsify and which were effectively withdrawn only a few weeks after filing. Thus they bear none of the ‘circumstantial guarantees of trustworthiness’ essential to admission under the residual exception of Rule 807.”

Trustworthiness: Statement of injured person on how he would have acted if he had been warned

Batoh v. McNeil-PPC, Inc. v. 2016 WL 922779 (D.Conn.): Kimball developed rare and extremely painful skin conditions after taking one dose of Motrin. Over a year later, overcome by continued pain and suffering from these conditions and the damage they had done to his life, Kimball killed himself. His mother, Batoh, sued the manufacturer of Motrin claiming that the Motrin Kimball took contained inadequate warnings. Batoh sought to admit statements that Kimball made to her and his brother, to the effect that if he had been adequately warned about the dangers of Motrin, he never would have taken it. The court found that Batoh had not established that Kimball’s hearsay statements were sufficiently trustworthy to be admissible as residual hearsay:

There is little evidence in the record about the circumstances under which Kimball made the statements to his mother and brother. In her deposition, Batoh testified that the conversation occurred “within several months after he got out of the hospital,”

and that the only thing that was said in the conversation was Kimball's statement that "if [the label] had been more specific and he'd had more information than what was on there, that he would not have taken [the Motrin]." As for the statement reported by Kimball's brother, there is no evidence of the circumstances other than that it occurred sometime after Kimball developed [the disease]. There is no evidence about Kimball's mood or demeanor when he made these statements, the time of day the conversations took place, the location at which the conversations occurred, the presence of any other witnesses, or any circumstances that might have prompted him to discuss the Motrin label. Further, what little evidence there is in the record about other subjects Kimball was discussing around the same time, if anything, weighs against a finding of trustworthiness: Batoh testified that "a couple months after his October 2010 hospitalization," Kimball brought up the possibility of bringing a lawsuit based on his condition and told her that "he had called a lawyer." This is at least a suggestion that the statement was made in the context of conversations about possible litigation—a suggestion of untrustworthiness. See *Greco v. Nat'l R.R. Passenger Corp.*, 2005 WL 1320147 (declining to admit under Rule 807 written statement created by decedent "at the prompting of the attorney for his estate"). * * *

Batoh argues further that the statements are trustworthy because Kimball died before this litigation began and therefore "had no reason to lie about reading the Motrin label, or in stating that an adequate warning would have altered his behavior." First, having "no reason to lie" does "not amount to a circumstantial guarantee of trustworthiness." *United States v. Wilson*, 281 Fed.Appx. 96, 99 (3d Cir.2008) ("Before the District Court, Wilson's primary argument in favor of admission of the private investigator's testimony was that Renee Russell had 'no reason to lie,' and he now argues that a person 'speaking to a stranger about a matter in which they have no involvement or interest, will generally make truthful statements.' This is not an 'exceptional guarantee of trustworthiness.' "). Second, while the evidence of timing is vague on this point, too, the suggestion that the statement to Batoh was made around the same time that Kimball was contemplating litigation is at least some evidence of a motive, if not to lie, then to shape his memories to fit the contours of a legal claim.

In short, Batoh has failed to identify any circumstances in the record that make the statements Kimball made to Batoh and Timothy Kimball especially trustworthy. And when the statements are measured against the factors that some courts have considered to determine trustworthiness under Rule 807, they do not fare well. Those factors include whether the declarant was under oath; the voluntariness of the statement; whether the statement was based on personal knowledge; whether the statement contradicted any previous statement; whether the statement was preserved on videotape to provide the jury an opportunity to evaluate the declarant's demeanor; the declarant's availability for cross-examination; the statement's proximity in time to the events described; whether the statement is corroborated; the declarant's motivation to fabricate; whether the statement was prepared in anticipation of litigation; the statement's spontaneity; and whether the declarant's memory or perception was faulty. In this case, when the scant evidence about the statements is viewed in the light most favorable to Batoh, it would permit a finding that the statements were voluntary, based on personal knowledge, and not contradictory.

But virtually none of the other factors cited would support their admission. The statements were not under oath or video-taped; they were made either “several months” or at some other unspecified time after the events described; they are not corroborated; there was at least a motivation to shape the statements, if not to fabricate; there was no opportunity to cross-examine; and there is some suggestion that the statements were made in anticipation of litigation.

Trustworthiness --- employee’s statement favoring the county in a county investigation

County of Stanislaus v. Travelers Indemnity Co., 142 F.Supp.3d 1065 (E.D. Ca. 2015): In a case involving an environmental contamination, the plaintiff offered a statement given by its employee to county investigators; the statement, about the possible cause of the contamination, favored the company. The court found that the statement was not admissible under Rule 807 because the county had not established its trustworthiness. The court was concerned that the statement was not under oath, and it was made in an investigation that was initiated by the county itself.

Trustworthiness: Business records not qualified by a foundation witness

Bryndle v. Boulevard Towers, II, LLC, 132 F.Supp.3d 486 (W.D.N.Y. 2015): The plaintiff slipped and fell on the defendant’s driveway, and sought to admit business records of a third-party contractor to show that work had been done on the driveway. But the plaintiff made no attempt to obtain a foundation witness to qualify the records. The plaintiff argued that the records were admissible without a foundation witness under Rule 807. But the court disagreed. The court was concerned that if the plaintiff were correct, the foundation witness requirement of Rule 803(6) would be evaded and eroded by use of Rule 807. It explained as follows:

Rule 807 is not intended to address situations already covered by Rules 803 or 804, such as the business record exception to hearsay recognized by Rule 803(6). *See, e.g., Glowczenski v. Taser Int’l Inc.*, 928 F.Supp.2d 564, 573 (E.D.N.Y.2013) (Rule 807 inapplicable where evidence specifically covered by Rule 803(18)). Rather, as indicated by the express language of Rule 807, it pertains to statements that are “not specifically covered by a hearsay exception in Rule 803 or 804.” * * *

Here, Plaintiff could have sought to establish the admissibility of the invoices through a certification from an employee of K.J. Contracting or testimony at a deposition through the use of a third-party subpoena. Furthermore, Plaintiff could have questioned Defendant's representatives at their depositions about the invoices and Defendant's representatives may have been able to fulfill the requirements of Rule 803(6). * * * In

other words, Plaintiff had a variety of tools at his disposal to authenticate and lay the foundation for these invoices, but he failed to avail himself of these opportunities. Plaintiff offers no argument in response to Defendant's motion to strike as to why he did not, through discovery, establish the admissibility of the K.J. Contracting invoices. As a result, the court will not consider them.

Reporter's comment: In the digest of cases admitting residual hearsay, there are a number of cases in which courts admitted business records where the party failed or simply didn't try to obtain foundation testimony.

Trustworthiness: Statements from patients regarding business dispute

Southern Home Care Services, Inc. v. Visiting Nurse Services, Inc. of Southern Connecticut, 2015 WL 4509425 (D.Conn.): In a dispute over whether the defendants (former employees) were "poaching" patients who were being treated for mental and physical disabilities, the plaintiffs offered statements made by patients who were interviewed by caretakers employed by the plaintiffs. These statements indicated the defendants were soliciting their business. The court found that the patient's statements were insufficiently trustworthy to qualify as residual hearsay:

The Second Circuit has cautioned that the residual exception applies "very rarely, and only in exceptional circumstances." *Parsons v. Honeywell, Inc.*, 929 F.2d 901, 907 (2d Cir.1991). The circumstances here are not exceptional. ResCare argues that "the statements came from patients with no motivation for insincerity," but insincerity is not the only evil the hearsay rules address. Excluding hearsay also guards against faults in the declarant's perception, memory and narration. *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 232–33 (2d Cir.1999). Nothing suggests the patients in this case are better perceivers, recallers and narrators than the ordinary hearsay declarant. Moreover, they gave their statements while being interviewed by questioners who had a stake in the answers. Given the patients' mental condition and the possibility that their statements were influenced by the power of suggestion, the statements are not unusually reliable.

Trustworthiness: Statements made hours after an accident

Prescott v. R & L Transfer, Inc., 111 F.Supp.3d 650 (W.D.Pa. 2015): After a car and a truck collided, the truck driver involved made a number of statements to various individuals, including a fellow driver and his wife. These statements ranged from 2-7 hours after the accident. The court found these statements were not sufficiently trustworthy to be admissible as residual hearsay.

Importantly, Mead's statements were not made under oath and he was never deposed or subject to cross-examination concerning his statements. Instead, the hearsay statements

were made during a phone conversation several hours after the accident. While the conversations * * * occurred during the morning following the accident, Mead had an opportunity during that interval of time to reflect on what he had observed. It is this interval of time and opportunity to reflect and fabricate that render the excited utterance and present sense impression exceptions inapplicable. For the same reason, the residual exception should not apply.

Reporter's observation: The result is probably correct because the proponent made little effort to qualify the statements other than by arguing that they were made close in time to the event. But the analysis here implies that because the statements were not admissible under Rules 803(1) or (2), they were not admissible under Rule 807 either. That analysis cannot be correct, because the very reason for the residual exception is to admit reliable statements that don't fit a standard hearsay exception.

Trustworthiness: Plea allocutions

Garnett v. Undercover Officer, 2015 WL 1539044 (S.D.N.Y.): The court held that statements in one defendant's plea allocution, implicating the other defendant, could not be admitted under Rule 807, because they were insufficiently trustworthy. The court elaborated as follows:

First, Mr. Cintron had reason to curry favor with the prosecution by implicating [the other defendant] in the drug transaction in the hopes of receiving a more favorable plea deal. Second, while the plea was submitted under oath before a judge, the statements were not subject to cross-examination by [the other defendant] or anyone else, as they would be in the context of a trial or deposition, as neither [the other defendant] nor his counsel were present during the plea allocution.

Reporter's comment: See *Levinson v. Westport National Bank*, 2013 WL 2181042 (D.Conn.), discussed in the case digest on admitted residual hearsay, in which the court comes to the opposite conclusion on the admissibility of plea allocutions.

Trustworthiness: Defense counsel's hearsay statements about representing a client

United States v. Rivers, 777 F.3d 1306 (11th Cir. 2015): After he was convicted of narcotics offenses, Rivers filed a motion to vacate, alleging ineffective assistance of counsel. The complaint was that the lawyer never discussed the strength of the government's case, or the possibility of plea bargaining or accepting a plea. At an evidentiary hearing, the lawyer for Rivers's codefendant (Rodriguez) at trial testified to conversations he had with Rivers's trial counsel, in which that counsel stated that he had reviewed the evidence with Rivers and discussed plea agreements with him. That testimony, of what Rivers's counsel said, was admitted under Rule 807. But the court of appeals found this to be error. The court first addressed the fact

that the parties and the lower court erroneously focused on the credibility of the *testifying lawyer*: this was incorrect because “a Rule 807 analysis must consider whether the declarant’s original statements now being offered in court have guarantees of trustworthiness given the circumstances under which they were first made. The fundamental question, therefore, is not the trustworthiness of the witness reciting the statements in court, but of the declarant who originally made the statements.” The court next noted that the only ground asserted for the reliability of the declarant’s statement was that it was being made to counsel for one of the declarant’s codefendants. The court evaluated this trustworthiness factor as follows:

Without more, this reasoning is insufficient to establish the equivalent circumstantial guarantees of trustworthiness that Rule 807 requires. Most notably, we do not believe that McComb’s statements are believable merely because he uttered them to counsel for his client’s codefendant. If McComb was providing constitutionally effective assistance of counsel, we agree with the district court that he would have had every incentive to tell the truth to Rodriguez. But if he was failing as completely as Rivers alleges, he would have had every incentive to dissimulate. In any event, to declare that statements made by an attorney to counsel for a codefendant are inherently trustworthy simply because they are made by a lawyer during the course of representing a criminal defendant is to say that even an attorney performing incompetently would not lie about it. Under the circumstances here, this Court will not assume that much. Ultimately, we do not believe that any amount of trustworthiness in the relevant circumstances here is equivalent to that of the specific hearsay exceptions, as required by Rule 807.

The court also emphasized “the near absence of corroborating evidence for these statements.” It conceded that “[t]he existence of corroborating evidence does not necessarily make hearsay evidence admissible under Rule 807” and that “corroborating evidence must be extraordinarily strong before it will render the hearsay evidence sufficiently trustworthy to justify its admission.” But on the other hand, the absence of corroborating evidence is a strong indicator that the statement does not meet the trustworthiness requirement of Rule 807.

Trustworthiness: Witness statement clarifying a deposition

Emhart Industries, Inc. v. New England Container Co., Inc., 2014 WL 5808390 (D.R.I): In a case involving an environmental cleanup, a central witness was deposed in an earlier litigation involving the same site. When this new litigation was brought, the plaintiff in this litigation interviewed that witness and the witness made a written statement under oath, clarifying and in some ways repudiating statements made in the earlier deposition. The court held that the written statement was not admissible under Rule 807 because it was insufficiently trustworthy. The court explained as follows:

The Cleary Statement was prepared while litigation was in full swing and while Emhart was formulating its expert strategy. Additionally, the involvement of Emhart's attorneys—to the exclusion of Defendants—in the preparation of the Cleary Statement undercuts its value; unsurprisingly, the culmination of the back-and-forth dialogue between Cleary and Emhart's attorneys is highly favorable to Emhart. *See Polansky v. CNA Ins. Co.*, 852 F.2d 626, 631 (1st Cir.1988) (finding abuse of discretion in admitting a letter under Rule 807 because, inter alia, it “was merely a self-serving statement written by a representative of the party who seeks its admission to prove the truth of what the letter implicitly asserts”).

Most importantly, Emhart elected to perpetuate Cleary's testimony in a manner that deprived Defendants of an opportunity for cross-examination. To be sure, the absence of crossexamination is not determinative in the Rule 807 analysis. But, in this case, Emhart's failure to depose Cleary looms large. When this case commenced in 2006, Cleary was over 90 years old. Emhart knew * * * that he was an important witness, yet it waited nearly two years before reaching out to Cleary. Moreover, when it finally did contact Cleary in late February 2008, Emhart did not promptly notice his deposition, but instead spent over a month compiling the Cleary Statement. Even after the Cleary Statement was executed, Emhart waited almost five more months before seeking to depose Cleary. By that point, it was too late. Although Cleary's death was untimely, it was hardly unforeseeable, and Emhart's choice to create the Cleary Statement—a process that excluded Defendants—in lieu of deposing Cleary—which would have afforded Defendants an opportunity for cross-examination—undermines the trustworthiness of the Cleary Statement.

The court also noted that the written statement's inconsistency with the earlier deposition was an indication of untrustworthiness. And these untrustworthiness factors were not sufficiently countered by the fact that the written statement was under oath and that it was corroborated by other evidence generated by the plaintiff.

For another case excluding statements offered to clarify a deposition, see

Canning v. Broan-Nutone LLC, 2007 WL 2816184 (D.Me.): The court held that an affidavit of a deponent, seeking to clarify his deposition testimony, was not sufficiently trustworthy to be admissible under Rule 807. The court emphasized that “Rule 807 is to be used only rarely” and that “the declaration came well after the testimony, after Dowell passed up an opportunity to clarify his testimony in an errata sheet, was procured by Broan in the summary judgment context, and was procured in a context that has foreclosed any cross-examination.”

Trustworthiness: Newspaper articles

Bowcut v. Beauclair, 2009 WL 2245132 (D.Ida.): The plaintiff brought an action complaining of substandard prison conditions. As proof of those conditions he offered a newspaper article. The court found that the article was not admissible under rule 807, as it did not contain sufficient indicia of reliability or trustworthiness for main reasons. “First, the article does not contain a publication date or a byline attributing the article to any one reporter. Second, the article does not state where the unnamed reporter obtained the information regarding the deputy warden and correctional officers at NCCC.” ***See also McGill v. Correctional Healthcare Companies, Inc.***, 2014 WL 6513185 (D.Colo.) (newspaper article quoting individuals is not sufficiently trustworthy under Rule 807 to be admissible to prove what they said).

Trustworthiness --- Videotaped statement of a hospital patient

Navedo v. Primecare Medical, Inc., 2014 WL 1451836 (M.D.Pa.): In a suit charging neglect of the medical needs of a prisoner who died prior to trial, the plaintiff sought to admit a videotaped statement of the decedent while he was in the hospital. The statement was offered under Rule 807. The court found trustworthiness a close question, but concluded that the plaintiff had not met the heavy burden of showing trustworthiness. It elaborated as follows:

Decedent was not under oath and Defendant was not able to cross-examine her. Additionally, Plaintiff concedes that the testimony was not spontaneous but was made in anticipation of litigation, and Decedent thus had a considerable financial stake in her statements. Moreover, to the extent Decedent commented as to the medical treatment she received at York Hospital, her statements were not contemporaneous but were made in November 2010, six months after the treatment took place. These factors all weigh strongly against trustworthiness.

In contrast, the statement was made voluntarily based on Decedent's personal knowledge, it does not appear to contradict anything in the record, and it was videotaped, thereby allowing a jury to evaluate her demeanor during her testimony. Moreover, to the extent Decedent commented on her current suffering, it was more or less contemporaneous with the testimony at issue. Thus, there are considerable factors that weigh both for and against admission of the videotape. However, because the factors do not clearly favor admission and in consideration of Plaintiff's heavy burden associated with Rule 807, the Court finds that “exceptional guarantees of trustworthiness” are not present in this matter and the Court will exclude the evidence on this basis.

Trustworthiness --- Statement by a minor to a district attorney about a crime

United States v. Hill, 2014 WL 198813 (E.D.N.Y): An 11 year-old boy made a statement about a crime to the district attorney, and the boy's account tended to exculpate the defendant who was charged with murder. But the court found the statement to be insufficiently trustworthy

to qualify as residual hearsay because of, among other things, the boy's age and the fact that his account conflicted with every other account made by bystanders. The court elaborated as follows:

In this case, Abreu, an 11-year-old boy, made an unsworn statement to an assistant district attorney at 11:00 p.m. two days after the shooting. Although there is no indication that Abreu was motivated by bias or an improper motive, the record is also bereft of any evidence that corroborates Abreu's account of what transpired in the cab or establishes that it is reliable hearsay. To the contrary, Abreu's account is not only uncorroborated, it is contradicted by the contemporaneous accounts provided by two other eyewitnesses, including Abreu's mother, who are testifying at trial, as well as two other eyewitnesses who are not testifying at trial. * * *

Moreover, the circumstances of Abreu's statement do not contain sufficient indicia to establish that it is particularly trustworthy. Abreu was 11 years old at the time of the shooting and made only an unsworn statement two days after the incident, at 11:00 p.m., a significant period of time that precludes his statement from being admissible as a present sense impression under Rule 803(1). Abreu's statement is brief, and there is no evidence that he was significantly closer to the shooting than his mother, Givens. There is no indication that Abreu was ever questioned about the discrepancies between his statement and the statements provided by other witnesses, that his statement was particularly detailed in any way to suggest that it is particularly trustworthy, or that he made the statement close in time to the incident while still under the stress of excitement caused by the shooting to qualify as an excited utterance under Rule 803(2). * * * Therefore, because there is no evidence to corroborate Abreu's statement and there is no indication that Abreu's statement has "equivalent circumstantial guarantees of trustworthiness" comparable to the exceptions to hearsay admissible under Rules 803 and 804, defendant's motion to admit Abreu's statement under the residual hearsay exception in Rule 807 is respectfully denied.

Note: The Second Circuit affirmed the district court's ruling that Abreu's statement was not sufficiently trustworthy to be admissible under Rule 807. 2016 WL 4129228 (2nd Cir.):

The district court did not abuse its discretion in precluding Abreu's statement under the residual hearsay rule because, inter alia, the statement did not meet the trustworthiness requirement. The statement is recorded in a report prepared by law enforcement as an after-the-fact summary of Abreu's interview, and the exact circumstances by which the report was prepared are unclear. The statement itself, made late at night and two days after the crime, is a child's recollection of a traumatic event.

For other cases finding eyewitness statements to authorities to be insufficiently trustworthy, see

Kyeame v. Buchheit, 2011 6151428 (M.D. Pa.): A party sought to admit a statement that an eyewitness gave to the police regarding a disputed event. But the court found that the

statement was not sufficiently trustworthy to be admitted as residual hearsay. The court reasoned as follows:

Although Mr. Fisher is known and named, had no apparent financial interest in the litigation, and was aware of the pending litigation when he made his statements, the Court finds that other factors compel the exclusion of his statements. First, although Mr. Fisher presumably made the statements based on his personal observations, he made the statements over one year after he allegedly witnessed Plaintiff's arrest. Therefore, his recollection of the events was not fresh when he reported them to Captain Watson. Further, although Mr. Fisher voluntarily made the statements, the statements lack specificity: They fail to indicate the distance between Mr. Fisher and the parties at the time of the incident, whether Mr. Fisher had a clear view of the parties, whether he could overhear any of the words spoken by the parties, or whether Mr. Fisher had any problems with his vision or hearing. Second, Mr. Fisher's statements were neither made under oath nor subject to cross-examination, the traditional methods used to ensure trustworthiness. * * * Third, the report includes no information regarding Mr. Fisher's professional background and qualifications that would indicate that Mr. Fisher was qualified, in any way, to determine whether Defendant's actions were appropriate. Fourth, Defendant has presented no other witnesses or evidence—apart from the testimony of Defendant, who is inherently biased in this matter—to corroborate Mr. Fisher's statements. * * *

United States v. Cubie, 2007 WL 3223299 (E.D. Wi.): Statements made by a shooting victim to responding police officers and firefighters were not admissible under Rule 807:

That Benion may have been shot in connection with a drug debt enhances the unreliability of his statements against the defendants. As such, the general purposes of the Rules of Evidence and the interests of justice” are not best served by the admission of the statements.

Trustworthiness --- Letter prepared by a litigant and signed by a public official

Morton v. Yonkers, 2013 WL 4014452 (N.D.Tex.): In a bankruptcy proceeding the court excluded a letter signed by the Navajo Nation Department of Justice. The Trustee argued that it should have been admitted by the bankruptcy court under Rule 807, but the reviewing court found no error, because the letter was not sufficiently trustworthy. The court explained as follows:

The Letter was originally drafted by the Trustee's counsel and came into existence as a result of the Trustee's counsel's solicitation in communicating with William A. Johnson, an attorney for the Natural Resources Unit of the Navajo Nation Department of Justice, by telephone and e-mails. When questioned by the bankruptcy court, the Trustee's

counsel acknowledged that the Letter is substantially identical to the sample letter he provided to Mr. Johnson for consideration. Additionally, it is unclear what all was said during the telephone conversations between the Trustee's counsel and Mr. Johnson that caused Mr. Johnson to sign the letter drafted by the Trustee's counsel with only minor revisions. Their e-mail communications, however, indicate that counsel for the Trustee presented the information and his views in a one-sided manner and did so for the sole purpose of obtaining a favorable opinion in support of the Trustee's position in the bankruptcy litigation. Thus, the Letter was drafted in significant part by the Trustee's counsel, not the Navajo Nation, with only a few minor variations and done in an apparent effort by the Trustee to create evidence for the pending litigation that supported the Trustee's position. This alone makes it untrustworthy.

Note: The district court's decision was affirmed by the Fifth Circuit. *In re Vallecito Gas, LLC*, 771 F.3d 929 (5th Cir. 2014) ("We are persuaded by the district court's thorough explanation that the letter is untrustworthy, in large part because it was drafted by Morton's counsel and was prepared after Morton's counsel provided the Navajo Nation official with only one side of the story.").

Trustworthiness --- Same analysis as for corroborating circumstances under Rule 804(b)(3)

United States v. Benko, 2013 WL 2467675 (D.Va.): The defendant was charged with assisting a lawyer, Collins, in obtaining false testimony. One of the charges was that the defendant put the name of an FBI agent on a card during an interview, so that the witness could read the name from the card. Collins made a statement during his own plea negotiations that nobody held up a card during the witness interview. The defendant argued that Collins's statement was admissible as a declaration against penal interest, and alternatively as residual hearsay. The court found that Rule 804(b)(3) was inapplicable, in part because of lack of corroborating circumstances indicating trustworthiness:

The defendant and Collins are accused of working together to record false statements. Collins could have made this statement in an effort to minimize the criminal liability of an accomplice, who, it should be noted, became involved in the case in an effort to assist Collins in handling an investigation of Collins' involvement in other criminal conduct. In addition, the defendant can point to no corroborating evidence for the exculpatory portion of Collins' statement, in which he denied holding up the sign. Although Collins' presence at the interview is evidently corroborated by the testimony of other witnesses, Collins' characterization of his actions at that time is not. * * * I conclude that the declarant's questionable motive and the absence of relevant independent supporting evidence renders Collins' statement fatally uncorroborated for the purposes of Rule 804(b)(3).

Turning to the residual exception, the court held that the statement failed to meet the trustworthiness requirement for the same reasons it failed to meet the corroborating circumstances requirement.

For the reasons I described in concluding that the statement lacked corroboration, I also find that Collins' statement lacks particularized guarantees of trustworthiness for the purposes of Rule 807. The declarant had some motivation to lie in making his statement. The defendant has not pointed to any evidence that can specifically corroborate Collins' denial of holding up the sign.

Reporter's comment: It makes eminent sense to place the corroborating circumstances requirement of Rule 804(b)(3) and the trustworthiness requirement of 807 on the same track. Both are designed to assure that the hearsay is truthful.

For other cases equating Rule 807 trustworthiness and Rule 804(b)(3) corroborating circumstances, see

United States v. Brown, 2011 WL 43038 (N.D. Ill.): In a drug prosecution, a codefendant had made post-arrest statements that the defendant did not know that drugs were in the car. The court found first that this statement did not qualify under Rule 804(b)(3), both because it did not tend to implicate the declarant and because the defendant failed to show corroborating circumstances indicating trustworthiness. On the trustworthiness question the court declared that the statement was inconsistent with other evidence in the case and that “[s]uch inconsistency, coupled with evidence regarding a pre-existing relationship between the Brown and Rowe and the absence of any other evidence tending to confirm Brown's statements, are sufficient to undermine any characterization of Brown's post-arrest statements about Rowe as trustworthy.” Turning to the residual exception, the court found that the post-arrest statements failed the Rule 807 trustworthiness requirement for the same reasons they failed the Rule 804(b)(3) corroborating circumstances requirement.

United States v. Hao Sun, 354 Fed. Appx. 295 (10th Cir. 2009): Child pornography was found on the defendant's computer, when he was visiting the United States. He sought to admit a statement and testimony from his cousin and his parents, indicating that the cousin had used the computer in China and had downloaded pornography on it (while taking the Fifth Amendment as to whether it was child pornography). The court evaluated whether the cousin's statements should have been admitted under Rule 804(b)(3) and found no abuse of discretion in excluding it. The cousin's statements were not subject to cross-examination and were not corroborated by the parent's statements, because the parent's statements were biased and unreliable. The court then held that “[f]or the same reasons that Sun Liutao's statements lack sufficient trustworthiness under Rule 804(b)(3), they also lack trustworthiness under Federal Rule of Evidence 807.”

United States v. Jackson, 2009 WL 1783999 (10th Cir): In a crack cocaine prosecution, the defendant offered an affidavit and videotaped statement of his friend, who stated that the crack cocaine was his. The defendant argued that the statements were admissible under Rule 804(b)(3) and 807. The court found no error in the trial court's determination that the defendant had not shown sufficient corroborating circumstances to satisfy Rule 804(b)(3) --- and, for the

same reason, had not satisfied the trustworthiness requirement of Rule 807. As to trustworthiness for both rules, the court emphasized the following:

[The trial court] considered the close relationship between Armstrong and Jackson which provided a reason for Armstrong to help Jackson by claiming the drugs were his. The court also considered the vagueness of Armstrong's on again, off again statements. Other than indicating the cocaine found in the home belonged to him, Armstrong did not identify the amount of cocaine, where it was located, how it was packaged or how it got to the house. Therefore, there was no way for the court to determine from Armstrong's statements whether the cocaine claimed by Armstrong was the same cocaine leading to the charges against Jackson.

United States v. Hunt, 521 F.3d 636 (6th Cir. 2008): In a health fraud prosecution, the defendant sought to admit a statement that an associate made to police investigators ---essentially that the associate knew that the actions were fraud but he didn't think the defendant did anything wrong. The court found that the statement failed the trustworthiness requirement of Rule 807:

Hunt argues that it is reasonable to conclude that the statements are truthful because they tend to incriminate the declarant, Noble, while exculpating Hunt. However, it is at least equally reasonable to conclude that the statements are not trustworthy. It would not be bizarre for an individual to lie in order to protect another individual with whom he has a business relationship. More importantly, a statement is not rendered trustworthy simply by the fact that it tends to exculpate one other than the declarant. This principle is seen clearly in Rule 804(b)(3) which says that a statement that exposes the declarant to criminal liability while exculpating the accused is not admissible unless corroborating circumstances indicate its trustworthiness. The absence of such corroborating circumstances in this situation indicates that the affidavit statements lack circumstantial guarantees of trustworthiness equivalent to those found in Rule 803 or 804. Thus, it is not clear that the statements bear the requisite trustworthiness.

United States v. Sablan, 2008 WL 700172 (D.Colo.): In a case involving a murder of a prison inmate, the defendant offered a statement from a fellow inmate that he murdered the victim, not the defendant. The defendant argued that the statement was admissible under Rules 804(b)(3) and 807. The court held that the statement failed the corroborating circumstances requirement of Rule 804(b)(3) and, for the same reasons, failed the trustworthy circumstances requirement of Rule 807. The analysis was as follows:

First, * * * William Sablan [the declarant] knew Rudy [the defendant] (and was even related to him) and thus may have had a motive to lie for him. Second, William Sablan made the statements to FBI agents who were in a position to decide whether and who to prosecute. William Sablan's statements, while inculpatory, also support an argument that William was claiming self-defense. This could be viewed as trying to curry favor with the authorities on this issue. Third, William Sablan's statements changed over time (he made statements in which he implicated Rudy and also made statements where he implicated himself and not Rudy). Fourth, William Sablan's statements contradict some of the evidence in this case.

Reporter's comment: It is sensible to set the same standards for Rule 804(b)(3) corroborating circumstances and Rule 807 trustworthiness. It would be confusing and unjustifiable to have two separate standards.

United States v. Williams, 2007 WL 2509726 (D. Minn.): In a firearms prosecution, the defendant sought to admit jailhouse statements made by Spillman, who was arrested with the defendant. These statements, made in phone conversations, indicated that Spillman put the guns in the car. The defendant offered the statements under Rules 804(b)(3) and 807. The court found that the trustworthiness requirements of the two rules should be treated similarly --- that is, if the statement fails the trustworthiness requirements of one it would fail the other as well. The court concluded that the jailhouse telephone conversations were insufficiently trustworthy for the following reasons:

On a number of occasions during various phone calls, Spillman denies knowledge of the guns in the van, or that some unknown person put the guns in the van and that he was trying to unload them. On another occasion, Spillman states he is going to take the rap for the Defendant. Given the number of contradictory statements made by Spillman over the course of these phone calls, the statements lack trustworthiness. In addition, Spillman is not a reliable declarant, given his prior criminal history. In his phone calls, he admits that he is on probation in Wisconsin, and some of the phone calls involve what Spillman's girlfriend should say to his probation officer. Further, the fact that the phone calls were monitored, and that when using the phones, the caller is informed that the call is monitored, would indicate that the phone calls are not spontaneous.

United States v. Driscoll, 2006 WL 1462489 (E.D.Tenn.): A defendant and her mother were indicted for fraud. The mother made a statement to the daughter's lawyer, essentially saying that she didn't know her conduct was illegal, and the daughter was innocent. The court found that the statement was not admissible as a declaration against interest, in part because it lacked corroborating circumstances indicating trustworthiness. And for the same reason, it did not satisfy the Rule 807 requirement of equivalent guarantees of trustworthiness. The court evaluated the circumstances as follows:

When Blankenship executed the statement, her competency was in question. This suggests the statement may not be trustworthy. Also, it is reasonable to assume a mother, especially one who is about to die, has a strong incentive to take the blame to protect her daughter. Lastly, the statement executed by Blankenship was not prepared by Blankenship or even by her attorney. Instead, it was prepared by her daughter's attorney. This clearly suggests the statement is not trustworthy.

Reporter's Comment: This is a rational application of the trustworthiness requirement. Rule 807 should not be expanded in any way that would admit an uncorroborated statement by a mother to the daughter's lawyer that exculpates the daughter. Presumably, any residual exception that has a reference to trustworthiness would exempt such statements from its coverage.

The case demonstrates that the corroborating circumstances requirement of Rule 804(b)(3) is linked with the trustworthiness requirement of Rule 807. If a statement fails one it should of necessity fail the other.

Trustworthiness --- Expert's affidavit prepared for a motion for sanctions

Exe v. Fleetwood RV, Inc., 2013 WL 2145595 (N.D. Ind.): The court found that a supplemental affidavit of a party's expert (who was dead by the time of the proceeding) was inadmissible under the residual exception. It was insufficiently trustworthy, because it was made in anticipation of a sanctions proceeding, and it differed from the testimony that the witness gave at a deposition.

Trustworthiness --- Statement of accident victim

Malley v. Wal-Mart Stores, Inc., 2013 WL 2099917 (D.Miss.): In a slip-and-fall case, the injured party wrote out a statement and diagram and gave it to his attorney. By the time of trial, he had died. The representative of the estate offered the statement and diagram under the residual exception. But the court found that it was insufficiently trustworthy, as it was prepared for counsel in anticipation of litigation, and it differed from other statements that the injury party had made.

Trustworthiness --- Police officer's statement to another officer

United States v. Mejia, 948 F.Supp.2d 311 (S.D.N.Y. 2013): During a traffic stop of the defendant, the officer found a gun on the side of the road. The defendant was prosecuted for felon-firearm possession. He sought to admit a statement from one police officer to the arresting police officer regarding whether there was a video camera in the police car. The court held that the statement from the officer was not admissible as residual hearsay, as the defendant failed to show sufficient guarantees of trustworthiness. The defendant's argument boiled down to the fact that police officers are trustworthy by nature. The court responded as follows:

[T]here is nothing about being a police official that inherently prevents insincerity, faulty perception, faulty memory, or faulty narration. Surely, Defendant is not suggesting that all police officials, by virtue of their employment, are automatically presumed to be sincere, to have particularly accurate perception and memories, or to offer accurate narrations. Indeed, at trial, Defendant aggressively attacked the trustworthiness and credibility of [the arresting officer]. Nor does Defendant explain why the nature and surrounding circumstances of the hearsay statement at issue here, other than the declarant's status as a police officer, guarantee trustworthiness. In fact, the specific

circumstances here—a statement by a declarant, who may or may not have personal knowledge as to the presence of a video camera approximately two years earlier, which might not be corroborated by records—do not suggest inherent trustworthiness.

Reporter’s comment: The court’s focus on perception, narration, memory and sincerity, come from the Second Circuit’s opinion in *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 232–33 (2d Cir.1999). The Second Circuit outlined the “criterion of trustworthiness” that a district court should employ under Rule 807:

The hearsay rule is generally said to exclude out-of-court statements offered for the truth of the matter asserted because there are four classes of risk peculiar to this kind of evidence: those of (1) insincerity, (2) faulty perception, (3) faulty memory and (4) faulty narration, each of which decreases the reliability of the inference from the statement made to the conclusion for which it is offered.... The traditional exceptions to the hearsay rule, in turn, provide the benchmark against which the trustworthiness of evidence must be compared in a residual hearsay analysis.... It is thus important to recognize that the trustworthiness of these exceptions is a function of their ability to minimize some of the four classic hearsay dangers.

This is an interesting take on the residual exception, but one could argue that it provides too rigid a structure. For one thing, many of the standard exceptions would fail if assessed against all the hearsay concerns (for example, excited utterances may suffer from faulty perception). For another, the test doesn’t seem to recognize the value of independent corroborating evidence. It can be argued that a better approach is to allow the court to consider all the circumstances that might guarantee truth-telling, along with all the corroborating evidence, and then make an assessment of whether the hearsay is a truthful account of an event.

Trustworthiness: Published articles, “specifically covered” by another exception

Glowczenski v. Taser Intern., Inc., 928 F.Supp.2d 564 (E.D.N.Y. 2013): In a product liability action brought against Taser, the defendants sought to strike exhibits that were published articles in scientific journals. The plaintiffs had not qualified the articles under Rule 803(18) because they had not established a foundation that the articles were authoritative. The plaintiffs argued that the articles could be considered under Rule 807, but the court disagreed. The court reasoned that the residual exception applies only to hearsay that is “not specifically covered” by another exception. In this case, the articles were “specifically covered by another hearsay exception, Rule 803(18), and Rule 807 is inapplicable.”

Reporter’s comment: The court rejects the “near miss” view of Rule 807 – i.e., that it can be used to qualify hearsay that misses an admissibility requirement of a standard exception. Most courts are to the contrary --- they hold that the major purpose of Rule 807 is to allow such statements to be admissible if they are reliable. This court’s minority view could be said to have the virtue of preserving the standard hearsay exceptions --- the “near miss” approach could tend to erode the admissibility requirements of the standard exceptions.

Trustworthiness --- statement inconsistent with the evidence

Gov't of Virgin Islands v. Mosby, 512 Fed. Appx. 253 (3rd Cir. 2013): The defendant was convicted of murdering a police officer. He argued that the trial court erred in excluding the recorded statement made by Paniagua to a government informant. Paniagua stated that he was approached by someone to hire a contract killer to murder the officer, and that Paniagua participated in the murder. But the court found no error in excluding the recording, because it was insufficiently trustworthy --- in addition to being implausible it was unsupported by any evidence and was inconsistent with the evidence that did exist:

There is simply no evidence to support the tape's suggestion that a hit man was brought to the Virgin Islands. If anything, the evidence at trial suggests that a hit man was *not* involved because of the multiple guns used in the killing. Mosby does not explain why the officers would pay a hit man \$50,000 to join them in murdering a police officer, rather than to simply kill the officer himself. * * * Furthermore, the tape does show that Paniagua's statement was not spontaneous and was made when he had reason to enhance his criminal reputation to the CI by sounding "all powerful." Accordingly, the Superior Court's ruling that the statements on the tape were inadmissible hearsay was not an abuse of discretion.

Trustworthiness --- Terrorist organization's claim of credit for a terrorist act

Gill v. Arab Bank, 893 F.Supp.2d 542 (E.D.N.Y. 2012): The plaintiffs sought to prove that Hamas was responsible for a terrorist act, and offered evidence from a video in which Hamas claimed responsibility. The court held that the statements in the video were not admissible as declarations against interest under Rule 804(b)(3) because they were, in context, not against interest:

The motivation of self-interest in a claim of "credit" for a terrorist attack on a civilian undermines trustworthiness. An incentive exists for an individual or an organization to mislead. Under the perverse assumptions of terrorists, an armed attack on civilians reflects glory. Taking "credit" for such an attack is deemed a benefit, not a detriment, and is not reliable under the circumstances.

The court held that, for the same reason, the statements failed the trustworthiness requirement of Rule 807.

Trustworthiness --- Statements submitted by a foreign government with an interest in the litigation

In re Vitamin C Antitrust Litig., 2012 WL 4511308 (E.D.N.Y.): A ministry of the Chinese government submitted written statements to the court in the nature of amicus submissions. The defendants sought to have the factual assertions in the ministry's statements to be admitted for their truth. The defendants argued that the statements were admissible as public reports under Rule 803(8), but the court disagreed, finding that the statements were untrustworthy because they were made in anticipation of litigation, and the Chinese government had a vested interest in the defendant's position in that litigation. For the same reason --- i.e., suspect motive, the statements failed the trustworthiness requirement of the residual exception.

Trustworthiness ---Consumer reports of injuries averted

Wielgus v. Ryobi Technologies, Inc., 893 F.Supp.2d 920 (N.D. Ill. 2012): In a product liability action involving a saw, the defendant sought to offer consumer reports of accidents that had been averted by installing a finger-saving device on the saw. The court held that the reports were not admissible under the residual exception:

As the defendants point out, customers who report finger saves to SawStop receive in exchange a free replacement cartridge, valued at \$69. That reward raises at least a question about whether the declarants are motivated by a desire to provide accurate information untainted by the desire to replace a costly part for free. And as pointed out above, in many cases the reports are made by declarants who do not have personal knowledge of the underlying accident. Given those circumstances, and because the residual exception is meant to be narrowly construed, this court declines to admit the finger saves reports under Rule 807.

Trustworthiness: statements made by a non-party in a litigation

United States v. Cohen, 2012 WL 289769 (C.D. Ill.): In a real estate dispute, a citizen of a foreign country gave testimony in his own country by way of answering written questions, but he refused to answer many of the questions. The court found that the declarant's written statements were not admissible under Rule 807 because there was an insufficient showing of trustworthiness:

The testimony was given under oath, though Kolzoff did not submit to United States' laws which punish perjury. His testimony was subject to Liechtenstein penalties for giving false testimony. Although Windsor notes that Plaintiff had an opportunity to

develop questions propounded to Kolzoff, the witness answered only a fraction of the questions in his statement. Therefore, it cannot be said that Kolzoff was subject to cross-examination. This factor weighs against admitting the testimony of the out-of-court declarant.

* * *

Because the residual exception should be narrowly construed and because most of the applicable factors weigh against admitting the testimony, the Court concludes that Kolzoff's testimony is inadmissible pursuant to Rule 807. The most important factors are Kolzoff's admitted limited amount of knowledge, the limited corroborating evidence, and the fact that Kolzoff was not subject to cross-examination. It is also significant that Kolzoff could lose money if the Plaintiff prevails. The Court concludes that Kolzoff's statement does not have "equivalent circumstantial guarantees of trustworthiness," as other testimony which is admitted pursuant to hearsay exceptions. Accordingly, it would not serve the interests of justice to admit the testimony.

Trustworthiness --- Customer complaints

QVC, Inc. v. MJC America, Ltd., 2012 WL 33026 (E.D.Pa.): While many courts, as seen in the case digest on admissible statements, have admitted voluminous customer complaints on the ground that they cross-corroborate each other, this court did not. The court found the complaints to be insufficiently trustworthy under the following analysis:

QVC argues that the complaints "were made voluntarily, were based upon the personal knowledge and experience of the customers, the statements were made in close temporal proximity to when the Heaters were sold and delivered, the customers have no motive to fabricate, and the customers' comments were not made in anticipation of litigation." Soleus, on the other hand, notes that a QVC quality engineer questioned whether the customer claims of fire might have been exaggerated. Further, the customer complaints were not made under oath; the declarants were not subject to cross-examination; and the statements have not been verified. The interests of justice are not best served by allowing admission of these complaints for their truth. This is particularly true where the Rule 807 residual hearsay exception is meant to apply only when certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present.

Reporter's comment: Comparing this case to the other consumer complaint cases shows one of the possible problems with the residual exception --- inconsistent determinations. Most courts rely on the cross-corroboration that is found with high volumes of similar complaints; this court did not even mention that factor. This court was concerned about the lack of cross-examination (which if taken literally would mean that hardly any statements would be admissible under Rule 807). Other courts are not concerned with lack of cross-examination so long as the statement is reliable. So these completely different approaches to the same evidence lead to a risk that a case gets determined not by what is reliable, but by what the judge feels about hearsay that doesn't fit a standard exception.

For another example of a contrary approach, see *F.T.C. v. E.M.A. Nationwide, Inc.*, 2013 WL 4545143 (N.D. Ohio), in which the court held that consumer complaints were insufficiently trustworthy to be admissible as residual hearsay:

The consumer complaints do not have sufficient indicia of trustworthiness. To be sure, they were submitted by consumers to government or non-profit organizations, and most consumers may have made their best efforts to convey accurate information. But, the consumers often made the complaints with hopes of receiving some type of refund or other financial benefit. The complaints were not made under oath. The complaints allege acts by entities not named in this lawsuit. And, the complaints list events that, perhaps not created in anticipation of litigation, were created with knowledge that litigation was possible.

Note that the court does not at all consider that the complaints cross-corroborated each other. Then the court proceeded down the “equivalence” path:

Taken together, these concerns warrant exclusion of the evidence. The first requirement for admission under Rule 807 is that the evidence has “equivalent circumstantial guarantees of trustworthiness” as evidence admitted under other hearsay exceptions. But other exceptions have greater guarantees of trustworthiness than the consumer complaints here. Rule 803(4), for example, allows for a statement made for medical diagnosis, because it is unlikely a declarant would lie about her health in order to gain an advantage in litigation. Similarly, Rule 803(2) provides for the admission of an excited utterance if “the declarant was under the stress of excitement” that the startling event or condition caused. Underpinning this exception is the belief that a declarant would not have the time or wherewithal to create falsehoods when faced with imminent danger or shock. These types of guarantees of truthfulness are simply not present in the consumer complaints.

It might be true that the consumer complaints don’t have the same “types” of guarantees, but that should not be the question. The question should be whether they are reliable. The “equivalence” language is essentially a misdirection. Moreover, Rule 803(2) is, as we know, not exactly a high bar for any equivalence standard, but the court puts it on a pedestal --- this is another problem with the equivalence standard, i.e., that the court may not properly assess the strength of the reliability guarantees for the standard exceptions.

See also

***FTC v. Washington Data Resources*, 2011 WL 2669661 (M.D. Fla.):** In this case the court distinguished cases finding consumer reports to the FTC to be admissible under Rule 807. The court explained as follows:

In this instance, unlike [other cases], the Commission offers each declaration to establish more than merely the extent of consumer injury, i.e. the price paid for the defendants' service. Rather, the Commission offers the declarations as substantive evidence of the

defendants' alleged deceptive statements and marketing material, the defendants' course of dealing with a consumer, and the defendants' failure to deliver promised services. Unlike the letters in [other cases], the declarations proffered by the Commission derive from the Commission's contacting certain consumers and procuring a declaration for the purpose of litigation. Although each declaration reports a similar experience and occurred under oath, no declaration presents the most probative evidence that the Commission could procure with reasonable effort. The fact that the Commission purportedly deposed certain consumers belies the Commission's argument on this point. Furthermore, although corroborated by other evidence, no statement is subject to cross-examination. The Commission shows no exceptional circumstance warranting the admission of an un-cross-examined declaration into evidence as a substitute for live testimony (either in a deposition or at trial).

Trustworthiness --- Foreign documents

United States v. El-Mezain, 664 F.3d 467 (5th Cir. 2007): In a prosecution for material support for a terrorist organization, the court held that the trial court erred (but harmlessly) in admitting reports that were seized by the Israeli military. The reports basically stated that the defendants were financing Hamas. The government argued that the reports were prepared by the Palestinian Authority and so were akin to public records. But the court found that the records failed the comparison to public records and were not sufficiently trustworthy to be admissible under Rule 807. The court elaborated as follows:

The matters reported in the PA documents have nothing to do with the PA's own activity, but rather describe the activities and financing of Hamas. Therefore, the guarantee of trustworthiness associated with a public agency merely recording its own actions is not present. Moreover, the conclusions stated in the PA documents are not the kind of objective factual matters we have found to be reliable * * * when reported as a matter of course. Instead, the PA documents contain conclusions about Hamas control of the Ramallah Zakat Committee and the sources of Hamas financing that were reached through unknown evaluative means.

This leads to a larger problem with the documents: there is nothing known about the circumstances under which the documents were created, the duty of the authors to prepare such documents, the procedures and methods used to reach the stated conclusions, and, in the case of two of the documents, the identities of the authors.

We know only that the PA documents were found in the possession of the PA. [T]here is nothing in the documents or the record that reveals whether the declarants had firsthand knowledge of the information reported, where or how they obtained the information, and whether there was a legal duty to report the matter. * * *

The Government argues that the PA had a “strong incentive” to report accurate information about Hamas. There is no doubt that may be true, but the Government points to nothing in the record about the PA's practice of record keeping. There is also nothing

in the documents or the record showing that the declarants in these documents were especially likely to be telling the truth. We therefore cannot say that there was little to gain from further adversarial testing. Without further information about the circumstances under which the PA documents were created, we are faced with conclusory assertions amounting to classic hearsay and no facts from which to divine the documents' reliability.

Trustworthiness: Improper focus on the witness relating the hearsay:

Pecorella-Fabrizio v. Boheim, 2011 WL 5834951 (M.D. Pa.): In an action against a police officer for violation of constitutional rights, the plaintiff offered an account by an eyewitness made to the plaintiff. The eyewitness died before trial. The court found that the evidence was not sufficiently trustworthy to be admissible under Rule 807. The court's analysis is as follows:

Some of the factors do weigh in favor of finding trustworthiness: Ms. Williams is known and named, had no financial interest in this litigation, and presumably made the statement based on her personal observation. These factors, however, are outweighed by the factors that compel the statement's exclusion. First, the statement was neither made under oath nor subject to cross-examination, the traditional methods used to ensure trustworthiness. Second, there is no evidence corroborating that Ms. Williams ever made the statement, and, as Defendants contend, the statement fails to actually identify Defendant Boheim as the officer who entered the Kozy Nozes store.

Further, in evaluating a statement's trustworthiness, consideration should be given to factors bearing on the reliability of the reporting of the hearsay by the witness. Ms. Pecorella–Fabrizio, who testified at her deposition that Ms. Williams made this statement, has an inherent bias in favor of admitting the statement, especially considering that it “is the only probative evidence” on this point. * * * Given the inherent bias of Ms. Pecorella–Fabrizio and the lack of any corroborating evidence, the reporting of the hearsay statement by Ms. Pecorella–Fabrizio is not reliable.

Reporter's comment: The concern about whether the statement was ever made is not a hearsay problem and should not be relevant to the trustworthiness inquiry --- as discussed in other Reporter entries in this outline. It is a misguided analysis that is prevalent in the Third Circuit --- but apparently only in the Third Circuit. *See Rivers v. United States*, 777 F.3d 1306 (11th Cir. 2015) (discussing and criticizing the Third Circuit view and concluding that the trustworthiness inquiry must focus on the declarant and not on the witness).

For another case improperly focusing on the witness relating the hearsay, see

United States v. Manfredi, 2009 WL 3823230 (W.D.Pa. 2009): In a tax prosecution, the defendant sought to show that he had a tax-free source of income --- monetary gifts from his father. To prove this he sought to introduce testimony from his aunt that she spoke to the father when he was hospitalized, and the father said that he had given his son and daughter-in-law “more money than they would ever need.” The court found that the father’s statement was not admissible as residual hearsay. It made the following points (beyond the ordinary mantra that use of Rule 807 is limited to “rare and exceptional” cases):

- In evaluating trustworthiness the court must consider both “the facts corroborating the veracity of the statement” and “the circumstances in which the declarant made the statement and the incentive he had to speak truthfully or falsely.”

- The statement failed the equivalence test for Rule 804 exceptions because the declarant was not dying, was not cross-examined, and was not speaking against interest. The court specifically noted that the “strong propensity” for truthfulness associated with a dying declaration was not present because the father made the alleged statement in 1991, but died two years later. The court made no comparison to the Rule 803 exceptions.

- The statement was “self-serving and one could reasonably conclude that Mr. Manfredi, Sr. had an incentive to exaggerate his past philanthropy to his son and daughter-in-law.”

- The trustworthiness evaluation requires consideration of who the *witness* is, and here the aunt was biased in favor of her nephew and so may be lying about whether the statement was ever made.

- Because the statement was untrustworthy, admitting it would not be in furtherance of the purposes of the rules and the interests of justice.

Reporter’s comment: There is much to challenge here. First, the “equivalence” inquiry cannot mean that if a statement fails one of the admissibility requirements of each of the standards exceptions it is, for that reason, insufficiently trustworthy. If that were so, *no* hearsay statement could be offered under the residual exception because by definition the exception is to be used when the hearsay fits no standard exception. This is one of the problems of the “equivalence” standard --- it is subject to misunderstanding and misapplication.

Second, the trustworthiness evaluation in fact does *not* take into account the credibility of the in-court witness. The testifying witness’s credibility is a question for the jury, not the judge. The hearsay question is whether the out-of-court statement is reliable. The reliability of the in-court witness is not a hearsay problem because that witness is testifying under oath and subject to cross-examination about what they heard. See, e.g., *Rivers v. United States*, 777 F.3d 1306 (11th Cir. 2015) (“The fundamental question [for residual hearsay] is not the trustworthiness of the witness reciting the statements in court, but of the declarant who originally made the statements.”). It appears that the Third Circuit is alone in requiring an assessment of the reliability of the in-court witness under Rule 807. The district court in *Manfredi* relied on *United States v. Bailey*, 581 F.2d 341 (3rd Cir. 1978).

If Rule 807 is to be amended, it might be useful to add in the Committee Note that the reliability of the witness is not a relevant consideration for the court under Rule 807. Such language was included in the Committee Note to the 2010 amendment to Rule 804(b)(3), which provides, among other things, that “[t]o base admission or exclusion on the witness’s credibility would usurp the jury’s role of determining the credibility of testifying witnesses.”

- The court’s reference to the “strong propensity” for truthfulness for dying declarations is a vast overstatement. Indeed, if equivalence is to be used, then the comparable trustworthiness standards to the dying declaration exception should be quite low.

- Once again, the “interests of justice/purposes of the rules” requirement is superfluous -- the statement fails these requirements because it has failed the trustworthiness requirement.

Trustworthiness: Diary of a claimant

Jencks v. Naples Comm. Hosp., Inc., 829 F.Supp.2d 1235 (M.D. Fla. 2011): In an action claiming disability discrimination, the representative of the decedent’s estate sought to admit the decedent’s diary account of activities relevant to the dispute. The court found that the diary entries were not sufficiently trustworthy to be admissible under Rule 807. The court stated that “the alleged factual statements in the diary are self-serving and possibly were made in anticipation of litigation.”

Trustworthiness: Hearsay not “exceptional”

PixArt Imaging, Inc. v. Avago Tech. Gen. IP (Singapore) Pte. Ltd., 2011 WL 5417090 (N.D. Cal.): In a patent dispute, the proponent offered a hearsay statement from a former official of the adversary regarding a licensing question. The proponent argued that the statement was admissible under Rule 807 because the official made the same statement a number of times, and had no reason to lie. The court rejected the argument, reasoning as follows:

Upon review of the evidence, the Court finds that this is not an exceptional circumstance where admission under the residual hearsay exception is warranted. Rather, Avago contends that Kuo's statement is trustworthy because it was made consistently and without any motivation to lie. However, to allow statements under Rule 807 on the basis that they were made repeatedly and allegedly without any motive to lie would convert the residual exception into a sweepingly broad exception to the bar on hearsay testimony. Thus, the Court finds that Kuo's statement is not admissible under the residual hearsay exception.

Reporter’s comment: The emphasis on “exceptional circumstance” leads to a fuzzy ruling. It would be better for the court to say that the two factors cited do not overcome the high standard of trustworthiness --- while that may not be so, at least it would confront the trustworthiness question head on. Simply because a statement is made under relatively common circumstances

should not disentitle it from admissibility if it is actually trustworthy. The “exceptionalist” analysis can result in exclusion of trustworthy statements simply because they are not “unusual” enough.

For other “exceptionalism” analyses, see

Cotton v. City of Eureka, 2010 WL 5154945 (N.D. Cal.): In an action alleging excessive force after police officers responded to a fight and one of the participants was beaten and eventually died, the defendants sought to admit a hearsay statement made by the other participant. The court held that the statement was not admissible as a declaration against interest, and then held that the statement was not admissible under Rule 807 either. The entirety of the rationale for exclusion is as follows:

In the instant case, Defendants have made no showing that there are exceptional circumstances justifying application of FRE 807. The mere fact that the hearsay exception under FRE 804(b)(3) is inapposite does not qualify as an exceptional circumstance.

Reporter’s comment: This is another case, most of them from the 9th circuit, in which the court relies on a perceived lack of “exceptional circumstances” rather than an inquiry into trustworthiness. “Exceptional circumstances” is not a phrase found in the text of Rule 807. And there seems to be no guidance or structure for a court to determine whether exceptional circumstances exist. Surely these courts are wrong when they hold that it is not exceptional simply because the proponent cannot fit the statement under some other hearsay exception --- as that is the situation for *every* proponent seeking to use the residual exception.

United States v. Bonds, 2009 WL 416445 (N.D.Cal.): In the Barry Bonds prosecution, the government proffered statements made by Anderson (Bonds’s trainer) to a Balco Lab employee, to the effect that the urine samples he submitted for testing came from Barry Bonds. The government argued among other things that the statements were admissible under Rule 807, but the court disagreed:

According to the government, Anderson's statements are admissible under Rule 807. The government maintains that if Anderson refuses to testify, [which he did] the Court will be presented with “exactly the type of scenario that the residual exception was intended to remedy.” It is difficult to see how Anderson's anticipated refusal to testify represents an “exceptional” circumstance—the Rules of Evidence provide for precisely the circumstances now before the Court. Rule 804 governs situations when a witness is “unavailable” to testify and provides that one such scenario occurs when the declarant “persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so.” Fed.R.Evid. 804(a)(2).

In addition, in all of the cases relied on by the government, there were far greater guarantees of trustworthiness than are present in this case. * * * In light of * * * evidence

that on occasion BALCO employees tampered with the labels of samples, the Court cannot find that the requisite guarantees of trustworthiness are present in this case. The statements are not therefore admissible under Rule 807.

Reporter’s Comment: The court provides little analysis on trustworthiness. The factor that it considers important --- that Balco employees tampered with the labels --- has little to do with the trustworthiness of Anderson’s hearsay statement that the samples came from Bonds. Ultimately the court is relying on the “exceptional” language --- not in the Rule --- to exclude the evidence. It is difficult to figure out how a court rules that some proffers of hearsay are “exceptional” and some are not.

Note that the district court’s decision on Rule 807 was affirmed by the Ninth Circuit, 608 F.3d 495 (2010). The court found no abuse of discretion in the trial court’s misguided “exceptionalist” reading of the rule. As to trustworthiness, the court implicitly recognized that the statement should not be excluded because Balco tampered with the labels --- because the issue was whether *Anderson* made a reliable statement. But the court held, without explanation, that the district court finding “properly focused on the record of untrustworthiness of the out of court declarant, Anderson, as required under the rule.”

United States v. Wilson, 2008 WL 2333023 (3rd Cir.): Appealing a felon-firearm possession conviction, the defendant argued that it was error for the court to exclude testimony of his private investigator. The witness would have testified that he contacted a local bartender, Renee Russell, who told him that Rebecca Grandon, the housekeeper who saw Wilson's gun at the motel (and who testified at trial) had a personal relationship with Wilson that soured and Grandon wished to get even with Wilson. The court found that the testimony was not sufficiently trustworthy to be admissible under Rule 807, while stating that the Rule is “to be used only rarely, and in exceptional circumstances,” and is meant to “apply only when certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present.” As to the investigator’s proposed testimony, the court reasoned as follows:

Here, the declarant did not make the statement under oath, nor could the court be certain that the person on the other end of the phone actually was Renee Russell. Moreover, as the District Court noted, Wilson's counsel never asked Rebecca Grandon during cross-examination whether she was familiar with an individual named Russell. Before the District Court, Wilson's primary argument in favor of admission of the private investigator's testimony was that Renee Russell had “no reason to lie,” and he now argues that a person “speaking to a stranger about a matter in which they have no involvement or interest, will generally make truthful statements.” This is not an “exceptional guarantee of trustworthiness.”

Reporter’s comment: Once again we see a court exclude a statement because it is not “exceptional” even though “exceptional” is not in the rule. It is hard to see what is wrong with the argument made by the defendant that Russell had no reason to lie --- that is a direct argument about trustworthiness. If the residual exception were made less “exceptional” perhaps some courts would confront trustworthiness issues more directly.

More examples of exceptionalism analysis

Horton v. Hussman Corp., 2007 WL 288516 (E.D.Mo.): In an employment discrimination action, the court held that a deposition from a related case was not admissible under Rule 807. The analysis was simple to a fault:

Rule 807 is reserved for “exceptional circumstances” where the evidence at issue carries a “guarantee of trustworthiness equivalent to or superior to that which underlies the other recognized exceptions.” *United States v. Thunder Horse*, 370 F.3d 745, 747 (8th Cir.2004). The deposition at issue does not involve exceptional circumstances.

Reporter comment: “Exceptional circumstances” is not language in the rule. But in many courts this snippet from the legislative history has taken on a life of its own.

United States v. Green, 2007 WL 3120328 (3rd Cir.): In an illegal reentry case, the defendant offered a letter from counsel to prove that he was a United States citizen. The letter was ten years old, written by the lawyer to the defendant while he was in prison on another charge. The court found that the letter was not admissible under Rule 807. First, it was not more probative than other evidence of citizenship, such as naturalization papers. Second, it was not sufficiently trustworthy, as it was an unverified letter containing an unsupported conclusion. The court closed with a shout-out to the “rare and exceptional” language:

Moreover, Rule 807 is to be used only rarely, and in exceptional circumstances and applies only when certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present. For the reasons discussed, there were neither requisite exceptional circumstances nor exceptional guarantees of trustworthiness. Prior counsel's representation that Green was still a citizen, without explanation or support, contained in a letter addressing only disenfranchisement, lacked probative value.

Trustworthiness: Affidavit of deceased claimant

Blackburn v. Northrup Grumman Newport News, 2011 WL 6016092 (E.D.Pa.): In an asbestos case, the plaintiffs offered an affidavit from a woman whose husband and son were allegedly exposed to asbestos at work. She averred that asbestos was in her home and she was exposed to and injured by it. The court held that this affidavit was not sufficiently trustworthy to be admissible under Rule 807. While the affidavit was made under oath, the declarant was a claimant, and “had every incentive to set forth facts in the light most favorable to her.”

Trustworthiness: Absconding declarant

SEC v. Kramer, 778 F.Supp.2d 1320 (S.D.Fla.): In an SEC prosecution of Kramer, the SEC sought to admit the statements of Baker to SEC investigators, in which he implicated Kramer in wrongdoing. The court held that the statements were not sufficiently trustworthy to be admissible as residual hearsay. The court's main concerns was that Baker was a shifty sort who evaded prosecution:

The Commission asserts that Baker's both retaining counsel and avoiding "blame shifting" in Baker's statements provide some indicia of trustworthiness. However, the Commission's view ignores the countervailing, unsettling indicia of untrustworthiness, the most telling of which is the fugitive status of the declarant. By evading legal process, Baker avoids cross-examination and accountability as to each statement that inculpates Kramer. For example, Baker assuredly understood after his first encounter with the Commission that Baker faced legal action for his conduct on behalf of Skyway. Baker terminated the examination and returned after obtaining counsel. After Baker's second visit with the Commission, Baker absconded. Baker's state of mind at each stage, his hostility or other attitude toward Kramer at a given moment, his perception of his best interest or his exposure, his motives, his fears, and his plans, among other things, are utterly unknown, although highly probative of credibility.

Trustworthiness: Conflicting statements of witnesses made to a defendant's investigator

United States v. Halk, 634 F.3d 482 (8th Cir. 2011): In a felon-firearm prosecution, the defendant offered statements from a father and son, who were in the house with the defendant when police found the guns. Both declarants implicated themselves and averred that the defendant did not know about the gun. The court found the statements to be insufficiently trustworthy to qualify as residual hearsay. One of the declarants, the father, made directly contradictory statements --- in one statement he said the gun was his son's and in another he said the gun was his. "In addition, other circumstances at the time of the declarations diminish their credibility. All of the proffered statements were made over a year after Halk's arrest and during interviews conducted by defense investigators in anticipation of litigation. Moreover, Rule 807 is applicable only in exceptional circumstances not present here."

Trustworthiness: Verified answer

Reassure America Life Ins. Co. v. Warner, 2010 WL 4782776 (S.D.Fla.): In an interpleader action involving insurance monies, the man whose estate was a claimant had filed a

verified answer in a related litigation. The representative of the estate argued that the verified answer was admissible under the residual exception, but the court disagreed:

In this case, Shomers's Verified Answer * * * weighs heavily in direct support of the charge that Shomers is entitled to the proceeds of the \$2,000,000 life insurance policy * * *. The corroborating evidence pointed to by the Shomers Estate does not go to the key assertions in the Verified Answer, specifically regarding the fraud or coercion allegedly used to trick or to force Shomers into signing the change of beneficiary form. Indeed, Shomers seems to assert both that he was tricked into voluntarily signing the form by fraud and that he was coerced into involuntarily signing the form by some unspecified intimidation. [The answer] is internally inconsistent, further undermining its trustworthiness. Accordingly, the Court finds that the Verified Answer is not admissible at trial under Federal Rule of Evidence 807, and the Court will not consider it in ruling on the motions for summary judgment.

Trustworthiness: Employee declaration

LG Electronics v. Whirlpool Corp., 2010 WL 3829644 (N.D.Ill.): In a case involving product disparagement, a salesperson for Whirlpool filed a declaration indicating that LG was disparaging a Whirlpool product. The court found this declaration inadmissible under Rule 807. It declared as follows:

Whirlpool has not established the reliability—and therefore the admissibility under Rule 807—of Mr. Green's declaration. Mr. Green was not subject to cross examination when he made the declaration, his declaration encompasses information outside of his personal knowledge in the form of hearsay, and the declaration is uncorroborated. Additionally, Whirlpool has not shown that a short period of time elapsed between the statement and the underlying events, thereby making it difficult for Whirlpool to favorably craft the declaration.

Trustworthiness: Lawyer's notes of meeting prepared in anticipation of litigation

Phillip M. Adams & Associates, LLC v. Winbond Electronics Corp., 2010 WL 3767297 (D.Utah): The court held that a lawyer's notes of meetings, which were prepared in anticipation of litigation, were not sufficiently trustworthy to be admissible as residual hearsay. (They were found unqualified as business records for the same reason).

Trustworthiness: Self-serving statement of accused

United States v. McCraney, 612 F.3d 1057 (8th Cir. 2010): Appealing convictions for narcotics, robbery, and firearms, the defendant Williams argued that the trial court erred in failing to admit statements he made to police officers after his arrest. He argued that the exculpatory statements should have been admitted under Rule 807, but the court found no error, reasoning as follows:

The disputed statement was a declaration by Williams that he did not know anything about the robbery of Jones prior to when it occurred, that he was taken by surprise when McCraney entered the car and pulled out a gun, that after the robbery McCraney instructed him to drive away from the parking lot, and that McCraney then put the gun to Williams's head and told him to keep driving while the police pursued them. Williams suggests that a statement given by an uncounseled arrestee who is under interrogation by law enforcement officers bears sufficient indicia of trustworthiness to warrant admission under Rule 807, because the very purpose of police interrogation is to obtain truthful statements that can be used to further an investigation.

* * * Williams was arrested after leading police on a highspeed chase. The police found a cell phone belonging to the robbery victim on his person and located cocaine and accessories to a handgun in his car. Williams could not plausibly deny altogether that he had participated in the robbery and subsequent flight, so he had clear motivation to present himself as an unwitting and unwilling participant. The district court did not abuse its discretion in ruling that a statement made under these circumstances is not sufficiently trustworthy to be admitted into evidence under Rule 807.

Trustworthiness: “no reason to lie”

United States v. Doe, 2010 WL 2195993 (S.D. Ga. 2010): The government sought to admit statements made to U.S. Department of State investigators by third parties located in Nigeria. The court found that the government had not established affirmatively that the statements were sufficiently trustworthy to be admissible under Rule 807. The court explained as follows:

[T]here must be some evidence to show that the statement, while hearsay, is particularly believable. In this case, the Government states only that “there is no evidence indicating that the testimony provided to the United States Department of State Investigators was fabricated, made up or coerced.” However, the Government's statement is merely an observation that, in its opinion, there is little evidence to indicate that the declarants' statements are false. Indeed, it is no surprise that the Government believes that its own witnesses are telling the truth. However, the Court is disinclined to find that the Government vouching for its own witnesses establishes a sufficient “guarantee of trustworthiness” in their testimony to render it admissible under Rule 807. Therefore, the Court concludes that the proffered statements are not admissible under Rule 807 because the Government has not established that the statements are particularly trustworthy.

The court also found that the government had failed its notice obligations because they provided notice only six days before trial. The court stated that “[w]ith only six days notice, the Defendant is ill afforded a ‘fair opportunity to prepare to meet’ this evidence, which is located across the Atlantic Ocean in four separate towns on the west coast of Africa.”

Trustworthiness: Declaration prepared for a pretrial proceeding

Leeds LP. v. United States, 2010 WL 2196099 (S.D. Cal.): In a quiet title action involving tax liens, the plaintiff sought to admit declarations of a fact witness that had been prepared for pretrial proceedings, the witness having become unavailable. The court found that the statements failed the trustworthiness requirements of Rule 807. It reasoned as follows:

Documents prepared for purposes of litigation lack the guarantee of trustworthiness that Rule 807 requires. See *Wilander v. McDermott Int'l, Inc.*, 887 F.2d 88, 91–92 (5th Cir.1989) (residual exception did not apply because statement prepared in anticipation of litigation and was later contradicted by witness). Mr. Dunster signed these declarations in the course of this litigation to help prepare Plaintiff's Rule 30(b)(6) witness for a deposition. Moreover, he was for many years a close personal friend of Don and Susanne Ballantyne, the people that owed the IRS money and the reason why the IRS placed a lien on the property at issue here. Mr. Dunster could therefore have an interest in the outcome of the litigation. For these reasons, Mr. Dunster's declarations do not have circumstantial guarantees of trustworthiness.

Trustworthiness: Hearsay in a police report

Gov't of the Virgin Islands v. Krepps, 438 Fed. Appx. 86 (3rd Cir. 2010): Appealing a murder conviction, the defendant argued that the trial court erred in excluding police reports containing statements of three witnesses that would have established a time line of the victim's location that was favorable to the defendant. The court found that the trial court did not err in finding the reports inadmissible under Rule 807. The defendant argued that “the police officer had no reason to lie” but the court responded that this argument overlooked the fact that the witness statements to the police were hearsay. “Indeed, the unreliability of the statement of one of the witnesses, Ms. Gines, is evident inasmuch as she was uncertain as to when she had last seen Anderson during the month of October.”

For other cases involving double hearsay, see:

Earhart v. Countrywide Bank, 2009 WL 2998055 (W.D.N.C.): The plaintiff alleged that he was denied a loan because of false statements provided to a lender by Countrywide. He sought to admit records of denial prepared by a mortgage agent indicating that lenders denied the

loan. The court held that the records were admissible as business records to prove that a report had been made, but reports by the lenders of the reason that the loan was denied were double hearsay that could not be admitted under Rule 807. The court found that the plaintiff had failed to establish both the trustworthiness and the “more probative” requirements:

Earhart did not meet the exceptional circumstances that are required for admission of hearsay under Rule 807. Earhart offered no indication regarding the trustworthiness of information given by various unidentified lenders to Bedian. Earhart failed to explain how the statements of credit denial are more probative than the testimony from the lenders themselves regarding why they denied Earhart's loan applications. Earhart also failed to explain why the testimony from lenders could not be obtained through reasonable efforts.

Krepps v. Gov't of the Virgin Islands, 2006 WL 1149216 (D.V.I.): A police report of statements taken by a police officer that tended to exculpate the defendant was excluded when offered as residual hearsay: “The statements reflected simply what other parties told the officer, with no indication the accuracy of those statements had been—or could be—verified. Moreover, neither Officer Colon nor the declarants testified at trial. There was, therefore, nothing presented below from which the court—or this court on review—could determine that the circumstances surrounding the statements of the witnesses bore exceptional guarantees of trustworthiness, or that the witnesses had a duty or a particular motivation to be truthful.”

Trustworthiness: Witness required to establish circumstances of the hearsay statement

Mathis v. Tourville, 2010 WL 889785 (E.D.Mich.): The plaintiff was a security guard and a nightclub; he sued a police officer who shot him when responding to a fracas at the club. The defendant claimed that the plaintiff was shooting a gun at the time. To prove that claim the defendant offered a statement that the police took from a bystander shortly after the shooting. The bystander stated that he saw the plaintiff with a gun. The court found that the bystander's statement was insufficiently trustworthy. It elaborated as follows:

First, the only investigator who spoke to Mr. Mitchell about the incident was Officer Hampton; however, Defendant does not list him as a potential trial witness. Officer Hampton is the only person who can attest to the circumstances under which the statement was made, for example: whether Mr. Mitchell appeared truthful; whether he appeared intoxicated, or under the influence of drugs; whether his behavior was consistent with his statement; and, whether he said anything else that may or may not have been inconsistent. Simply stated, without Officer Hampton's testimony, it is impossible for the Court to make the determination of trustworthiness that is prerequisite to admission under Rule 807.

Reporter's comment: Note that the court is not stating that the credibility of the in-court witness is a factor relevant to the trustworthiness of the statement --- it is not, because the focus is on the reliability of the declarant. The reliability of the witness is a question for the jury. But the court is holding, correctly, that establishing trustworthiness of the hearsay statement often requires witnesses to the circumstances surrounding the statement. These witnesses will need to convince the judge about the relevant circumstances.

Note also that the court finds that the witness statement did not satisfy the “more probative” requirement because there were other witnesses to the shooting. Again, this is a problem with the “more probative” requirement. The hearsay should be compared to other testimony from the declarant that could be presented at trial, not to all the other evidence on point. Comparing the hearsay to other evidence requires significant conjecture and essentially requires a comparison of apples and oranges.

Trustworthiness: Police officer statements denying excessive force

United States v. Burge, 2010 WL 899147 (N.D.Ill.): The defendant, a police officer, was charged with filing false answers in a case brought by an arrestee who was allegedly tortured by officers under the defendant's supervision. The defendant sought to introduce statements made by two officers at various proceedings, in which the officers denied that the arrestee was mistreated. The court found that these statements were insufficiently trustworthy to satisfy Rule 807:

O'Hara and Yucaitis each testified under circumstances such that they were strongly motivated to deny they or Burge had tortured and abused Wilson or other arrestees or knew of such occurrences. At the hearing on the motion to suppress evidence in Wilson's criminal case, such an admission would have undermined the prosecution of Wilson, who was charged with the murders of two police officers. In the civil rights cases, it cannot be said that they testified voluntarily because their refusal to testify would have permitted an adverse inference and increased their risk of being disciplined or prosecuted. Moreover, it could have subjected them to substantial damages, including punitive damages for which they would not have been indemnified. At the Police Board hearing, their jobs and ranks were at stake. Yucaitis and O'Hara were under Burge's command * * * further motivating them not to implicate Burge. In this scenario, that they corroborated one another adds no measurable weight to the testimony. Where so much was at stake for the officers, this motivation to lie is not outweighed by the gravity of violating a testimonial oath.

The court also held that the statements did not satisfy the “more probative” requirement, because there were other witnesses that could be called to testify to the alleged acts of torture and abuse. Finally, the court held that the purposes of the rules and the interests of justice would not be met,

because the statements were not sufficiently trustworthy. (Meaning that the “purposes of the rules’ interest of justice requirement was completely superfluous).

Reporter’s comment: The Seventh Circuit affirmed the trial court’s Rule 807 analysis, 711 F.3d 803 (7th Cir. 2013). The court stated that the district court correctly concluded that “the officers accused of participating in Wilson's abuse would have had a motive to testify falsely to exculpate themselves” and that other witnesses could be called.

Trustworthiness: Statements made to an investigator

United States v. Rodriguez, 2009 WL 535828 (9th Cir.): An employee of Brinks was convicted for taking part in an armed robbery of a Brinks truck. He argued that the trial court erred in excluding statements from another Brinks employee made to a defense investigator. The court found that the trial court did not abuse discretion in finding that the employee’s statements were insufficiently trustworthy to qualify as residual hearsay. The court noted that “[t]he statements Ayala allegedly made to the defense's investigator have no indicia of reliability. They were not recorded, not made under oath, and there is no way to tell whether they were made voluntarily.”

Trustworthiness and Not more probative: Statement of a target of a criminal investigation

United Technologies Corp. v. Mazer, 556 F.3d 1260 (11th Cir. 2009): The case involved theft of blueprints. The Office of the Inspector General prepared a report that included inculpatory statements from a corporate official involved in the theft. The court held that these hearsay statements were not admissible under Rule 807. First, they were insufficiently trustworthy:

Congress intended the residual hearsay exception to be used very rarely, and only in exceptional circumstances, and it applies only when certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present. Notwithstanding the proffer agreement under which Mazer submitted to the government interview, Mazer's position as a target in a criminal investigation provided him ample motivation to implicate others (even falsely), including APM, in his misconduct in order to diffuse and mitigate his own culpability. Thus, the statements lack the “equivalent circumstantial guarantees of trustworthiness” that Rule 807 requires.

The court also held that the “more probative” requirement was not met because “UTC could have taken reasonable steps to obtain admissible testimony directly from Mazer prior to the district court's ruling on APM's motion to dismiss, but it failed to do so.”

Trustworthiness: Debriefing memoranda

AAMCO Transmissions, Inc. v. Baker, 591 F.Supp.2d 788 (E.D.Pa. 2008): In a trademark infringement suit, a party sought to admit interviews that its investigators conducted with undercover shoppers. The court declared that the interviews were insufficiently trustworthy to be admissible under Rule 807:

The statements contained on the audio-recordings and in the debriefing and shopping memoranda are not trustworthy because: (1) they were not made under oath; (2) the investigator's statements in the shopping memoranda were not based on personal knowledge; (3) the declarants were not subject to cross-examination; (4) the shoppers' statements were made to the investigators nearly an hour after the shoppers arrived the Center; (5) the statements were not corroborated; and (6) they were not spontaneous.

The court also found that the party had not satisfied the “more probative” requirement because it had made no attempt to locate and procure the testimony of the interviewees.

Trustworthiness: Testimony from another proceeding

New Cingular Wireless v. Zoning Hearing Board, 2008 WL 4978315 (E.D.Pa.): In a dispute about cell towers, the Board sought to admit testimony and evidence from another proceeding involving Verizon. The court found that the evidence was not admissible under the residual exception because “plaintiff was not a party to the Verizon proceeding and had no opportunity to cross-examine or contest any of the evidence presented therein.” The court did not do an assessment of whether the evidence was trustworthy, however.

Trustworthiness: Letter written by a party to litigation

Schoolcraft Memorial Hosp. v. Michigan Dep’t of Health, 570 F.Supp.2d 949 (W.D.Mich. 2008): In a case involving interpretation of Medicare, a party sought to prove its interpretation by proffering letters written to that party by a Department of Health and Human Services Official. The court found that these letters failed the trustworthiness requirement of the residual exception. It reasoned as follows:

The letters are the out-of-court statements of a declarant who made the hearsay statements without the solemnity of the oath that would be administered were Mr. Daly to testify in court. * * * Further indicia of the unreliability of the statements of the letters are the facts that the letters were written to one of the parties to this litigation—not to the Court or the parties generally; and they are essentially an adoption of that parties'

language—they do not present an independent statement of the declarant and are in that respect elicited by leading questions.

Trustworthiness: Unidentifiable declarant

Pryor v. Hurley, 2008 WL 3307136 (S.D. Ohio): The plaintiff charged that the county clerk refused to timely file a notice of appeal. To prove this point, he would testify that he called the clerk’s office and an unidentified person told him that the defendant refused to file the notice. The court found that the unidentified person’s statement was not admissible as residual hearsay. The court was concerned that the plaintiff could not identify the date of the telephone conversation nor the identity of the declarant. So the statement did not have circumstantial guarantees of trustworthiness equivalent to the other exceptions.

Trustworthiness: Statements to a party’s investigator

United States v. Vargas, 2008 WL 2180176 (2nd Cir.): In a drug prosecution, the defendant sought to admit a tape of a secretly recorded conversation between a defense investigator and a prisoner, which implicated someone other than the defendant as the leader of the conspiracy. The court found that the tape was not sufficiently trustworthy to be admissible as residual hearsay. The court reasoned that “because the statement was made in jail to an investigator working on behalf of Martinez, the prisoner had reason to exculpate Martinez in order to avoid retribution.”

Trustworthiness: Suspect motivation and lack of corroboration

Trade Finance Partners LLC v. AAR Corp., 2008 WL 904885 (N.D. Ill.): In a breach of contract action, the plaintiff sought to admit an email by a corporate official describing the plaintiff’s involvement. The court found that the email was not admissible under Rule 807. It failed the trustworthiness requirement: “Cooper’s recollection, as reflected in his affidavit and e-mail, may well be biased or inaccurate, and he had every reason to misrepresent the communication with Reidlinger to his client, in order to inspire confidence. That TFP points to no testimony or documents supporting Cooper’s recollection is notable.” The court also noted that the plaintiff could have introduced other evidence proving its involvement in the transaction, so the email was not the most probative evidence reasonably available.

Trustworthiness: Declaration prepared in anticipation of litigation

Hall v. C.I.A., 538 F.Supp.2d 64 (D.D.C. 2008): In an FOIA litigation, the plaintiff sought consideration of his declaration of events and statements that he had heard from others. The court found that the declaration was not admissible under Rule 807 --- and therefore would not be considered on summary judgment --- because it was nothing more than uncorroborated “bare hearsay” prepared for purposes of the litigation.

Trustworthiness: Taped testimony or affidavit from a deceased witness

Tatum v. PACTIV, 2007 WL 2746647 (M.D. Ala.): Taped testimony by a deceased witness was found insufficiently trustworthy to qualify as residual hearsay.

Jackson's statement is an unsworn statement made in anticipation of litigation, which would be offered to prove the truth of the matter asserted. Defendants had no opportunity to cross-examine or speak with Jackson prior to his death, which occurred shortly after the statement was recorded. Jackson's statement relates to events that happened a number of years earlier, creating the potential for faulty memory or fabrication.

See also:

Phillips v. Irvin, 2007 WL 2156402 (S.D. Ala.): In an excessive force case, the plaintiff sought to admit an affidavit from a purported eyewitness, deceased at the time of trial. The court held that the trustworthiness requirement of the residual exception was not satisfied:

Plaintiff submits no evidence of any kind concerning the circumstances under which Champion Jackson's Affidavit was prepared or signed. The Jackson Affidavit is separated in time from the date of the incident by more than two years. There is no indication in the Jackson Affidavit or in the record generally that Jackson was aware of his potential liability for perjury, the existence of this lawsuit, or the likelihood that his statements would be subjected to cross-examination. To be sure, the Affidavit reflects that it was “sworn to” before a notary public (who is also plaintiff's counsel), whatever that may mean. An oath alone, however, is an inadequate safeguard to meet the requirement of the residual exception that the statement have “equivalent circumstantial guarantees of trustworthiness.” Plaintiff's argument that sufficient guarantees of trustworthiness are provided by corroborating evidence is similarly unavailing. To tip the balance in favor of admissibility, corroborating evidence must be extraordinarily strong. Plaintiff has identified no “extraordinarily strong” corroborating evidence for the Jackson Affidavit, but has instead touted the uniqueness of that affidavit among all of the evidence in this case.

Trustworthiness and Not more probative: Customer statements

Western Insulation LP v. Moore, 242 Fed. Appx. 112 (4th Cir. 2007): In an action alleging tortious interference, the plaintiff sought to prove that it lost out on bids. To do so it offered a report of customer statements on who won these bids and at what price. The court held that the customer's statements were not admissible as residual hearsay, because they failed both the trustworthiness and "more probative" requirement.

First, there was no indication regarding the trustworthiness of the information the customers allegedly gave to Western's sales representatives. In fact, the customers may well have had a motive to mislead Western in order to cause Western to submit lower bids in the future. Second, clearly it would have been more probative to produce the testimony of the customers themselves rather than secondhand accounts of the information the customers provided.

Trustworthiness: Letters submitted in an application for a green card

De Venustas v. Venustas, Intl., 2007 WL 2005560 (S.D.N.Y.): In a trademark dispute the plaintiff sought to admit letters that were submitted in an application for a green card for an executive. The court held that the letters were not sufficiently trustworthy to be admissible as residual hearsay:

The letters may have been written to present Mr. Bradl in a particularly positive light in order to enable Mr. Bradl to secure his residency status, and could even have been prepared by someone other than the signatory. There is nothing about the letters that suggests they were created under circumstances suggesting that they are inherently trustworthy.

Trustworthiness: Near miss of Rule 804(b)(1)

U.S. ex rel. Miller v. Bill Harbert Intern. Const., Inc., 2007 WL 842079 (D.D.C. 2007): This was a civil case involving conspiracy, brought against a corporation and an individual after a corporate official (Anderson) was tried criminally for conspiracy. The plaintiffs sought to admit testimony from the Anderson trial. The court found that the testimony was not admissible under Rule 804(b)(1) because Anderson was not a "predecessor in interest" of the corporation and individual in this case. Anderson's motive was to show that he was not a member of the conspiracy; that differed from the current parties, whose motive was to show that there was not conspiracy at all. The plaintiffs argued that the testimony was admissible under Rule 807 as a "near miss" of Rule 804(b)(1), but the court disagreed. It reasoned as follows:

Plaintiffs argue that this evidence is such a near-miss that it should fall under Rule 807. But this testimony fails on almost every prong of that Rule. First, Rule 807 can only apply to a "statement not specifically covered by Rule 803 or 804." This Circuit has made clear that this provision is more residual than catchall, meaning that it is meant to pick up

the residue of reliable and probative hearsay evidence not otherwise admissible, and is not meant to catch all of the arguably admissible evidence that rightly does not fit within the existing categories. This evidence is clearly meant to be channeled through Rule 804(b)(1), and clearly fails. This is a strong indication that it is not meant to be admitted via Rule 807.

The residual exception next requires that a statement “hav[e] equivalent circumstantial guarantees of trustworthiness.” The testimony here does not have equivalent guarantees of trustworthiness. Granted, the testimony was taken under oath, is captured in verbatim transcripts, and was presided over by a federal judge—these are all trappings which suggest trustworthiness. But for all of the hearsay exceptions, there is always some factor or factors that make up, at least in part, for the fact that the party against whom the evidence is offered cannot cross-examine the declarant. Former testimony usually must satisfy the requirements of Rule 804(b)(1) so that the loss of the ability to cross-examine is made up for by the fact that when the former testimony was given, the party against whom it is now offered, or someone with very similar interests, had a chance to develop that testimony. The defendants against whom this testimony is offered in this case did not have that opportunity, and no one who did have that opportunity also had the interests of these defendants at heart. Nothing in this testimony makes up for the inability to cross-examine here, and so it cannot be offered [under Rule 807].

Reporter’s comment: The court shows concern that too broad an application of Rule 807 will end up eroding the limitations of the standard exception. That approach is in conflict with the broader approach to the same question of admissibility of testimony outside Rule 804(b)(1) employed by a court in the Western District of Michigan in *Stryker Corp. v. XL Ins. America*, 2007 WL 172401 (W.D.Mich.). The point is that the federal courts are not uniform in their approach to the residual exception.

Trustworthiness --- News reporter’s repudiated statement

United States v. Libby, 475 F.Supp.2d 73 (D.D.C. 2007): In the Lewis Libby prosecution, the defendant sought to admit the statement of reporter Andrea Mitchell, made on television, that would tend to show that she informed Tim Russert of NBC about Valerie Plame being a CIA agent --- before Libby made that disclosure. Mitchell subsequently recanted, saying she had made a mistake. The court found that Mitchell’s first statement was not admissible as residual hearsay, relying heavily on the legislative history --- and case law in the D.C. Circuit --- indicating that the exception is to be narrowly construed. The court declared as follows:

Mitchell represented to the Court through counsel and stated publicly that she was mistaken when she had spoken these words on the Capitol Report. And * * * this Court’s own review of the statement showed that the way it is worded makes it somewhat ambiguous as to when Mitchell was saying she first heard about Ms. Wilson’s affiliation with the CIA. The Court simply could not find any indication that this statement had the requisite level of trustworthiness to qualify as an exception to the hearsay rule under this

Circuit's construction of the residual hearsay exception. Because the District of Columbia Circuit commands this Court to strictly construe Rule 807 narrowly, and because Mitchell's October 2003 statement lacks sufficient indicia of reliability, admitting this statement under the residual hearsay exception would have perverted the limitation on the admissibility of hearsay statements.

Trustworthiness: Deposition where opponent was not noticed

Ponzini v. County of Monroe, 2016 WL 4500775 (M.D.Pa.) (deposition inadmissible under Rule 807 because it was prepared in anticipation of litigation and the party against whom it is offered was not given notice of the deposition).

Trustworthiness --- Law firm's account of a meeting

Barry v. Trustees, 467 F.Supp.2d 91 (D.D.C. 2006): In an ERISA action, the plaintiff sought to admit a law firm's account of a meeting in which structuring transactions were discussed. The court found the law firm's report to be an insufficiently trustworthy record of the statements made at the meeting. The court emphasized that the report contained disclaimers that it was not intended to be a verbatim record but rather a summary, and that the topics in the report were not in the same order as they were taken at the meeting. In the course of the discussion, the court made the following points about Rule 807:

- The materiality and interest of justice requirements are meaningless because they simply restate Rules 401 and 102 respectively.
- The residual exception is “extremely narrow and requires testimony to be very important and very reliable” and because “the exception is to be used sparingly, the proponent of the statement bears a heavy burden to come forward with indicia of both trustworthiness and probative force.”

Reporter's comment: This is a good example of a strict construction of Rule 807, relying heavily on the legislative history requiring “exceptional circumstances.” A law firm's summary of a meeting would seem to be a very reliable account under the circumstances; and the disclaimers sound like little more than legalese.

Trustworthiness: Statement of claimant made in anticipation of litigation

Boyd v. City of Oakland, 485 F.Supp.2d 1015 (N.D. Cal. 2006): In a section 1983 case, the court found that a hearsay statement from the plaintiff to his mother (who was also his lawyer) about what happened in an encounter with the police was not admissible under Rule 807.

The court concluded that “Mr. Boyd's statements are self serving (e.g. made in contemplation of litigation, as established above) and lack corroboration.”

Trustworthiness: Statement of patient about medical care

Lentz v. United States, 2006 WL 2811252 (W.D. Mo.): In an FTCA case, the question was whether a veteran was told (incorrectly) by a VA nurse that he was suffering from lung cancer; after speaking to the nurse, the veteran committed suicide the next day. The critical evidence was testimony from the veteran’s daughter who would state that her father told her that he had been informed of lung cancer by the nurse. The hearsay statement by the father of what the nurse said was offered as residual hearsay, but the court found it insufficiently trustworthy, reasoning as follows:

The Court does not find that Ms. Baty's testimony regarding the telephone conversation with her father contains the guarantees of trustworthiness commensurate to the other hearsay exceptions. Mr. Lentz was sixty-nine years old at the time, it is possible that he did not hear what the nurse told him or he might have simply misunderstood. Therefore, the Court does not find that this testimony fits into the residual hearsay exception.

Reporter’s comment: This is a harsh ruling. Residual hearsay should not be excluded on the court’s mere assumption that a 69 year-old man has difficulty hearing and understanding things. This questionable ruling may have been spurred by the court’s attempt to find reliability “commensurate with the other exceptions.” It wasn’t a dying declaration (because he killed himself the next day) and it wasn’t a present sense impression (because it was made an hour after he spoke to the nurse). But it was made fairly soon after the event and the veteran certainly had no reason to falsify. This might be the kind of statement that would be covered by a liberalization of the residual exception.

Trustworthiness: Relationship to business records

Brown v. Crown Equipment Corp., 444 F.Supp.2d 59 (D.Me. 2006): On a motion in limine in a product liability action, the plaintiff sought to admit accident reports of other incidents involving the product. The plaintiff invoked Rule 803(6) but the court found that the plaintiff had not yet shown that the records were prepared by a person with knowledge. The plaintiff then argued that Rule 807 applied, but the court held that before that motion could be considered, the plaintiff was required to try to establish admissibility under Rule 803(6):

Here, where the plaintiff has invoked a subsection of Rule 803 but has not presented sufficient evidence to allow the court to determine whether it applies to each of the proffered reports, the court cannot proceed to consider Rule 807 until a decision has been made that the reports are “not specifically covered by Rule 803,” as Rule 807 requires. I doubt in any event that the circumstances of this case present “exceptional

circumstances” that would justify application of Rule 807, but at this time I need not reach that issue.

Reporter’s Comment: One of the ways to liberalize Rule 807 would be to delete the requirement that a statement not be admissible under another exception. That would avoid what might be seen as a rigid and inefficient ruling such as the court made here.

Trustworthiness: Statement by a possible suspect

United States v. Chase, 451 F.3d 474 (8th Cir. 2006): The defendant was charged with voluntary manslaughter, stemming from a fight between rival groups. He sought to admit the statement from someone who said that she drove her car into the mob. The court found that this was insufficiently reliable to be admitted under Rule 807: “At the time Fast Horse made the statement, she was a suspect in an assault case as the result of her use of an automobile to run down an individual of the rival group, and thus she had motive to implicate others and downplay her role in the incident.”

Trustworthiness: Gesture by an impaired declarant

United States v. Two Shields, 435 F.Supp.2d 973 (N.D. 2006): A victim of assault was hospitalized and could not speak, but shook his head when asked if the defendant was the perpetrator. Previously the victim indicated that he couldn’t remember anything about the assault. The court found that testimony about the head-shake failed the trustworthiness requirement of the residual exception:

BuffaloBoy's physical and mental health at the time of the statement is seriously in question. The Court finds that his blood alcohol concentration, coupled with his severe head injury, calls into serious question the veracity of the non-verbal statement. BuffaloBoy was unable to recall even his own age. To that end, Dr. Roller indicated that Thomas BuffaloBoy was incoherent and unintelligible. Further, BuffaloBoy's statement to Kathleen BuffaloBoy directly contradicts previous verbal statements he had made to family members and medical professionals. Finally, BuffaloBoy's statement is merely a head gesture. By their very nature, head gestures are far less clear than verbal or hand written responses. A head gesture is susceptible to multiple interpretations or misinterpretations.

Trustworthiness: Letter recounting disputed events

Metropolitan Enterprise Corp v. United Technologies, Int’l, 2006 WL 798870 (D.Conn.): A letter recounting disputed events was excluded:

The letter was not prepared contemporaneously with the events in question. It was prepared at least in part by a party, David Liu, who has an interest in the outcome of this case. The author of the letter was not under oath and will not be available for cross examination. The testimony of CAL's Charles Peng that the contents of Wei's letter were "not 100 percent correct" because there were other reasons besides price that entered into CAL's decision in awarding the contract, indicates that cross examination of the author as to the accuracy of his letter is important in weighing and considering the significance of this letter, and underscores the precise purpose of hearsay exclusions. The residual hearsay exception is to be "used very rarely, and only in exceptional circumstances." *Id.* (citation omitted). The Wei letter is not "exceptional" in any way; it is an ordinary piece of correspondence that does not meet any of the exceptions to the hearsay rule.

II. MORE PROBATIVE

Not more probative: Other witness statements available

Draper v. Rosario, 2016 WL 4651407 (9th Cir.): A prisoner alleged that he had been beaten up by a prison guard. A witness to the event refused to testify because he feared reprisal. Counsel moved for the witness's prior sworn statement to be admitted under the residual exception. The court of appeals found no error in its exclusion. It concluded that the district court did not err in concluding that the witness's statement was not more probative than the testimony that would be provided by two other prisoners. The court explained as follows:

Draper's counsel argued that Doe's testimony was unique because he "saw Mr. Draper put his foot against the bars to try to prevent his head and body from hitting the bars, [and] the witness was distinct that the foot move was defensive." While the other prisoner witnesses (Shepard and Thompson) did not provide this exact account, they both testified that Draper was at no time resisting Rosario and that Rosario was the aggressor. On this record, the district court reasonably concluded that Doe's statement about Draper's defensive foot move was not significantly more probative than the testimony already presented.

Reporter's comment: The more probative requirement is hard enough to satisfy as written. The court would not appear to be justified in requiring that a proponent show that the hearsay is *significantly* more probative than other reasonably available evidence. Here, where the hearsay statement is more detailed and apparently from a different perspective than the other statements, it should be found to satisfy the more probative requirement.

Not more probative: Other hearsay statements of the declarant available

Ponzini v. Monroe County, 2016 WL 4494173 (M.D. Pa.): A prisoner died in prison and a disputed issue was whether he committed suicide. The defendant offered testimony from a guard that the prisoner told the guard that he was going to buy him a pizza. The court held that this testimony could not be admitted under Rule 807, because it was not more probative than any other evidence that could be offered to prove the prisoner's mental state. The court noted that "Defendants point to numerous statements made by Mr. Barbaros to medical professionals while he was incarcerated in an attempt to demonstrate that he gave no indication that he was suicidal. These statements, made to nurses and mental health professionals, are far more probative of Mr. Barbaros' state of mind than the statement at issue."

Reporter's comment: This is arguably a sound application of the more probative requirement, because the comparison is between the hearsay and other statements from the declarant. It is contrasted to a general "best evidence" search over all the evidence that could be produced in the case. An amendment to Rule 807, discussed in the Reporter's memo, would limit the more probative requirement to a comparison with other statements from the declarant.

Not more probative --- statement of a former employee where a statement of a current employee is found admissible

Nationwide Agribusiness Ins. Co. v. Meller Poultry Equipment, Inc., 2016 WL 2593935 (E.D. Wisc.): An employee fell from a catwalk. Two employees made hearsay statements that the employer, Meller, had weakened the steel on the catwalk. One of the employees, Kreyer, made his statement while still employed so it was admissible against Meller under Rule 801(d)(2)(D). The other was made by a former employee, Schmidt --- so not admissible under Rule 801(d)(2)(D) --- and the plaintiff offered it under Rule 807. But the court excluded the statement, reasoning that “Schmidt's statements about steel quality are not more probative than Kreyer's statements about the same subject. Therefore, Schmidt's hearsay statements are not admissible under Rule 807.”

Reporter’s comment: This is an unfortunate result of the existing “more probative” test. The hearsay statement from one declarant is inadmissible simply because the hearsay statement of another is found admissible. Surely it is appropriate to try to admit statements from multiple declarants, in the same way as it is appropriate to call more than one eyewitness to an event. The limits on cumulative testimony imposed by Rule 403 are sufficient to protect against overkill. The “more probative” requirement is more rigid. It says “you don’t need the hearsay statement if you have another statement from anyone else.” But that seems cold comfort to anyone trying a case.

Note that if Schmidt had been employed when he made the statements, they would have been admissible along with Kreyer’s statements, as there was no argument that Schmidt’s statements were cumulative under Rule 403. If that is so, why should the statements be excluded when offered under Rule 807, assuming that they satisfy the rigorous standard of trustworthiness? A Rule 801(d)(2) statement is admitted without any trustworthiness review; it seems to compare unfavorably with a trustworthy statement offered under Rule 807, but it gets better treatment because of the “more probative” language of Rule 807.

Not more probative – Material Safety Data Sheet

In re C.R. Bard, Inc., MDL No. 2187, Pelvic Repair System Products Liability Litig., 810 F.3d 913 (4th Cir. 2016): In a product liability action, the district court admitted assertions in a material safety data sheet (MSDS) as proof that polypropylene was potentially dangerous for human implantation. The court noted that an MSDS is “a warning and disclaimer of liability for the self-interested issuing party.” The court of appeals held that the trial court erred in admitting the MSDS as proof of dangerousness. It did not analyze trustworthiness, although it is clear from the opinion that if it had, it would have found the MSDS inadmissible. Instead, the court relied solely on its conclusion that the MSDS was not more probative than any other evidence reasonably available:

The relative dangers of polypropylene in pellet and monofilament form was an issue that received substantial attention from both parties' experts who themselves relied on studies, reports, empirical evidence, and tissue sample slides evidencing Ms. Cisson's particular pathology. The warning in the MSDS, on the other hand, was nothing more than an assertion made by the self-interested manufacturer of polypropylene that the product should not be implanted in humans. The MSDS made no attempt to explain why polypropylene might be dangerous or how Phillips had come to this conclusion. Because there was ample other evidence available to address polypropylene's viability as a material for surgical implants, we find that the district court abused its discretion in finding, again *sua sponte*, that the MSDS could come in for its truth under Rule 807.

Reporter's comment: Comparing the proffered hearsay with other evidence in the case is fraught with peril; simply because other evidence in the case might prove the point does not mean that the proffered hearsay would be useless. Litigants have every reason to add multiple sources of evidence to prove a point, as the whole can be greater than the sum of its parts. What this court is really saying is that the MSDS was not *reliable*, especially in comparison to the adversarially-tested information presented in the case. Unreliability is a reason on its own to exclude the MSDS, and it seems to be the more straightforward analysis. Put another way, you don't need a "more probative" requirement to exclude the questionable hearsay in this case.

Not more probative --- deceased person's statement could have been proven by testimony from others affected by the statement

Nance v. Ingram, 2015 WL 5719590 (E.D.N.C.): In a case alleging that a sheriff interfered with the plaintiffs' business after the plaintiffs' contributed to the sheriff's opponent in a campaign, the plaintiffs' offered a hearsay statement from an official (now deceased) who attended a department meeting and told one of the plaintiffs about a directive issued by the sheriff that would harm their business. The court held that the hearsay statement was not admissible under Rule 807, because "there are a number of other witnesses from whom plaintiffs could obtain similar evidence with reasonable efforts. For example, plaintiffs could have deposed or sought affidavits from other attendees of the BCSO department meeting or from any one of the former patients who allegedly left plaintiffs' healthcare practice due to defendant Ingram's directive. Instead, plaintiffs have relied upon a statement from a person who is now deceased in order to introduce evidence of a statement which defendant Ingram denies making."

Reporter's comment: One of the problems with the "more probative" requirement is that a court can almost always find some other source of evidence that can plausibly be found and used to prove the point. Here the court hypothesizes, that people *affected* by the directive, not only people who heard the statement, would be an alternative source of the evidence.

Not more probative --- Expert's reports

United States v. Lasley, 2014 WL 6775539 (N.D.Iowa): In an in limine proceeding in a murder prosecution, the defendant argued that his experts' reports should be admitted for their

truth at trial. The defendant argued that they were admissible under Rule 807, but the court disagreed, stating that “Defendant's experts are available and intend to testify at trial. Therefore, the reports are not more probative on the point for which they are offered than any other evidence that the proponent can obtain through reasonable efforts. That is, the experts' testimony itself is more probative on the point for which such experts' reports are offered.”

See also:

N5 Technologies LLC v. Capitol One, 56 F.Supp.3d 755 (E.D.Va. 2014): In a patent action, the plaintiff sought to admit an expert report prepared in another litigation under Rule 807. The court found the report inadmissible, because “plaintiff, through reasonable efforts, could have retained its own expert and presented testimony on the doctrine of equivalents, but chose not to do so. Plaintiff must now live with the consequences of this choice and may not escape those consequences by seeking to admit defendants' expert report into evidence via * * * Rule 807.”

Not more probative --- newspaper articles

Planned Parenthood Southeast v. Strange, 33 F.Supp.3d 1381 (M.D. Ala.2014): In a case challenging abortion regulations, the plaintiffs offered newspaper reports describing legislative activities. The court held that the newspaper reports were not more probative than any other evidence reasonably available. The court explained as follows:

In this case, the plaintiffs argued that the court should admit the newspaper articles under Rule 807 in light of the absence of official legislative history. However, even if the articles in question satisfy the requirement of trustworthiness and even if admitting them would serve the interests of justice, the articles would not be admissible because the plaintiffs could have introduced other, equally probative evidence of the reported statements: They could have called the legislators themselves and examined them as to their statements; and, alternatively, they could have elicited testimony from the reporters or other witnesses who observed the statements reflected in the newspaper articles. *See Larez v. City of Los Angeles*, 946 F.2d 630, 641–44 (9th Cir.1991). By attempting to introduce the articles instead, the plaintiffs denied the State the opportunity to cross-examine the observers as to the accuracy of the alleged statements. The plaintiffs did not show that they made reasonable efforts to obtain such testimony or that it would have been futile to do so.

For other cases finding newspaper articles inadmissible because not more probative, see

Adams v. County of Erie, Pa., 2011 WL 4574784 (W.D.Pa.): The plaintiff contended that he was fired from a public job for political reasons. The court held that newspaper articles regarding Erie County Politics were not admissible under Rule 807. The court stated that “no showing has been made, and the Court does not find, that the newspaper articles in question are the best evidence that could be procured through reasonable efforts.”

Irvin v. Southern Snow Mfg., Inc., 2011 WL 4833047 (D.Miss.) (newspaper article not admissible under Rule 807 because there was “no evidence that this is truly an exceptional case requiring the article to be admitted.”).

Not more probative --- testimony from a prior trial

United States v. Turner, 561 Fed. Appx. 312 (5th Cir. 2014): The defendant was tried after a mistrial, and he sought to admit some testimony that a government witness gave at the original trial. The defendant made no attempt to determine whether the witness was available. The court held that the testimony was properly excluded because it was not as probative as testimony by the witness at the current trial would be. The court explained as follows:

Although Rule 807 does not contain an explicit requirement that the declarant be unavailable, it still requires the proponent of the hearsay to undertake reasonable efforts to get better evidence, and Rule 807(a) only applies if another exception does not. Here, Turner has not pointed to any reasonable efforts to obtain Ubani's live testimony. Indeed, Turner's counsel argued that because she was relying on the residual exception only, there was no need to even determine whether Ubani was available. That contradicts both the letter and spirit of the residual exception, which is intended to be a last resort. * * *

Turner cannot rely on Rule 807's residual exception to do an end run around Rule 804(b)(1)'s requirement that the witness be unavailable, particularly where she has made no attempt to show that Ubani is unavailable.

Not more probative: Statement about an accident

Rosenbaum v. Freight, Lime and Sand Hauling, Inc., 2013 WL 785481 (N.D. Ind.): Grecco was stopped at a light when he was rear ended by a truck. The dispute was over whether a truck behind that truck was responsible for the accident. Grecco made a taped statement to a representative of the defendant, and the defendant sought to admit it as residual hearsay. The court found that the statement was trustworthy, because Grecco was an innocent party with no motive to falsify; also, he stated that he knew he was being recorded and that his statement could be used at trial. But the court found that Grecco's statement was inadmissible under Rule 807 because it was not more probative than other evidence available. That was because the drivers of the two trucks were in a better position than Grecco to see what happened, because Grecco was hit from behind.

The court also reviewed the interests of justice requirement and noted that while Grecco was dead by the time of trial, the defendant had ample time to depose him and never took the

opportunity --- even though the defendant knew the value of Grecco's testimony because it had taken his statement. The court stated that under the interest of justice requirement, "a trial court is not required to remedy the deficiencies of a party's trial preparation when considering the admissibility of hearsay."

Reporter's comment: This case shows the problem with the more probative requirement. The court is holding that the testimony from the two drivers involved is more probative than Grecco's, because they saw the accident directly and he did not. But in fact Grecco's testimony is sure to be important and even necessary, because the two drivers involved in the accident will likely have conflicting accounts. The more probative requirement could be more usefully and predictably applied if the hearsay were compared only to other evidence available from the *declarant* --- as opposed to a comparison with all other evidence in the case.

Not more probative --- prisoner's statement where statements could be generated from other sources

Haynes v. White County, Ark., 2012 WL 460263 (D.Ark.): The plaintiff claimed that a prison was deliberately indifferent to her husband's medical needs, and that he died as a result. To prove that he hadn't been treated, the plaintiff offered the grievances that the plaintiff filed with the prison, which indicated that he had not been seen by a doctor. The court held that these filed grievances were not admissible under Rule 807, for two reasons.

First, they were insufficiently trustworthy because they were biased. Second, they failed the more probative test because "[a]lthough Haynes obviously is unavailable to testify, the plaintiff could through reasonable efforts obtain testimony on the issue of whether Dr. Killough came to the jail from other inmates or from Dr. Killough himself."

Reporter's comment: It goes without saying that any possible testimony from the doctor should not be considered under the "more probative" test. If that were so, the hearsay proffered by a party would never qualify under Rule 807 because the party could just call the adversary for their opinion on the subject.

Not more probative: Testimony reasonably available through letters rogatory

Madison Inv. Trust v. Bank of N.Y. Mellon, 2010 WL 1529436 (D.Colo.): A hearsay statement made by a witness in a foreign country was found inadmissible under Rule 807 because the proponent made no attempt to obtain testimony from the witness pursuant to letters rogatory.

Reporter's comment: The court implicitly made the findings that: 1) Use of a letters rogatory procedure is within the scope of "reasonable efforts" that a proponent must try under Rule 807; and 2) the testimony obtained by letters rogatory from the witness would be at least as probative as the witness's hearsay statement. Query whether either of those findings are sound. The letters rogatory procedure is cumbersome and lengthy. More importantly, the letters rogatory procedure calls for answers to interrogatories --- why would that be any better evidence than an informal statement made closer in time to the event?

Not more probative: Witness statement of a declarant available to testify

United States v. Wilkerson, 656 F.Supp.2d 22 (D.D.C. 2009): A witness to a crime made inconsistent statements to police. The defendant wanted to admit the one that favored his position. The court held that the statement was not admissible as residual hearsay, because the witness was available "since live testimony by Carthens himself was readily available and clearly more probative than his recorded statements."

Reporter's comment: If the defendant knows that the witness's testimony would not be as favorable to his position as a prior statement, it seems harsh to rule that the testimony is "more probative" than the statement. It would seem that the "more probative" requirement should be assessed by whether the testimony would advance the proponent's case as much as the hearsay would.

Not more probative: State bar determination

Auguste v. Sullivan, 2009 WL 807446 (D.Colo.): In a suit against a prosecutor claiming damages from an illegal search, the plaintiff sought to admit a report of a state bar disciplinary proceeding, imposing discipline on the prosecutor for his conduct in the challenged search. The court found that the report could not be admitted under Rule 807, because the plaintiff had not shown that it was more probative than any other evidence reasonably available:

Plaintiff has made no showing that she cannot present witnesses and exhibits to substantiate her case without relying on the Bar Court Decision. There is no reason effectively to preempt the duties of the jury in this case to resolve factual disputes by introducing as evidence the findings of a judge in the California disciplinary proceeding.

Reporter's comment: This is an exceedingly harsh application of the more probative requirement. That requirement cannot mean that inefficiency is mandated. As stated throughout, the more probative requirement should be limited to a comparison with other evidence available from the declarant, not to all the other evidence that might be found in the case.

Not more probative: Must seek motion to compel

Tele Atlas NV v. NAVTEQ Corp., 2008 WL 4809441 (N.D.Cal.): In a summary judgment motion, an employee of the plaintiff averred that employees of third parties had told him something (redacted in the opinion) about the defendant. The plaintiffs argued that these statements should be considered under Rule 807, because the plaintiffs were being “thwarted” in obtaining the testimony from the third party in discovery. The court sympathized with the argument, but ultimately held that the hearsay was not more probative than obtaining testimony from the declarants by seeking a motion to compel:

The court sympathizes with the difficult decision of whether to file a motion to compel against a firm that one wishes to secure as a customer. A motion to compel is easily filed from a legal perspective. However, from a business perspective focused on satisfying customers, winning their business, and keeping them happy, the notion of filing a motion to compel a potential customer to provide additional discovery understandably raises concern. * * * Nevertheless, Tele Atlas has the legal tools to obtain the evidence it believes it needs. Tele Atlas has chosen to forgo those tools to not risk alienating Garmin and losing Garmin's business. The choice to further Tele Atlas' business interests cannot in turn be used to justify admitting hearsay statements against NAVTEQ under Rule 807 and prejudicing NAVTEQ.

Not more probative: Plea agreements of available witnesses

United States v. Hawley, 562 F.Supp.2d 1017 (N.D. Iowa 2008): The court held that plea agreements were not admissible under Rule 807 where the witnesses were available to testify. The government argument that the plea agreements would be “more persuasive” than the in-court testimony but the court was not convinced that this would be the case, nor that “more persuasive” was the same as “more probative.” In a subsequent opinion, at 2011 WL 10483390, the court also held that a taped statement about a matter four years after the event, as well as grand jury testimony, were insufficiently trustworthy to be admissible under Rule 807.

Not more probative: Prior testimony of available witnesses

United States v. Peterson, 2008 WL 627418 (D.N.Dak.): The government sought to admit two witness transcripts of testimony from a prior, related trial. The witnesses were available but the government argued that admitting the transcripts would “streamline” the trial, and that the government did not wish to go to the expense of producing the witnesses. The government argued that the transcripts were admissible under Rule 807, but the court disagreed, stating that the transcripts were not more probative than testimony from the available witnesses.

Not more probative: Witness statements with no attempt to produce the witness or obtain an affidavit

Taylor v. N.E. Ill. Regional Commuter RR Corp., 2008 WL 244303 (N.D. Ill.): In a FELA action, the plaintiff sought to admit written statements that she had obtained from witnesses to her injury. The court found that these statements could not be admitted as residual hearsay:

Here, none of the statements were taken under oath and plaintiff has failed to demonstrate how the statements are trustworthy or reliable at all. Moreover, under Rule 807 the statements must be “more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.” Plaintiff has failed to show that these witnesses are unavailable to testify at trial. This Court cannot conclude that unverified statements are more probative than live witnesses who could be cross-examined and assessed for credibility. Even if one of the witnesses is retired and unavailable to testify at trial as plaintiff suggests, plaintiff still could have attempted to secure an affidavit from that witness. An affidavit would at least provide sworn testimony. Plaintiff failed to explain any reasonable efforts undertaken to procure an affidavit or to arrange for the available witnesses to testify at trial.

Not more probative: Statements to counsel where other statements have been made

United States v. Awer, 502 F.Supp.2d 273 (D.R.I. 2007): In a drug case, the defendant sought to admit a written statement by Johnson that the drugs were hers and not the defendant’s. The court found the written statement admissible under Rule 804(b)(3). Johnson also made oral statements to attorneys to the same effect. These were held not admissible under Rule 804(b)(3) because they were confidential and so there was no risk of incrimination. The defendant moved to have the statements to attorneys admitted under Rule 807, but the court found the statements were not “more probative” of other reasonably available evidence: “because Ms. Johnson’s written statement, the best evidence of her assertions, is admissible.”

Reporter comment: The defendant has a good argument that the statements to the lawyer would be useful even though the written statement was admitted. The statements to the lawyers were made under circumstantial guarantees that were different, and probably stronger, than the written statement. This shows the difficulty of applying the “more probative” requirement. If trustworthy hearsay has circumstantial guarantees that are different from evidence already admitted, it should be admissible under the residual exception (as it would be if it qualified under a standard exception).

Note: The district court’s opinion was affirmed in *United States v. Awer*, 770 F.3d 83 (1st Cir. 2014) (“Because reasonable minds can disagree on whether the attorneys’ testimony was vital, the district court’s position—that the testimony was not more probative than Johnson’s written statements—cannot be an abuse of discretion, especially when Rule 807 is “to be used very rarely” and only in “exceptional circumstances.”).

Not more probative: Deposition of a declarant not shown to be unavailable

Bouygues Telecom, S.A. v. Tekelec, 473 F.Supp.2d 692 (E.D.N.C. 2007): Deposition testimony was not admissible under Rule 807 because there was no showing that the deponents would be unavailable for trial and therefore the proponent had failed to show that the deposition testimony was more probative than any other testimony reasonably available.

Reporter's comment: This is a sound application of the necessity requirement --- the comparable is to evidence that could be obtained from the declarant, as opposed to any other source, so it is easily applied. Moreover, the residual exception should not be used as a device that would simply substitute deposition testimony for producing an available witness for trial.

Not more probative: Patient's statement of health where medical records are available

Morris v. Crete Carrier Corp., 2006 WL 6929730 (W.D. Okla.): An accident victim spoke to his wife about his health issues. The statements from husband to wife were offered under the residual exception, but the court found that the statements were not more probative than any other evidence on the point: "medical records provide the most probative evidence on this point."

Reporter's comment: The case shows the problem of a "more probative" requirement that requires consideration of evidence coming from other than the declarant. Who is to say that the medical records are better evidence than the victim's own statement of how he feels? And assuming reliability, why does it make sense to exclude one piece of evidence simply because you have the other?

Not more probative: Summary of a prior statement of an available declarant

United States v. Sparkman, 235 F.R.D. 454 (E.D.Mo. 2006): The defendant sought to offer a police officer's summary of a prior statement of a government witness. The court found it not admissible under Rule 807 as it was not more probative than the testimony of that government witness.

III. Interests of Justice

Interests of Justice: Foreign bank records

Lakah v. UBS AG, 996 F.Supp.2d 250 (S.D.N.Y. 2014): The court held that foreign bank records were not admissible under Rule 807. The proponents could not qualify the records under Rule 803(6) because they could not obtain a foundation witness or a certificate. The court held that it would be against “the interests of justice” for the court to use the residual exception to “end-run” the foundation requirements of Rule 803(6).

Reporter’s comment: Here we see the interests of justice language being used as a means to explain an exclusion without the court having to resort to an actual investigation of whether the hearsay is trustworthy. This led the court to a different result than other courts that have admitted foreign bank records under Rule 807. See *United States v. Turner*, 718 F.3d 226 (3rd Cir. 2013), and *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362 (S.D.N.Y. 2014), discussed in the digest on hearsay found admissible under Rule 807.

Interests of justice and Not more probative: Summary judgment affidavit

Ragin v. Newburgh Enlarged City School Dist., 2011 WL 2183175 (S.D.N.Y.): The court held that an affidavit previously prepared for a summary judgment motion was not admissible under Rule 807, largely because it was not more probative than any other evidence reasonably available. The court elaborated as follows:

The Saturnelli Affidavit addresses Saturnelli's recommendation to the Board that Ragin's employment be terminated and her subjective reasons for making this recommendation; it is certainly “offered as evidence of a material fact.” It is not, however, more probative than other evidence Defendants could have procured through reasonable efforts. All of the facts contained in the affidavit can be established by the introduction of business records, Saturnelli's January 2007 deposition, or the testimony of other witnesses. Defendants could have elicited the testimony contained in the Saturnelli Affidavit by asking additional questions during her January 2007 deposition or by conducting an additional deposition at some time prior to December 2010, but they failed to take either course of action.

The court also had an unusual interpretation of the interests of justice requirement. It stated that “the general purposes of the Federal Rules of Evidence and the interests of justice will not be best served by admission of the Saturnelli Affidavit, because the application of the residual exception in this case would abrogate the requirement in Rule 804(b) (1) that a party against whom prior sworn testimony is offered must have had an opportunity for cross-examination.”

Reporter’s comment: The interests of justice can be criticized for being nothing but a duplication of Rule 102. But another criticism might be that it can be an empty vessel for the court to fill with its own discretion. In this case, the court refuses to apply the residual exception because it would not be “just” to do so as it would undermine the limitations of Rule 804(b)(1). But many other courts have allowed sworn but uncross-examined statements to be admissible

under Rule 807. Interests of justice should not be an excuse for judge-dependent predilections either opposed to or in favor of a residual exception.

APPENDIX 2

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Case Digest: Hearsay Proffered Under Rule 807 Found Admissible 2006-Present

By Daniel J. Capra

Note: The cases are grouped by which admissibility requirement was predominantly discussed by the court. Within those subject matters the cases are listed by date, with the exception of multiple cases discusses a common point, which are grouped together.

I attempted to include all reported cases with a meaningful discussion of a Rule 807 admissibility requirement, in which the proffered hearsay was excluded by a trial court or was found by an appellate court to be excludible.

Cases involving notice are generally not included as they have already been reviewed when the Committee worked through a proposal to modify the notice requirements of Rule 807.

I. TRUSTWORTHINESS

Trustworthiness: Probationer's report to probation officer

United States v. Moore, 824 F.3d 620 (7th Cir. 2016): The defendant was charged with selling a firearm to a felon and falsely reporting that it was stolen. The felon had provided a phone number to his probation officer in a written supervision report, and evidence indicated that the defendant called that phone number on a number of occasions. The calls to the felon would implicate the defendant in the sale of the firearm and rebut the argument that it was stolen. The trial court excluded testimony from the probation officer that the felon had provided him that phone number. But on interlocutory appeal, the court found that the trial court erred and the hearsay statement of the felon about his number should have been admitted as residual hearsay. The only disputed factor was trustworthiness. The district court had focused almost exclusively on the fact that the felon was not under oath when he filled out the supervision form. But the court of appeals found that focus to be too narrow. The court analyzed other trustworthiness factors as follows:

[T]he most important factor here is Hayden's motivation—or lack thereof—to lie about his phone number. The district court concluded that Hayden's criminal history casts doubt on his motivation to tell the truth. Hayden's apparent willingness to break the law does not explain why he would lie in this instance, however. When Hayden identified his phone number as (____) ____-9312, he knew not only that he could be punished for lying but that probation officers would use that number to contact him. He knew that they would call him because they had done so with a number he had previously reported.

Furthermore, at the time he gave his probation officer the 9312 number, Hayden had no reason to believe that his phone number would be integral in the criminal prosecution of another man. In short, he had no obvious reason to lie.

The court also found substantial corroboration:

Most notably, we know that [Hayden] confessed to smoking marijuana in his February 2012 report and that he accurately conveyed a change in his contact information in the report filed on March 22, 2012. In the latter report, he listed a new phone number, the 6466 number, which a Deputy United States Marshal did use to contact him. And the 6466 number is also corroborative in another respect: Moore's phone was in frequent contact with the 9312 number throughout the first few months of 2012. But that correspondence ended abruptly on March 7, 2012. Hours later, Moore's phone commenced an equally prolific exchange with the 6466 number, a powerful indication that the person who owned that number was previously using the 9312 number.

The court closed with a general statement about applying the residual exception:

We have warned against the liberal admission of evidence under Rule 807, see *Akrabawi v. Carnes Co.*, 152 F.3d 688, 697 (7th Cir. 1998) (cautioning against the frequent utilization of Rule 807, lest the residual exception become “the exception that swallows the hearsay rule”), but in the circumstances of this case, the exception is particularly apt. Hayden's statements in the Reports bear markers of reliability that are equivalent to those found in statements specifically covered by Rule 803 or Rule 804. The purpose of Rule 807 is to make sure that reliable, material hearsay evidence is admitted, regardless of whether it fits neatly into one of the exceptions enumerated in the Rules of Evidence. That purpose is served by admitting the Reports, and the district court erred in excluding them from Moore's trial.

Reporter's comment: The court's permissive approach to the residual exception might possibly be related to the fact that Judge Posner was on the panel. As the Committee knows, Judge Posner is in favor of a broad use of the residual exception as a substitute for reliance on some of the more questionable standard exceptions.

Trustworthiness: Detailed statement made to an insurance investigator

Thompson v. Property and Casualty Ins. Co. of Hartford, 2015 WL 9009964 (D.Ariz.): In a dispute over insurance coverage, a factual dispute was whether the plaintiff had purchased one or two chandeliers from Elek. To prove that only one was purchased, the defendant offered a statement that Elek made to the defendant's insurance investigator. Elek gave a detailed statement that when the plaintiff made his purchase he had two chandeliers in stock, the plaintiff had only purchased one, and that at the time of his statement he still had the other in storage because he couldn't sell it. (Elek died before trial.) The court held that Elek's statement to the

investigator was sufficiently trustworthy to be admissible as residual hearsay. The court cited *United States v. Valdez-Soto*, 31 F.3d 1467, 1471 (9th Cir. 1994) as “rebuffing the argument that the hearsay exception must be interpreted narrowly” and provided the following analysis of Elek’s statement:

The statements were not made under oath and subject to the penalty of perjury nor were they recorded in any way which would allow the judge an opportunity to view [Elek’s] demeanor. These circumstances cut against a finding of trustworthiness. But the declarant's perception, memory, narration, and sincerity concerning the matter asserted support a finding of equivalent trustworthiness. The interview transcript establishes that Mr. Elek understood Detective Peters' questions clearly and recalled the details of the transaction with ease and clarity, noting that the chandeliers he kept at Rose Jewelers were both expensive and “pretty special item[s].” Importantly, Mr. Elek was certain as to the number of chandeliers that he sold Plaintiff. He noted that Plaintiff “was a fine gentleman,” who most likely “paid in cash,” and unequivocally stated that Plaintiff bought “only one” chandelier. Mr. Elek further supported his claim with current, detailed information, telling Detective Peters that he still owned the second chandelier, and that it was currently in storage at his ex-wife's residence. Mr. Elek's statements were detailed, specific, clear, and they directly contradicted Plaintiff's attestation. Moreover, the statements were made “voluntarily based on facts within [his] personal knowledge.” *United States v. Leal-Del Carmen*, 697 F.3d 964, 974 (9th Cir. 2012). Finally, the record contains absolutely no evidence that Mr. Elek had motive to lie about the chandelier transaction or his business relationship with Plaintiff. See also *United States v. George*, 960 F.2d 97, 100 (9th Cir. 1992) (concluding that a declarant's statement had “particularized guarantees of trustworthiness” primarily because “there was no motive for the victim to lie”). For these reasons, the Court finds that Mr. Elek's statements—although not made under oath or subject to perjury—possess the “particularized guarantees of trustworthiness” necessary for their admission.

The court also found that admitting the statement was consistent with the interests of justice, essentially because Elek was unavailable and the statement was more probative than any other evidence reasonably available. Thus the interest of justice requirement was superfluous as it was met by another admissibility requirement in the rule.

Reporter’s comment: You can see where a Rule 807 opinion is going by the way it starts out. If the court begins with reciting the “rare and exceptional” language from the legislative history, the evidence is very probably going to be excluded. If the court cites a case like *Valdez-Soto*, the evidence is very probably going to be admitted. There are thus two strains of authority that can be relied upon, giving rise to relatively unconstrained judicial discretion in applying (or not applying) the residual exception. It is probably better *either* to have a narrow or a broad residual exception, than it is to have an exception that can be applied either narrowly or broadly depending on the predilection of the court.

Trustworthiness --- Emails written by army officers in response to an official investigation

Brokaw v. Boeing Co., 137 F.Supp.3d 1082 (N.D. Ill. 2015): In an action seeking damages after the crash of a military plane in Afghanistan, the defendants sought to exclude emails sent from two army officers to the NTSB, the public agency investigating the plane crash. The emails reported what the officers knew about the accident. The court held that any hearsay concern was covered by Rule 807, because the emails were supported by circumstantial guarantees of trustworthiness. The court explained as follows:

The emails were written under highly reliable circumstances, as they were prepared in response to the formal request of an NTSB investigator by members of the military, who responded directly through their military chain of command. The authors attest under oath that the statements made in their emails are true and accurate. In addition to the usual penalties for perjury, the authors of the emails are subject to military court martial for knowingly making a false statement under oath. Under these circumstances, the Court finds the emails sufficiently reliable * * *.

Trustworthiness: Rap Video

United States v. Norwood, 2015 WL 2250481 (E.D.Mich.); The court found that a rap video made by the defendant's coconspirator, in which the coconspirator threatened snitches, was admissible under Rule 801(d)(2)(E). In the alternative, the court found the video admissible under Rule 807. The court explained as follows:

Here, the videos were recorded, and there is no dispute that it was Gills who wrote the songs, videotaped himself rapping them, and placed them online. The videos also are offered as evidence of a material fact: that members of the conspiracy furthered their exclusive territory by seeking to evade law enforcement and impeding attempts to stop the conspiracy by intimidating those who "snitched." Similarly, the fact that Gills wrote songs about threatening witnesses and posted them online is more probative than any other evidence the Government can obtain through reasonable efforts, because it is direct evidence of a member of the conspiracy making these explicit threats. Lastly, admitting the videos serves the purposes of the rules and the interests of justice, particularly given that Gills testified during trial—including about the songs—and was thus available for cross-examination by both the Government and his co-Defendants.

Reporter's comment: The trustworthiness analysis is thin here --- the mere fact of recording doesn't make a statement reliable, as seen most obviously in election year debates. Moreover, the "more probative" analysis could be challenged, because the declarant testified at trial --- though it could be argued that the context of the rap video could not be replicated by in-court testimony about the rap video.

Trustworthiness: Industrial Catalogs

Dunlap v. Liberty Natural Products, Inc., 2015 WL 1778477 (D.Ore.): In a disability discrimination action, the court admitted catalogs published in the industry that showed accommodation devices that could be purchased to assist disabled persons in doing their job. The court found that the catalogs were sufficiently trustworthy to be admissible as residual hearsay, because “the catalogs were generally published in the industry” and “were not created for the purposes of litigation.”

Trustworthiness and More Probative: Consumer complaints

F.T.C. v. Magazine Solutions, Inc., 2009 WL 690613 (W.D.Pa.): The court found that multiple consumer complaints received by the FTC were admissible under Rule 807:

I agree with the FTC that the consumer complaints have sufficient guarantees of trustworthiness to permit admission under Rule 807. The declarants are known and named. The relevant statements contained therein were made based upon personal knowledge. Further, though the statements were not made under oath or penalty of perjury, they were made to governmental agencies and / or consumer agencies with the apparent expectation that action would follow based upon the representations. This gives me a measure of confidence in the truth of the assertions. Additionally, I find compelling the fact that so many of the complaints corroborate each other * * *. The consistency of the representations again reinforces the trustworthiness of the complaints. Moreover every indication is that the complaints were also made spontaneously, another indication of their trustworthiness. Other courts have also found consumer complaints to have sufficient guarantees of trustworthiness under Rule 807 to permit admission. *See FTC v. Figgie International Inc.*, 994 F.2d 595 (9th Cir.1993) (finding that letters of complaint sent to the FTC had “circumstantial guarantees of trustworthiness because they were sent independently to the FTC from unrelated members of the public, they all reported roughly the same experience which suggested truthfulness and they had no motive to lie about the price they paid).

The court also found the “more probative” requirement met because admission of the complaints would “eliminate the needless expense of bringing in hundreds of consumers from across the country to testify to what is essentially already written down in complaint form.”

For other cases admitted consumer complaints under Rule 807, see:

FTC v. Instant Response Systems, LLC, 2015 WL 1650914 (E.D.N.Y.): Consumer complaints to the FCC were found admissible under Rule 807. Trustworthiness was found because the reports “were sent spontaneously by unrelated individuals to a government agency” and recounted “similar and consistent factual accounts about the consumers' experiences.” And the reports met the “more probative” requirement because “it would be unduly wasteful of time and burdensome for the FTC to call each aggrieved consumer to testify, and the interests of

justice are therefore best served by using the caretakers' declarations.” *See also FTC v. Zamani*, 2011 WL 2222065 (C.D. Cal): The court found that consumer complaints were admissible under Rule 807. As in similar cases, the court found that the consumer complaints were trustworthy because they cross-corroborated each other. And the complaints were found more probative than other evidence because, given their volume, it would be unreasonable to require production of all the declarants. *FTC v. Direct Benefits Group*, 2012 WL 5508050 (M.D. Fla.) (noting that complaints were “made independently by unrelated consumers without solicitation” and that because 25,000 complaints that were made regarding Defendants' practices, “it is not reasonable to expect that the Commission would call all—or even a significant percentage—of the consumers who complained.”); *FTC v. AMG Services, Inc.*, 2014 WL 317781 (D.Nev.) (noting that the complaints reported “roughly similar experiences” and “were submitted by thousands of unrelated members of the public in different cities and states,” and that “the combined volume and similarity of the complaints indicate that there is little risk that the statements were the product of faulty perception, memory or meaning, the dangers against which the hearsay rule seeks to guard.”); *FTC v. Ewing*, 2014 WL 5489290 (D. Nev.) (finding consumer complaints to the FTC to be sufficiently reliable under Rule 807: “Although the complaints are unsworn, the volume and similarity of the complaints indicates the complaints are not the product of fault perception, memory or meaning, the dangers against which the hearsay rule seeks to guard.”).

Trustworthiness: Stamp of origin on a product

United States v. Burdulis, 753 F.3d 255 (1st Cir. 2014): The defendant was charged with possession of child pornography that was found on a thumb drive in his home. The crime required proof of some aspect of foreign commerce, and the government’s proof on this jurisdictional element was that the thumb drive had “Made in China” stamped on it. The defendant argued that the stamp was inadmissible hearsay. The court found that the “Made in China” stamp was properly admitted under the residual exception. As to indicia of reliability, the court relied on the fact that inscriptions indicating foreign origin are statutorily regulated, and that “[a]n authentic description, of the kind made regularly by manufacturers in accordance with federal law, bears significant similarity” to other exceptions, most notably the business records exception. Moreover, “[c]ommon sense” suggested “a low probability that someone would stamp ‘Made in China’ on a device made in the United States and presumably marketed here.” *See also United States v. Seguil*, 600 Fed. Appx. 945 (5th Cir. 2015) (stamp indicating that a video camera was made in Japan satisfied the Rule 807 trustworthiness requirement because “such inscriptions are required by law, and false designations of origin give rise to civil liability”); *United States v. Scott*, 2014 WL 2808802 (E.D. Va.) (stamped inscriptions on cellphone and memory cards to prove place of origin satisfied the trustworthiness requirement of Rule 807 because they are required by law and false designations are prohibited by law).

Trustworthiness: Report of dangerous condition

Parker v. Four Seasons Hotel, 2014 WL 1292858 (N.D. Ill.): The plaintiff claimed she was injured when a shower door shattered on her. She sought to admit an email from the contractor of the property, sent to the defendant, indicating that several shower doors had

cracked, including the one in the room that the plaintiff stayed in. The court held that the email was admissible under Rule 807. It elaborated as follows:

The email * * * does not appear to be admissible under any of the traditional exceptions to the Hearsay Rule. Nonetheless, courts have long recognized that the prohibition on hearsay is not intended to be a mechanical bar on otherwise reliable evidence. * * *

Where, as here, the so-called “hearsay dangers”—lack of reliability and the inability to cross-examine the declarant—are minimal, there is no reason to bar evidence simply because it is hearsay in a technical sense. There can be no question that the contents of the Sheridan Email are highly probative to the case and, indeed, more probative than any other evidence on the issue of premises liability. Moreover, there is nothing to indicate that the Sheridan Email is somehow unreliable or otherwise inaccurate. Gartin's comment to Schiavon that “several” sliding glass doors had broken in the past provides additional circumstantial guarantees that the statements in Sheridan's email are neither untrustworthy nor false. Under these circumstances, the Court concludes that the admission of this evidence would significantly enhance the likelihood of a correct outcome in this case. Accordingly, the statement is admitted under the Residual Exception to the hearsay rule.

Reporter’s comment: The court is surely taking a more free-and-easy attitude toward residual hearsay than other courts have done. There is no cautionary intro invoking Congress’s “rare and exceptional” language. There is no trotting out the case law stating that the exception be “narrowly applied” and that the hearsay must be “particularly trustworthy. There is no slavish adherence to an “equivalence” analysis.

Trustworthiness: Arbitrator’s opinion

Sievert v. City of Sparks, 2014 WL 358698 (D.Nev.): In an employment discrimination action brought by a firefighter, the plaintiff sought to admit factual findings determined by an arbitrator in a proceeding brought by another firefighter against the city. The court held that the arbitrator’s findings were admissible as residual hearsay. It explained as follows:

First, the arbitrator's opinion has the equivalent circumstantial guarantees of trustworthiness as the arbitrator was a neutral third party with no motive to favor either side, all the witnesses at the hearing swore on oath to tell the truth, and all the witnesses were subject to cross-examination by both the City and the union. Further, the witnesses' statements were made closer in time to the event in question than any other testimony currently before the court.

The court also found that the interest of justice factor was met because the evidence “forms part of the basis for Sievert's underlying retaliation claim.” Which is to say it was relevant.

Trustworthiness: Prisoner's statement to an investigator

Marcum v. Scioto County, Ohio, 2013 WL 9557844 (S.D. Ohio): In a suit by a prisoner for failure to provide proper medical care, the plaintiff sought to submit statements that a fellow prisoner made to a state investigator, describing the plaintiff's poor medical condition. The court found that the fellow prisoner's statements were sufficiently trustworthy to be admissible under Rule 807. It reasoned as follows:

There is no evidence in the record demonstrating that Inmate Adams had any connection or relationship with Marcum aside from his incarceration at Scioto County Jail during the relevant time period. Nor is there any evidence that Inmate Adams is acquainted or has any relationship with plaintiff. Indeed, plaintiff represents that her numerous attempts to locate Inmate Adams for purposes of being a witness in this matter have been unsuccessful. As for Inmate Adams' relationship with defendants, defendants have put forth no evidence demonstrating that there was any animosity between them. It is therefore reasonable to characterize Inmate Adams as a disinterested party with no reason to misrepresent the events he witnessed at Scioto County Jail in the time leading up to Marcum's death.

As for his motive for making the statement, Inmate Adams did not provide this statement voluntarily. Rather, he was questioned pursuant to a BCI investigation into the event's surrounding Marcum's death. Given that the statement was gathered as part of a larger investigation, the Court cannot conclude from the record that Inmate Adams had any improper motivation to provide the statement. * * *

The record contains no prior history of the declarant's statements or any evidence that he made inconsistent statements about the events surrounding Marcum's death. There is, however, other evidence supporting Inmate Adams' statements. * * * It therefore appears that the Adams Statement has the necessary guarantees of trustworthiness for admission under the residual hearsay rule. * * *

Trustworthiness: Client intake form

United States v. Stern, 2013 WL 6087744 (E.D.Wisc.): In a fraud case, the government sought to admit a client intake form, in which a fraudster seeking legal advice stated that the defendant referred her to the lawyer. The court found the form admissible under Rule 807. As to trustworthiness, the court stated the following:

The record before me suggests no reason why, at the time she made the statement, Leonard–Allen would have reason to lie about why she selected Losey's office. Further, at the time she made the statement, Leonard–Allen could not have known that the answer to a referral question would matter, one way or the other, in a criminal prosecution occurring several years later. Finally, there is no reason to believe that Leonard–Allen

lacked the knowledge or qualifications to make a statement as to who referred her to Losey. This information would particularly appear to be within her ambit. For all of these reasons, I find the statement sufficiently trustworthy.

Trustworthiness and More Probative: Recordings of customer confusion

ADT Security Services v. Security One International, Inc., 2013 WL 4766401 (N.D.Cal.): Recordings of customers indicating confusion were found admissible under the residual exception. The court explained as follows:

With respect to the first Rule 807 factor, such Recordings, once properly authenticated, have circumstantial guarantees of trustworthiness because they are contemporaneous, real-time recordings of a conversation, wherein the customer was unaware of the questions that would be asked of them and the customer had personal knowledge of the events related.

With respect to the second Rule 807 factor, the Recordings are evidence of the material fact of customer confusion.

With respect to the third Rule 807 factor, ADT persuasively argues that the Recordings of the phone calls between ADT's representatives and its former customers are ADT's "most reliable" source of evidence of customer confusion. ADT cannot present direct, contemporaneous evidence of confusion or of confusing statements by Defendants' telemarketers because the telemarketers did not record their calls. The telemarketers themselves reside in the Philippines, beyond the reach of this Court's subpoena power. As for the customers, many of them reside out of state, also beyond the reach of a subpoena, and in any event, requiring all the customers to testify personally would not be reasonable. * * *

Lastly, with respect to the fourth Rule 807 factor, the Court concludes that admission of the Recordings will serve the interests of justice in this case because ADT should not be unduly hindered in presenting its case by Defendants' own conduct in not recording its telemarketers discussions with prospective customers. Admitting the recordings "furthers the federal rules' paramount goal of making relevant evidence admissible."

Trustworthiness: Recorded conversation between father and son

Brumley v. Albert E. Brumley & Sons, Inc., 727 F.3d 574 (6th Cir. 2013): In a copyright dispute regarding an old song, the defendant proffered a recorded conversation between the person who wrote the song and his son, in which the father said he sold the song for three dollars. The trial court admitted the recording under Rule 807, and the court found no error. The court analyzed the trustworthiness question as follows:

[W]e believe that there are a numbers of factors indicating that the statements from the 1977 conversation have the requisite guarantees of trustworthiness. First, the statements should be considered more reliable than not given that Brumley, Sr. and Brumley, Jr. are father and son and not strangers. Second, there is no indication that Brumley, Sr. lacked capacity at the time that he gave the statement. One may argue that Brumley, Sr.'s memory might have been impaired due to the lapse of time between the Song's publication and the statement, but it is just as reasonable to assume that Brumley, Sr. would have accurately recalled the circumstances surrounding the creation of his most successful song despite the lapse of time. Third, Robert has not alleged that Brumley, Sr. was an untruthful person. Fourth, the statement is clear and unambiguous. Finally, the fact that Brumley, Jr. recorded the conversation adds an element of formality, which suggests that Brumley, Sr. may have given his statements added consideration. The district court did not abuse its discretion and err in admitting into evidence the statements from and transcript of the 1977 conversation.

Trustworthiness: Statement made to a police officer after an accident

Auto-Owners Ins. Co. v. Newsome, 2013 WL 3148334 (D.S.C.): After a boating accident, one of the participants made a statement to police officers that he was acting in the course of employment. The court found that this statement met the trustworthiness requirement of the residual exception:

[T]he statement has “circumstantial guarantees of trustworthiness” as it was made to a third-party law enforcement officer shortly after the boating accident. The statement at least has as much trustworthiness as a statement of a party opponent. Additionally, the statement is also being offered as evidence of a material fact—whether Mr. Robinson was acting within the course of his employment—and it is the most probative evidence on this point given that the only other person on the boat, Mr. Newsome III, has refused to testify. For these reasons, admitting the statement would also serve the purposes of the Rules of Evidence and the interests of justice.

Reporter’s comment: The court might be right about trustworthiness, but the analysis is questionable on two grounds: 1. Comparing the statement to a statement of a party-opponent is contrary to the text of the rule, which requires comparison with a Rule 803 or 804 exception; and 2. Party-opponent statements are not admitted because they are trustworthy but rather because admission is a consequence of the adversary system --- so they are not a proper referent if the goal is to determine whether residual hearsay is trustworthy.

Another thing to note about the analysis: the interest of justice/purpose of the rules factor is once again trotted out to do nothing. It is satisfied if the other admissibility requirements are met.

Trustworthiness: Plea allocutions offered in a civil case

Levinson v. Westport National Bank. 2013 WL 2181042 (D.Conn.): The court found that a guilty plea allocution was sufficiently trustworthy to be admissible as residual hearsay:

The Court is * * * persuaded that the statements in the plea allocutions demonstrate a high guarantee of trustworthiness as a result of the safeguards that a sentencing judge must take in order to accept a guilty plea under Rule 11 of the Federal Rules of Criminal Procedure. Under Rule 11, a sentencing judge is required to ensure that each guilty plea is voluntary and has a factual basis which is developed on the record at the plea allocution. Further, the trustworthiness of a plea allocution is bolstered by the fact that the criminal defendant gives his statements during the allocation sworn under oath. * * * Lastly, admission of the plea allocutions would facilitate the interests of justice in this case as it bears on material facts in dispute. Accordingly, the Defendants may offer the plea allocutions at trial.

Reporter's comment: Note that the interests of justice are found met because the plea allocution is proof of a material fact. Thus do two superfluous requirements satisfy each other.

Trustworthiness: Foreign bank records

United States v. Turner, 718 F.3d 226 (3rd Cir. 2013): The defendant was convicted of fraud on the United States. He challenged the trial court's admission of foreign bank records under the residual exception, on the ground that the government had not shown that the records were trustworthy. The court found no error. The defendant noted that the identity of the person who prepared the records was unknown, but the court responded that "the Government is not required to identify the declarant of the foreign bank documents in order for the documents to be admissible under Rule 807." The court noted that under its case law, the court cannot rely *solely* on corroborating evidence for its finding of trustworthiness, but in this case the trial court relied on circumstantial guarantees of trustworthiness in addition to corroboration --- specifically, the records were found in the home of the defendant's accomplice, and "in general, bank records provide circumstantial guarantees of trustworthiness because the banks and their customers rely on their accuracy in the course of their business." ***See also Chevron Corp. v. Donziger,*** 974 F.Supp.2d 362 (S.D.N.Y. 2014) (foreign bank records found admissible under Rule 807: "There is no reason to doubt their trustworthiness. They appear in the exact manner that one would expect, and Guerra testified as to how he obtained them directly from the bank, testimony that the Court credits. Thus, given the circumstantial guarantees of trustworthiness which were present here, the distant location of the bank, and the lack of any evidence in the record to suggest that the bank records are anything other than what they purport to be, the bank statements are admissible under the residual hearsay exception as an alternative to the business records exception.").

Trustworthiness: Bank Records Without Foundation Testimony

In re Mendez, 2008 WL 597280 (E.D.Cal.): In an adversary proceeding in bankruptcy, the defendant's bank records were admitted. No foundation witness was provided, but the court found that the bank records were admissible under Rule 807. It stated as follows:

The bank statements at issue here were not admitted under the business records exception to the hearsay rule, Federal Rule of Evidence 803(6), because there was no foundation testimony to establish that the bank statements were Bank of America's business records. However, courts have long recognized that bank statements may be admitted under the residual exception to hearsay because "bank documents, like other business records, provide circumstantial guarantees of trustworthiness because the banks and their customers rely on their accuracy in the course of their business." *United States v. Pelullo*, 964 F.2d 193, 202 (3d Cir.1992). In *Karme v. Comm'r of Internal Revenue*, 673 F.2d 1062 (9th Cir.1982), the Ninth Circuit Court of Appeals found that it was appropriate to admit bank statements into evidence as an exception to the hearsay rule "[g]iven the circumstantial guarantees of trustworthiness ..., the distant location of the bank, and the lack of any evidence in the record to suggest that the bank records are anything other than what they purport to be." *Karme v. Comm'r of Internal Revenue*, 673 F.2d at 1065.

See also

United States v. Banks, 514 F.3d 769 (8th Cir. 2008): An ATF form was offered to prove that a gun was bought by an individual. The form is prepared by the gun dealer upon the sale. The government did not seek to qualify the record as a business record by presenting a qualified witness. But the court found that the record was properly admitted under Rule 807, essentially as a "near-miss" of the business records exception. The court explained as follows:

As the note to Rule 803 emphasizes, when a statement is made concurrent with a "duty to make an accurate record as part of a continuing job or occupation" we can infer a certain level of trustworthiness. Fed. R. Ev. 803 advisory committee note to 1972 Proposed Rules ¶ 6. In most cases, this duty is established by testimony of a record's custodian. In this case, it is established by the ATF regulations requiring proper record keeping practices. The contents of Form 4473 are, therefore, inherently trustworthy.

Reporter's comment: These courts appear to be holding that the Rule 803(6) requirement of a foundation can be dispensed with simply by offering the bank records under Rule 807. But it can be argued that the goal of the residual exception should be to *supplement* the standard exceptions, not to undermine the limitations on the standard exceptions.

Trustworthiness: Working through the hearsay dangers

Lopez v. Miller, 915 F.Supp.2d 373 (E.D.N.Y.): To prove actual innocence in a habeas corpus proceeding, the plaintiff offered alibi witness affidavits from two witnesses who were deceased by the time of the proceeding. The court found that the affidavits were sufficiently trustworthy to be admissible under Rule 807, by evaluating and dismissing the hearsay dangers of insincerity, faulty memory, misperception, and faulty narration:

Guido and Rivera knew Lopez very well and almost certainly could not have “misperceived” that they were with him on the morning of the shooting absent some lapse in memory. * * * Although sixteen years had passed between the shooting and the signing of the affidavits, both Guido and Rivera described the morning of the shooting in detail: both remembered discussing the disagreement between Lopez and Juliana; Guido remembered that she was normally awake at around the time she saw Lopez because of her midnight shift at the hospital; and Rivera remembered the weather and the people present at her house that morning. The risk of faulty memory is particularly low because, soon after the events in question—once Lopez was arrested and indicted—the affiants expected that they would need to remember their interactions with Lopez. There is also no apparent risk of faulty narration, such as where testimony reflects confusion or where the witness simply misspeaks. Both witnesses stated without ambiguity (and in writing) that they were with Lopez on the morning of the shooting and gave relatively clear accounts of the basics of their interactions with Lopez. Although the witnesses could not describe the timing of these interactions with precision, this is not a problem of “faulty narration” but simply a fact that might make their testimony less compelling. The court must assume that the witnesses would have been similarly imprecise if they had been called to testify in person, but need not disregard their affidavits on this basis. In other words, the problem of imprecision goes to the affidavits' weight, not their admissibility.

The only potentially significant hearsay risk present with the alibi witness affidavits is the risk of insincerity—that is, the risk that Guido and Rivera were lying in their affidavits about their interactions with Lopez on the night of the shooting. Had the witnesses been available to testify, this class of error could have been tested with cross-examination. Nevertheless, * * * the court does not consider the risk of insincerity to be a major concern. The affidavits are detailed, internally consistent, and substantially consistent with each other. Because they were submitted in connection with a pending litigation, Guido and Rivera presumably expected to be subject to cross-examination on their contents, and indeed intended to testify before this court until shortly before the evidentiary hearing, when they became unable to do so. And * * * the court rejects Respondent's suggestion that Guido and Rivera fabricated false affidavits because of their familial relationships with Lopez; these relationships * * * had ended long before Guido and Rivera wrote their affidavits, which occurred twelve years after Lopez's remarriage and his loss of virtually all contact with those he had previously considered his family.

In short, three of the four classic hearsay dangers are absent or negligible, and the court does not find a significant risk of insincerity. See generally *Schering*, 189 F.3d at 233 (hearsay “need not be free from all four categories of risk to be admitted under Rule 807.”).

Reporter’s comment: This case comes from the Second Circuit, which requires courts to evaluate the trustworthiness of residual hearsay through the lens of the four hearsay dangers: insincerity, poor narration, impaired perception, and bad memory. This is a unique structure among the circuits. It is not clear that the structure is useful. For one thing, if the goal is equivalence, then many of the standard hearsay exceptions can be found wanting on one or another of the hearsay dangers --- for example, a dying declarant is likely to be short on the narrative quality, and an excited declarant may have been too excited to perceive the event accurately. Moreover, a focus on the four factors may lead a court to ignore corroboration, or other circumstances that simply don’t fit within the structure.

Trustworthiness: Statements in an unrelated litigation

FTC v. Ross, 2012 WL 4018037 (D.Md.): In an action alleging deceptive conduct in the sale of software, the court held that statements made in an unrelated litigation involving a dispute over profits among defendants in the instant litigation were admissible under Rule 807. The court went through the litany of Rule 807 requirements in the following analysis:

The United States Court of Appeals for the Fourth Circuit has cautioned that the residual hearsay exception “should not be construed broadly,” and that “[t]o construe it broadly would easily cause the exception to swallow the rule.” *United States v. Dunford*, 148 F.3d 385, 394 (4th Cir.1998) (citation omitted). Notwithstanding this cautionary instruction, this Court nevertheless finds that the circumstances of this case warrant admissibility of the challenged evidence under the residual exception because the evidence in question meets the four requirements of the rule.

* * *

Here, the out-of-court statements and documents were made in connection with the Canadian Litigation—a lawsuit in which Ms. Ross' co-defendants sued each other over the profits of Innovative Marketing, the business at the center of the present case. The statements were made by Innovative Marketing's high-ranking executives, and although they were not subject to cross-examination, were made in anticipation that they would be evaluated and challenged in a court of law. More importantly, however, unchallenged evidence in this case substantially corroborates the contents of the challenged evidence and therefore affords the challenged evidence the “ring of reliability.”

Regarding the second and third elements of the Rule 807 analysis, the Court concludes that the challenged evidence is offered as evidence of a material fact and is more probative than other evidence that can reasonably be obtained. The evidence relates to the scope and nature of the alleged conspiracy, and serves to illustrate a major element of the upcoming trial in this case—namely, the role Ms. Ross played while working at

Innovative Marketing. The evidence is certainly more probative than other obtainable evidence. To the extent other evidence even exists, Ross' and her co-defendants' silence and non-participation in discovery have severely hampered the FTC's collection of evidence in this case, and have made the collection of other probative evidence nearly impossible.

Finally, this Court concludes that admission of the challenged evidence under the residual hearsay exception will “best serve the purposes of these rules and the interests of justice.” [The defendant’s] and her co-defendants' silence and non-participation in discovery have limited the available evidence in this matter. Admitting the challenged evidence will best allow this Court to weigh the credibility of all of the evidence and to resolve the serious charges.

Reporter’s comment: Here once again, the interest of justice requirement replicates the more probative requirement. The interesting part is that the more probative requirement is satisfied because no other evidence is reasonably available --- because the defendant is suppressing it.

Trustworthiness: Child-victim’s statement regarding abuse

United States v. DeLeon, 678 F.3d 317 (4th Cir. 2012): The defendant was convicted of murdering his 8-year-old stepson. He argued that the trial court erred in admitting testimony of a social worker (Thomas) that the victim (Jordan) had told her of being severely beaten by the defendant. The court found the statement properly admitted under the residual exception:

Thomas's credentials and use of specific questions to verify Jordan's truthfulness support the trial court's conclusion that the statement had circumstantial guarantees of trustworthiness. Given that the government's case against DeLeon was largely circumstantial, the evidence of DeLeon standing and kneeling on Jordan's back to the point that it caused a visible injury to his forehead was certainly material. And because Jordan was deceased there was no more probative evidence of the encounter than his description to Thomas. Under the deferential abuse-of-discretion standard, we affirm the district court's ruling.

See also Doe v. Darien Bd. Of Educ., 110 F.Supp.3d 386 (D.Conn. 2015) (autistic child’s report to his parents of sexual abuse was admissible under Rule 807 because it was made without prompting, declarant’s tone was serious, the child was diagnosed as not being capable of lying, the child exhibited signs of trauma, and exhibited fear of the alleged perpetrator).

Trustworthiness: Statement of a prisoner about his medical condition

Estate of Gee v. Bloomington Hosp., 2012 WL 639517 (S.D.Ind.); A prisoner died, allegedly as a result of inadequate medical care. The prisoner's mother sought to testify to phone conversations, in which the prisoner said that he had not been eating, he needed to see a doctor, that he needed to go to the hospital, that he had a high fever, that he had blood sugar level of 588, and that he didn't think that anybody cared. The court found that these statements were admissible under Rule 807, explain that they "bear a strong indicia of reliability: at the time he made these alleged statements, Terry Gee obviously was not in a position to prognosticate that a lawsuit would arise out of his ultimate demise."

Reporter's comment: The court is holding that the trustworthiness requirement is met solely on the basis that the statement was not made in anticipation of litigation. As seen in other cases in this outline, most courts require a far stronger showing for a statement to be qualified under Rule 807. *Compare Bedingfield v. Dean*, 487 Fed. Appx. 219 (5th Cir. 2012) (in a case charging inadequate medical care of a prisoner, the prisoner's statement to his mother that the warden threatened him was not admissible under Rule 807; it was not enough that the prisoner had no motive to fabricate the statement).

Trustworthiness: Statement of a former employee

Lasnick v. Morgan, 2011 WL 6300159 (D.Conn.): The disputed question was whether the owner of a boat should have sought medical attention for a nanny that was on the boat. In response to a request from defense counsel, a former employee of the defendant sent an email with statements describing the disputed event. The court found that the statement was not sufficiently trustworthy to be admissible as residual hearsay. The court stated that a statement offered as residual hearsay must be compared to the standard exceptions, and in this case the most comparable exception was Rule 801(d)(2)(D) --- as the statement would have been admissible under that rule had the declarant still be employed at the time the statement was made. The court observed that "[e]mployee statements are liberally admitted under Rule 801(d)(2)(D) due to an assumption that an employee is usually the person best informed about certain acts committed in the course of his employment." * * * Though Seiler was no longer employed by Jamaica Bay at the time he wrote the email in question, the court finds no reason to suspect him of insincerity. The email was not solicited by the plaintiffs for use in this litigation; instead it was composed in response to a request from one of the defendants, Captain Kercher. Further, as the defendant points out, the email features no criticism of Kercher or the other defendants; on the contrary, it seems designed to justify Kercher's response to Santa Ana's illness. * * * Accordingly, the court finds that the Seiler email possesses a reliability commensurate with that of statements admitted under Rule 801(d)(2)(D) and, further, that it is sufficiently trustworthy for purposes of Rule 807.

Reporter's comment: The court made an error when it admitted the statement because it was comparable to a statement admissible under Rule 801(d)(2)(D). The comparable exceptions for trustworthiness are, by the terms of the Rule, the hearsay exceptions in Rules 803 and 804. This is a sensible limitation, because the exceptions in Rule 801(d)(2) are not based on reliability --- they are based on the adversarial theory of litigation. The court focused primarily on matters

other than whether the hearsay statement was trustworthy, largely because of the equivalence language in Rule 807.

Trustworthiness and More Probative: Child victim of sexual abuse

United States v. White Bull, 646 F.3d 1082 (8th Cir. 2011): In a child sex abuse prosecution, the trial court admitted a written statement that the victim prepared for a forensic examiner about the abuse. The court found that the statement satisfied the trustworthiness requirement of the residual exception.

Evidence presented at trial showed that Paula Condol has ten years of extensive training and experience as a forensic examiner, S.C.G.1. used age-appropriate language in describing the abuse, and S.C.G.1. consistently repeated the same facts about the abuse to adults. Perhaps the strongest circumstantial guarantee of trustworthiness, however, is the fact that S.C.G.1. testified at trial and was subject to cross examination regarding her statement. S.C.G.1. testified that she wrote [the statement] and that it described an event that actually occurred. We have previously stated that this situation vitiates the main concern of the hearsay rule. Additionally, [the statement] was offered as evidence of a material fact because it was relevant to the allegation of aggravated sexual abuse. The materiality requirement in Rule 807 is merely a restatement of the general requirement that evidence must be relevant.

The court had more difficulty with the question whether the written statement was more probative than any other evidence --- because the witness testified at trial. The court ultimately found no plain error in the trial court's finding that the more probative requirement had been met, because the written statement was more detailed than the victim's in-court testimony.

[W]e cannot say it was clear or obvious error to conclude that Exhibit 13 was more probative for the specific details of the alleged aggravated sexual abuse than what S.C.G.1. could provide through her testimony at trial. In her answers to the Government's questions on direct examination, S.C.G.1. repeatedly stated that she did not know what White Bull had done to her. Although S.C.G.1. later went on to describe aspects of the alleged abuse, her hesitant and somewhat inconsistent testimony made the admission of Exhibit 13 through Rule 807 possible.

Trustworthiness: Surveys

Lion Oil Trading & Transp., Inc. v. Statoil Marketing and Trading (US) Inc., 2011 WL 855876 (S.D.N.Y.): In a breach of contract action involving oil purchases, one party submitted a

survey conducted regarding barrel pricing. The court found that while there were some methodological flaws, the survey was sufficiently trustworthy to be admissible under Rule 807:

Survey respondents were unaware of the survey's purpose. While the interviews often took varied courses, they all arrived at the ultimate question of payback barrel pricing. This question was prefaced by a fact pattern recited in generally the same manner and phrased in generally the same way to each respondent. Moreover, the question as phrased cannot be characterized as leading. Finally, issues of perception were addressed through a standard set of screening questions designed to ensure familiarity with the crude oil trading market. The survey therefore contains sufficient indicia of trustworthiness to warrant admission.

See also United States v. Various Gold, Silver and Coins, 2013 WL 5947292 (D.Ore), where the court found surveys to be admissible under Rule 807:

[T]he reliability of the TurboSonic questionnaire responses has been sufficiently shown. Trustworthiness, which is closely aligned with reliability, depends on:

- (a) properly defining the “universe” of people whose opinions matter with respect to the subject of the litigation;
- (b) selecting a representative sample from this universe;
- (c) framing questions that are clear, simple, and nonleading;
- (d) following sound interview procedures;
- (e) accurately recording the gathered data;
- (f) following proper statistical methods in analyzing the data; and
- (g) protecting objectivity by keeping the polling process separate from litigation.

None of the factors discussed above provide a basis to find that the TurboSonic questionnaire responses are untrustworthy—all known TurboSonic customers were sent questionnaires and there has been no representative sampling or data analysis. Further, although the cover letter to the questionnaires noted that TurboSonic was subject to investigation, the potential for bias would not be in the proponents' (Claimants') favor. * * * [T]he questions were framed in such a way as to elicit truthful and accurate responses.

Trustworthiness: Plea agreement

In re Slatkin, 525 F.3d 805 (9th Cir. 2008): A trustee sought recovery from people who had received money from the perpetrator of a Ponzi scheme. To prove the Ponzi scheme, the trustee offered the fraudster's plea agreement, in which he admitted his intent to defraud. The court found that the plea agreement was admissible as residual hearsay. On the trustworthiness question the court reasoned as follows:

Slatkin's plea agreement has equivalent circumstantial guarantees of trustworthiness. His guilty plea, based on the plea agreement, (1) was made under oath with the advice of counsel, (2) subjected Slatkin to severe criminal penalties, (3) was made after Slatkin was

advised of his constitutional rights, and (4) was accepted by the court in the criminal matter only after the court determined that Slatkin's plea was knowing and voluntary.

See also:

Pendergest-Holt v. Certain Underwriters at Lloyd's of London and Arch Specialty Ins. Co., 2010 WL 3359528 (S.D. Tex.): In a case involving corporate fraud, the court held that two sets of documents were admissible under Rule 807: 1. A plea agreement and arraignment transcript of one of the fraudsters, who refused to testify in this proceeding; and 2. Records of a forensic accountant retained by a receiver. As to trustworthiness of the plea agreement, the court reasoned as follows:

Davis pleaded guilty under oath in open court to three serious criminal charges, which carry the potential of many years of imprisonment. The factual material in his plea agreement and transcript describing Davis's personal conduct are among the strongest evidence of those matters. See, e.g., *RSBI Aerospace, Inc. v. Affiliated FM Insurance Co.*, 49 F.3d 399, 403 (8th Cir.1995) (in coverage determination for lost inventory under insurance policy that excluded loss caused by any employee of the insured, court allowed the guilty plea of plaintiff's employee that he set the fire and confirmed he was employed by plaintiff at the time of the fire, and stated "guilty plea taken in open court is a sworn statement and, while not always conclusive, is powerful evidence."). The plea-related factual information, while hearsay, has circumstantial guarantees of trustworthiness equivalent to other evidence otherwise admissible under Rules 803 and 804. For instance, he knows that the Government continues to investigate the matters and is relying on his information to do so. If Davis is found to have lied, his can be charged with perjury.

As to the forensic accountant's reports, the court found sufficient trustworthiness through the following analysis:

The Court finds that there are "circumstantial guarantees" of the trustworthiness of the factual analysis Van Tassel and her expert staff have performed and described in her Reports. * * * FIT has performed a variety of services, including assisting in the capture and safeguarding of electronic accounting and other records of the Stanford Entities, and forensic accounting analyses of those records, including cash tracing. Van Tassel, who has "25 years of experience providing a variety of audit, accounting, tax, litigation, valuation and other financial advisory services," is a Certified Public Accountant and the Senior Managing Director of FTI consulting. Van Tassel interviewed dozens of people who were formerly employed by or who worked with Stanford entities. In addition, during at least 18 months of intense work, Van Tassel and her FTI staff examined many thousands of documents, including available accounting and other records (including email files of certain former Stanford employees) relating to numerous Stanford entities * * * . Van Tassel and her staff also examined extensive "SIB customer records, including but not limited to paper and electronic records documenting SIB CD purchases, interest payments and redemptions." FTI also obtained and analyzed paper and electronic files from third-party financial institutions where bank accounts of various Stanford entities are or were located, and electronic and other data from institutions that

currently hold SGC customer accounts and former employee accounts, as well as STC accounts. This intense, complex, and geographically far-flung work apparently has cost several, if not more, millions of dollars and simply cannot be replicated by the parties in this case.

Trustworthiness: Statement of a bystander

Goode v. United States, 730 F.Supp.2d 469 (D.Md. 2010): The only bystander to an accident gave a statement to the responding officer. She was unavailable at trial. The court found that the statement was admissible under the residual exception. The court evaluated trustworthiness as follows:

Plaintiffs seek to admit the hearsay statement of the only identified witness to the officer who responded to the accident scene. * * * The statement was obviously not made under oath, during a plea agreement, or before a grand jury. Furthermore, Jackson's statement to the officer was not contemporaneously transcribed so as to produce an exact replica of her statements, and the statement does not contain many details. Likewise, Jackson's statement to the officer was not subject to cross examination. [However] Jackson voluntarily gave her statement to the officer and she is otherwise an independent witness who did not have a personal stake in the outcome of this litigation [and] she provided her statement as to what she personally observed shortly after the accident occurred, which, without contrary evidence, convinces the Court that her statement contained in the Motor Vehicle Report, satisfies the circumstantial guarantees of trustworthiness.

The court found, however, that a handwritten statement that the witness provided to the Plaintiff's private investigator nearly three months after the accident did not satisfy the trustworthiness requirement of Rule 807.

First, the fact that this statement was provided nearly three months after the accident raises the possibility that Jackson's memory of the incident was affected by the passage of time. In addition, the statement was given at the request of Plaintiff's private investigator and in preparation for the litigation, which the Court believes at least raises a question as to the extent that the witness's handwritten statement was influenced by others.

Trustworthiness: Prior testimony at a related trial

United States v. Guerrero, 2010 WL 1645109 (S.D.N.Y.): Two defendants were tried separately for their part in a murder. At the first trial, an eyewitness testified in a way that identified the defendant at trial but tended to exculpate Guerrero. The eyewitness was extensively cross-examined by defense counsel. Guerrero, at his trial, proffered that eyewitness

testimony from the first trial, the witness having become unavailable. The court held that the statement was admissible under Rule 807. As to trustworthiness, it explained as follows:

Negron's statements were given under oath subject to penalty of perjury in a formal judicial setting, and Negron is unavailable. Mercado's skilled and experienced defense counsel had at least as strong a motive to undercut the accuracy and/or truthfulness of Negron's testimony as the Government would have here.

The court found that the testimony was a near-miss of prior testimony under Rule 804(b)(1): the miss being that the first case was in state court and the second in federal, and the federal government did not have an opportunity to develop the testimony at the prior trial. It stated that “[t]he reference to guarantees of trustworthiness equivalent to those in the enumerated exceptions suggests that almost fitting within one of these exceptions cuts in favor of admission, not against.”

Trustworthiness: Deposition

SEC v. Curshen, 372 Fed. Appx. 872 (10th Cir. 2010): Deposition testimony of a codefendant who was unavailable for trial was found properly admitted under the residual exception. The court found that the trustworthiness requirement was met because “it was taken under oath subject to penalty of perjury.”

Reporter’s comment: The court’s conclusory trustworthiness analysis goes way too far in admitting residual hearsay. If a statement is admissible under Rule 807 whenever it was made under oath subject to penalty of perjury, then the residual exception has just swallowed up Rule 804(b)(1) --- because that rule requires that the statement be made under oath subject to penalty of perjury, but it *also* requires that the opponent had a similar motive and opportunity to develop the testimony at the time it was given. The case digest on statements excluded under Rule 807 contains a number of examples in which depositions are found inadmissible.

For a similarly questionable decision, see ***United States v. Kimoto***, 2008 WL 4545342 (S.D.Ill.): A deposition was admitted against the defendant under the residual exception, even though the declarant was not unavailable. While the deposition might have been trustworthy, the court made no real attempt to apply the “more probative” requirement. Moreover, the ruling undermines the requirement in Rule 804(b)(1) that prior testimony is admissible only if the declarant is unavailable.

See also:

Stryker Corp. v. XL Ins. America, 2007 WL 172401 (W.D.Mich.): In a case by a manufacturer against its insurer regarding damages from a product, the sought to admit deposition testimony from a product liability case in which an official testified to how the product was marketed and tracked. The manufacturer was not a party to that action, so the court held that the deposition could not be admitted against the manufacturer as prior testimony under

Rule 804(b)(1). But the court held that the deposition was admissible as residual hearsay. The court reasoned as follows:

Ms. Kashuba's deposition in the Bartlett case offers guarantees of trustworthiness equivalent to hearsay admitted under Rule 804 because Ms. Kashuba's deposition was taken as part of a prior case. * * * The Court finds that admission of this evidence supports the general purpose of the Rules of Evidence as it is reliable evidence that almost conforms to the requirements of Rule 804.

Reporter's Comment: The court seems to be using the residual exception to dilute (or erase) the limitations of Rule 804(b)(1). Under that rule a party (or a predecessor in interest in a civil case) must have had a motive and opportunity to develop the testimony that is similar to the motive that would exist in the proceeding in which the testimony is proffered. Many courts have applied the "predecessor in interest" language to expand Rule 804(b)(1) so that there need not be a privity-type relationship between the party who developed the testimony and the party against whom it is offered. But this court went a step further and ruled that even if there was no predecessor in interest relationship (even expansively applied) the deposition was reliable because it was "taken as part of a prior case." So the case is an example of how a broad application of the residual exception may be used to erode the limitations (and predictability) of the standard exceptions.

Trustworthiness: Interrogatory responses

In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 681 F.Supp.2d 1412 (D.Conn. 2009): Interrogatory responses of one defendant, essentially laying out a timeline of the conspiracy, were found admissible against other defendants under Rule 807. The defendant ultimately settled with the plaintiffs but the interrogatories were filed before settlement discussions began. The basic challenge was to trustworthiness. The court reasoned that the interrogatory answers were inculpatory --- they did not and could not shift blame. The court also noted that "[i]nterrogatory answers are treated as judicial admissions, which can be used against a party in the course of litigation, meaning that interrogatories must be answered with a special degree of care. Accordingly, at the time the answers were verified by the appropriate corporate representative, Crompton remained subject to liability—and to the possibility of treble damages—on the basis of their answers to those interrogatories."

Trustworthiness: Recorded statement to the authorities

United States v. Lawson, 2009 WL 4663287 (E.D. Ky): The court found that a recorded statement to the authorities was admissible under the residual exception. It was made before the witness began to cooperate with the authorities and the defendants moved to admit it in order to provide a contrast with the witness's later, post-cooperation statements. The court found that the statement was admissible pursuant to the following analysis:

The recording has sufficient particularized guarantees of trustworthiness to be admissible under Rule 807. Rummage was under oath when he made the statements and was not under duress when the recording was made. Although Rummage now claims that those statements were untrue, he acknowledges making them. Whether he was lying during the OIG interview or lying in his more recent testimony is a central issue in this case but it does not support the United States' argument that the recording of the OIG interview is untrustworthy. The recording has circumstantial guarantees of trustworthiness equivalent to those underlying hearsay exceptions.

Trustworthiness: Testimony at a prior trial but not admissible under Rule 804(b)(1)

In re September 11 Litigation, 621 F.Supp.2d 131 (S.D.N.Y.2009): In the civil actions against the airlines for injuries suffered in the World Trade Center terrorist attack, the court held that testimony by FBI agents at the trial of Moussau, the “20th Hijacker” was admitted to show how the terrorists planned to overcome airport security was admissible under Rule 807. As to trustworthiness the court stated as follows:

In general, the prior testimony of Billings and Samit is trustworthy, to the extent that it reports their observations in carrying out the investigations. Billings and Samit were experienced FBI agents. Their testimony described their observations during authorized investigations, as well as their reports to superior officers of those observations. They testified in court, before a jury, under oath and penalty of perjury, in a highly-scrutinized, public proceeding, regarding matters they were trained to perform.

Next the court proceeded to tick off the other admissibility factors:

The agents' testimony about their investigations' results is material and more probative than other available evidence. * * * [E]vidence of the terrorists' plans is relevant to the element of causation. Billings and Samit both discovered evidence that makes more likely the Aviation Defendants argument that the terrorists intended to skirt aviation security. The testimony is the most probative of such evidence that is available because it is based on direct observations of government officials during property searches and interviews of an admitted would-be hijacker. The evidence is not synthesized, either by 9/11 Commissioners, or multiple anonymous government agents. Also, for these reasons, admitting this reliable and relevant evidence serves the interests of justice and is consistent with the general principles underlying the federal evidentiary rules.

See also:

Annunziata v. City of New York, 2008 WL 2229903 (S.D.N.Y.): In a malicious prosecution case, the plaintiff alleged that police officers coerced a grand jury witness to implicate the plaintiff falsely. The plaintiff sought to admit the witness's notarized statement and

subsequent trial testimony, in which he recanted his identification. The court found that the trial testimony was not admissible under Rule 804(b)(1), because the prosecutor who developed the testimony could not be found to be the predecessor-in-interest of the police officer-defendants. But the court did find that the trial testimony as well as the written statement were admissible under Rule 804(b)(3) because, by making the statements, the witness was subjecting himself to a perjury charge --- and corroborating circumstances need not be found, because that requirement does not apply in a civil case. The court further concluded that the written statement and the witness's testimony were admissible under Rule 807. As to trustworthiness, the court declared as follows:

In addition to being statements against interest, these statements are also admissible under Rule 807. With regard to the written statement, Mitchell initialed each page and signed the last page, after writing: "I have read this three page report and it is true." Furthermore, the statement was notarized by a public notary and is dated October 19, 2005, after Mitchell gave his grand jury testimony. Finally, the factual allegations contained in the statement are relatively neutral and matter of fact. Annunziata is not mentioned anywhere in the statement which merely avers that Mitchell "did not see anyone fire a gun." Thus, I find sufficient guarantees of trustworthiness to deem this statement admissible, in the alternative, under Rule 807.

So, too, do I find sufficient guarantees of trustworthiness with respect to Mitchell's trial testimony. Mitchell testified before a judge while under oath in a criminal proceeding. I find that the formalities of a trial, including the oath given to witnesses, the presence of a judge, and the transcription of testimony by a court reporter, provide sufficient guarantees of trustworthiness. Thus, in addition to being a statement against interest, Mitchell's trial testimony is admissible under 807.

And see also:

Sonnier v. Field, 2007 WL 2155576 (W.D.Pa.): In a section 1983 action alleging excessive force during a high speed chase, the defendant sought to admit testimony that a bystander gave at a coroner's inquest. The court agreed with the plaintiff that the testimony was not admissible under Rule 804(b)(1) because he had not had an opportunity to cross-examine at the inquest. But the court found sufficient trustworthiness for admission under Rule 807. It noted that "Revi was under oath, so there is a substantial guarantee of trustworthiness. Moreover, he was relating his personal observations as an uninterested bystander of a recent incident and had no apparent reason to testify falsely." And because the bystander was now deceased, the testimony was more probative than any other evidence reasonably available.

Trustworthiness and More Probative: Findings of a Bankruptcy Judge

Mountain Highlands LLC v. Hendricks, 2009 WL 2426197 (D.N.Mex.): The court found that a bankruptcy judge's statements at a hearing could be admitted under Rule 807 to prove why a plan was rejected. On the question of trustworthiness and "more probative" the court held forth as follows:

As a general matter, the Court believes that statements made on the record by a sitting judge and then reproduced in a transcript bear guarantees of trustworthiness similar to those in the other hearsay exceptions. With professional court reporters or recording equipment, there is little chance of error in the actual words used, and while judges are not giving testimony under oath during a hearing, the requirements of judicial oaths of office and the formality of a hearing give a judge's comments similar indicia of trustworthiness to that accompanying testimony under oath. Also, a judge, if he or she is sitting on a case, does not have a financial interest in the case, and has made a decision that he or she can be fair and impartial. A judge's statements thus have indicia of reliability similar to those for former testimony under rule 804(b)(1). Moreover, both counsel and parties appearing before the judge rely upon transcripts of judges' statements and appellate courts rely upon them in their appellate review. Part of the foundation of our system of justice presumes that a transcript can be trusted and that if a judge gives a reason for doing something the judge is taken at his or her word. The reason that judge gives may be incorrect or unreasonable, but that the reason was the basis for a particular action is accepted.

Stepping back, admitting a judge's statements on the record into evidence accords with common sense. As the parties' conduct in this case highlights, litigants are generally reluctant to depose sitting judges or subpoena them to testify at trial and, furthermore, requiring judges to act as witnesses can interfere with their judicial duties. Without depositions or live testimony at trial, however, courts will be excluding what may be the best and possibly only evidence unless courts accept judicial statements on the record as admissible evidence. Necessity has long been viewed as one of the hallmarks of the [residual] hearsay exception. * * * The scenario confronting the Court underscores how admitting into evidence judicial statements made on the record is appropriate as a matter of necessity. If the Court excluded the statements, it would be excluding the most direct evidence of why Chief Judge Starzynski held as he did and would be leaving the question largely to conjecture.

Note: The Tenth Circuit affirmed the trial court's Rule 807 ruling in *Mountain Highlands*. 616 F.3d 1167 (10th Cir. 2010): “[W]e conclude the district court did not abuse its discretion by ruling that a statement by a federal bankruptcy judge, made on the record in a hearing before both the parties in this case and clarifying the grounds for an earlier ruling, has sufficient ‘guarantees of trustworthiness’ so as to fall under the residual hearsay exception.”

See also:

Athridge v. Rivas, 421 F.Supp.2d 140 (D.D.C. 2006): Findings of fact from a prior related determination were admitted under the residual exception. Trustworthiness existed in the fact that a judge made the findings.

Trustworthiness: Cross-corroborating records

Cahoon v. Shelton, 2009 WL 1758738 (D.R.I): In a dispute over medical payments for firemen, the court found that two records indicating that the Board authorized payment of medical expenses for injuries sustained on the job were admissible under Rule 807. The court dutifully found that the evidence was “material” to an estoppel claim; that the records were more probative than any other evidence because of the passage of time; that the purposes of the Rules and the interests of justice would be met because the plaintiffs could use the evidence to prove their case; and that the records were trustworthy. As to trustworthiness the court reasoned as follows:

In each case, the documents were found in files maintained by the Fire Department and/or the Chief of the Fire Department. The memoranda are identically formatted and contain the same pieces of information regarding Thompson and Gordon: name, residence, date of birth, appointment date, retirement date, percentage of disability pension, number of service years, age at time of retirement, nature of injury sustained on the job, and Board decisions regarding to the plaintiff’s pension.

Reporter’s comment: Reliability is found here largely through corroboration. The court is impressed that the records cross-corroborated each other. The case is also an example of the court feeling the obligation of applying the materiality and interest of justice requirements, but to little effect. It basically comes down to the evidence being relevant, which it has to be anyway.

Trustworthiness: Privilege logs

Siemens v. Seagate Technology, 2009 WL 8762978 (C.D. Cal): In a patent infringement action, the court admitted privilege logs under Rule 807, to prove that a matter was diligently prosecuted. The court found the logs to be trustworthy “because the preparation was either done by or under the supervision of officers of the court.”

Trustworthiness: Bystander’s statement to police

United States v. Carneglia, 256 F.R.D. 384 (E.D.N.Y. 2009): The court held that a statement by an eyewitness to police was admissible under Rule 807 when offered by the defendants to prove facts related to a decades-old murder. The court stated as follows:

Defense exhibits A–2 through A–5 are reports of subsequent police interviews of Ball [after his initial report to police], bearing dates ranging from one day to eight months after the murder. While not excited utterances, the contents of these exhibits were admissible under Rule 807. These statements have circumstantial guarantees of trustworthiness reflected in their consistency with the statements [previously made by

Ball], the high degree of specificity of the statements, and the fact that Ball's only apparent motive was to assist law enforcement. Ball's statements were evidence relevant to a central issue, who shot Albert Gelb, and they were more probative on the point for which the defendant sought their introduction than any other available evidence. Where the charges relate to a crime committed over thirty years ago, recordings of contemporaneous statements by a reliable recorder, here a police officer, may be more valuable than any current recollections of available trial witnesses. Ball is, in any event, deceased and was thus unavailable as a witness.

Reporter's Comment: The case digest on excluded statements contains a number of cases in which statements from bystanders to police were excluded because they were not sufficiently trustworthy.

Trustworthiness and More Probative: Determinations by other courts

Alluisi v. Elliot Mfg. Co., Inc. Plan, 2009 WL 565544 (E.D.Cal.): The court held that determinations by other federal courts could be used to establish a fact under Rule 807 --- in this case the fact recognized was that the insurer Unum has a history of biased claim administration. The court applied Rule 807 as follows:

The evidence that Unum has a biased history is relevant to whether Unum had a conflict of interest and whether it abused its discretion in this case. The probative value of the judicial findings is more probative on the issue of biased history than any other evidence Plaintiff can procure through reasonable efforts. For Plaintiff to show this history through a review of Unum's other claims grants and denials would be burdensome as it would require significant discovery, expert interpretation of data, and potentially mini trials as the parties fought over whether Unum's conduct when denying other claims was proper. Because of the difficulty of this court reviewing other claims denials to show a history of biased claims administration, the interests of justice support admission. An established fact found by the Supreme Court, Second Circuit, Eight Circuit, Ninth Circuit, this court, and several other district courts has a sufficient indicia of reliability, accuracy, and trustworthiness to support the purpose behind the Federal Rules of Evidence.

Trustworthiness: Prison yard conversation

United States v. Berrios, 2008 WL 2700884 (D.V.I.): A prison yard conversation between two criminal associates was found admissible under the residual exception. The court reasoned that “[t]he conversation between Moore and Berrios was highly incriminating against them. Neither Moore nor Berrios was attempting to deflect criminal liability or to inculcate Cruz

or Rodriguez. If Moore or Berrios knew that they were being overheard, neither would have engaged in such a discussion. Thus, the statements possessed a particularized guarantee of trustworthiness.”

Trustworthiness: Offers of employment

Virola v. XO Communications, Inc., 2008 WL 1766601 (E.D.N.Y.): In an employment actions, the plaintiffs sought to testify to offers of employment and salary quotes they obtained from other employers. The court held that the offers and quotes were admissible as residual hearsay. As to trustworthiness, the court reasoned as follows:

The trustworthiness of an offer of employment and a salary quote, at least when given to an experienced professional, is circumstantially guaranteed by the powerful reputational pressures that a competitive labor market exerts on corporations. * * * Even with a legal presumption of at-will employment, a corporation that extends offers it does not intend to keep, or provides inaccurate salary quotes, will incur a negative reputation among prospective employees. While certainly not infallible, these market pressures provide circumstantial guarantees of trustworthiness that are equivalent to the assurances of reliability afforded by other hearsay exceptions. *Cf., e.g.*, Fed.R.Evid. 803(3); Fed.R.Evid. 803(16); Fed.R.Evid. 804(b)(4). Finally, given that the plaintiffs will be subject to cross-examination as to whether the statements to them were actually made, and in what circumstances, the interest in ensuring that the plaintiffs' prospective employers did not deceive them regarding the terms of their offers or potential offers is minimal, and I find that the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

Reporter’s comment: The court is probably right that offers and salary quotes are trustworthy, but the analysis shows a problem with the “equivalence” standard of Rule 807. If the ancient documents exception is a comparable, then the bar for admissibility is shockingly low. It is interesting that Judge Gleeson picked probably the three weakest hearsay exceptions as comparables.

Trustworthiness: Statements consistent with subsequent action

Patsy’s Italian Restaurant, Inc., v. Banas, 2008 WL 850151 (E.D.N.Y.): In a trademark dispute, one of the issues was whether a consent agreement had been entered into many years earlier. The defendant sought to admit testimony from a witness who was told by the principals of each party that they has entered into an agreement. The court found that the statements made to the witness by the principals were admissible as residual hearsay. As to trustworthiness, the court reasoned as follows:

Given the fact that the parties concede that for several decades the parties' predecessors operated their respective establishments in peaceful coexistence, the evidence of the purported consent agreement bears independent indicia of reliability.

Reporter's comment: It appears that the court found the statements trustworthy solely on the basis that they were corroborated by independent evidence.

Trustworthiness: Affidavit of a Public Official

Osprey Ship Mgmt., Inc. v. Jackson County Port Authority, 2008 WL 282267 (D.Miss.): An affidavit of the Chief of Operations of the Army Corps of Engineers about a COE project was found admissible under Rule 803(8), 803(16) and 807. The overlap between Rule 803(16) and 807 is notable.

Trustworthiness: Near miss of a dying declaration

Fossyl v. Watson, 2007 WL 6960324 (S.D. Ohio): A person dying of cancer made a statement to her husband that implicated herself in a previous murder. The court found that the statement was admissible under Rule 807. The entirety of the court's analysis is as follows:

First, Ms. Chinn's statement is offered to prove the material fact of who killed Cheryl Fossyl and how. Further, Ms. Chinn's statement is more probative on this point than other evidence which Plaintiffs can procure since she is the only eye witness to the death who tells a complete story. Finally, the general purposes of the rules and the interest of justice are served by admission of the statement because Ms. Chinn was seriously ill and facing her own mortality and thus, there are other indicia of trustworthiness associated with the statement.

Reporter comment: The statement was not a dying declaration because it did not concern the causes and circumstances of the declarant's pending death. Essentially the court is using the residual exception to cover a "near miss" of the dying declarations exception. But the analysis is pretty thin.

Trustworthiness: Claims investigation

Wezorek v. Allstate Ins. Co., 2007 WL 1816293 (E.D.Pa. 2007): In a dispute over insurance coverage after a house was burned down, the defendant sought to admit statements made by the insurance agent (Torres) during a claims investigation, about what information was provided to and provided by the insureds during the application process. The court held that the

statements were admissible under Rule 807. The court discussed the trustworthiness requirement as follows:

Allstate asserts Torres' statement is trustworthy because of the following: (1) it was taped, allowing the court to assess the credibility of the statement by listening to Torres' voice; (2) it was made two months after the application process in question; (3) Torres had personal knowledge of the events recounted in the statement; (4) it was not prepared in anticipation of litigation; (5) it is consistent with documents in Torres' file; and (6) Torres said his answers were true and correct. I agree.

The court found it not problematic that Torres was an insurance agent of the company that was doing the claims investigation. The court noted that “Torres' statement shows his willingness to admit when he made a mistake on the insurance application. After admitting the mistake, Torres did not attempt to explain it away as if he felt his job was in jeopardy.”

Reporter comment: While the court sets forth the mantra that Rule 807 is to be narrowly used in exceptional circumstances, on the facts it takes a broad view of the residual exception. After a fire, the claims investigation was adversarial, and Torres was being interviewed by his employer. These are not exactly strong circumstantial guarantees of reliability.

Trustworthiness: Corroborated letter describing abuse

Duncan v. Oregon, 2007 WL 987451 (D.Ore.): Plaintiffs sought to prove that a victim, Munoz, was abused by a probation officer. They sought to introduce the victim's letter describing threats and abuse. The plaintiffs offered the letter as an adopted statement under Rule 801(d)(2)(B), but the court declined to decide that question, finding that the letter “fits better” within Rule 807. On the question of trustworthiness, the court found as follows;

The trustworthiness of the letter is supported in a few ways. Its description of Boyles' abuse of Munoz is consistent both with Munoz's grand jury testimony and with Munoz's statements made to Detective Sudaisar. I realize that we have no grand jury transcript but the fact that an indictment resulted from the testimony creates an inference that Munoz testified about the abuse. Further, the threats Munoz describes in the letter are consistent with the threats Boyles made to other plaintiffs here. Based on the corroboration, I conclude that the letter's trustworthiness is equivalent to other hearsay exceptions.

Reporter's comment: Under a flexible approach to Rule 807, the court should not have to evaluate standard exceptions if it can find (perhaps more easily) that the statement is admissible under Rule 807. That is what the court did in this case. And the court's approach to trustworthiness shows the importance of and need for relying on corroboration. Without corroboration, the report would have been admitted only because it was consistent with other statements made by the declarant; and that would not seem to be a sufficient ground to conclude that the statement was true.

Trustworthiness: Balance sheet

In re Worldcom, Inc., 357 B.R. 223 (S.D.N.Y. 2006): In the Worldcom corporate fraud case, the court found that the Bankruptcy Court properly admitted Worldcom's restated balance sheet. The entirety of the analysis reads as follows:

The document is admissible as a business record under Rule 803(6) of the Federal Rules of Evidence, or under the general exception found in Rule 807 of the Federal Rules of Evidence. Moreover, Judge Hardin found that the intense public scrutiny involved in the restatement of WorldCom's financial adequately ensured that the results were trustworthy. The Court therefore holds that the bankruptcy court properly admitted WorldCom's restated balance sheet and relied on it in deciding the motion for summary judgment.

Trustworthiness: Newspaper article

Mandal v. City of New York, 2006 WL 3405005 (S.D.N.Y.): A newspaper article quoting a public official was offered to prove what the official said. The court found the article to be sufficiently trustworthy to qualify under Rule 807. It stated that the author of the article testified in his deposition that he has an independent recollection of the statements, and the parties who made the statements were available to testify and to be cross-examined.

Reporter's comment: This is a pretty broad view of the residual exception. Essentially any newspaper article that can be verified by the author or attacked by witnesses is admissible for its truth. Moreover, the necessity for admitting the article seems thin, because the author is available to testify and can verify what was said. The court did not consider whether the article was more probative than any other evidence reasonably available. The case digest on exclusion sets forth a number of cases in which newspaper articles were found inadmissible under Rule 807, either because insufficiently trustworthy or not more probative than other available evidence.

Trustworthiness: Usenet postings

Symantec Corp. v. Computer Assoc. Intern., 2006 WL 3950278 (E.D. Mich.): On a summary judgment motion in a patent case, the court found Usenet postings could be considered as they probably could be admitted at trial under Rule 807. The court analyzed the trustworthiness requirement as follows:

Richardson's hearsay statement was made contemporaneously with his purported uploading of the PKSFANSI program on the Internet, and was obviously made on personal knowledge. It is a simple statement of a recent past act, and thus does not bear the risks of faulty perception, memory, or narration, and Richardson repeated the statement in a subsequent posting. Further, nothing in Richardson's posting, nor any other evidence, suggests that Richardson would have had any motive to fabricate his claim to have posted the program on the Internet.

Evaluating other requirements of Rule 807, the court stated that the materiality requirement "is merely a restatement of the general requirement that evidence must be relevant" and that the interests of justice requirement "is merely a restatement of the general requirement that evidence must be relevant."

Trustworthiness: Birth Certificate

United States v. Vidrio-Osuna, 198 Fed.Appx. 582 (9th Cir. 2006): In an alien-reentry case, the court found that a birth certificate was properly admitted as proof that the defendant was born in Mexico. Applying the residual exception, the court declared as follows:

The hearsay statements were admissible under Fed.R.Evid. 807 because (1) the birth certificate contained birth records about which it would be difficult to conceive of any motive to lie and thus contained sufficient indicia of trustworthiness; (2) it was offered to prove an element of the crime; (3) it was more probative on this point than any other available evidence; (4) its admission served the general purposes of the Rules of Evidence and the interests of justice; and (5) defendant received a copy of it sufficiently in advance of trial in order to raise any doubts about its accuracy. Although the district court failed to make detailed findings to support admission of the birth certificate under Rule 807, we can and do make such findings.

Trustworthiness: Ancient document

Fresenius Medical Care Holdings, Inc. v. Baxter Intern., Inc., 2006 WL 2006 WL 1330001(N.D.Cal): In a patent case, a document describing a recording and monitoring system, found in a garage of the architect of the system, was found admissible as an ancient document, a business record, and under the residual exception. The court did not do an independent analysis of reliability under the residual exception.

Reporter's comment: The case supports the argument that limitation of the ancient documents exception is not problematic as to reliable hearsay).

Trustworthiness: Business record

Malletier v. Lincoln Fantasy, 2006 WL 897966 (D.P.R.): The court found that an inventory list of seized counterfeit items, prepared by a court-appointed custodian, was trustworthy enough to be admitted as residual hearsay. But the court also found that the list was admissible as a business record and a public record, so Rule 807 was not doing much work here.

II. MORE PROBATIVE

More Probative: Expert reports from a related case

Muhammad v. Crews, 2016 WL 3360501 (N.D.Fla.): The plaintiff, a prisoner, alleged that he was not receiving a diet consistent with his religious needs. He sought to admit expert reports prepared for the Department of Justice in a case with similar issues. The court found the expert reports to be admissible under Rule 807. As to trustworthiness, the court reasoned that the reports were “sworn expert reports prepared for the Department of Justice.” As to the “more probative” requirement, the court stated that “Muhammad—a prisoner proceeding pro se—can hardly expect to procure similar expert reports about the economics and security issues surrounding the provision of alternative diets through ‘reasonable efforts’ of his own. And allowing Defendants to offer their own de facto expert opinions without allowing Muhammad a reasonable chance to rebut those opinions would not serve the interests of justice.” The court emphasized, however, that the “more probative” requirement would generally be used to exclude expert reports prepared in other cases:

To be clear, this Court's ruling should not be construed as an endorsement of the regular use of the residual hearsay exception as a tool to bring expert reports from a similar case into one's own case. Under normal circumstances, the residual exception would not be appropriate because most parties can obtain their own expert reports—that is, they can, through “reasonable efforts,” find evidence just as probative, and probably more probative, on the issues involved in their case than an expert report from another case. *See, e.g., N5 Tech. LLC v. Capital One N.A.*, 56 F. Supp. 3d 755, 765 (E.D. Va. 2014) (rejecting attempt by plaintiff to introduce expert report through Rule 807 because “plaintiff, through reasonable efforts, could have retained its own expert and presented testimony on the doctrine of equivalents, but chose not to do so” and “[p]laintiff must now live with the consequences of this choice”). * * * But here we have a somewhat unique situation: there exist recent expert reports prepared for a case with similar issues to this one, brought against (more or less) the same defendants, and a pro se prisoner wishes to use those reports to rebut certain claims made by Defendants. Under these circumstances, the Magistrate should have considered the expert reports of Clark and Watkins under the residual hearsay exception.

More probative: Child-victim's statement regarding abuse

United States v. W.B., 452 F.3d 1002 (8th Cir. 2016): Hearsay statements of a victim of child-sex-abuse made to a forensic interviewer were admitted under the residual exception. On appeal the only claim of error was that because the child testified, her statements to the interviewer were not more probative than any other evidence reasonably available. The court noted that generally speaking, in-court testimony is more probative than hearsay, but this is not the case where a child witness's testimony is impaired by communication difficulties, reluctance to testify, fear, and the like. The court concluded as follows:

Given J.D.'s reticence in providing details of the abuse and her stated belief she could be hurt by testifying against W.B. in court, we believe the district court had ample reason to believe J.D. was unable or unwilling to testify further or more clearly regarding the details of the abuse. Accordingly, the district court did not abuse its discretion by concluding J.D.'s out-of-court statements to Hawkins were the most probative evidence available under Rule 807.

Reporter's Comment: The result would not change if the “more probative” requirement were limited to a comparison of the hearsay and any other statement that could be obtained from the declarant. In this case, that comparison was made and the hearsay was found to be the better statement.

III. INTERESTS OF JUSTICE

Interests of Justice: Statement of participant in an accident

Royal & Sun Alliance Ins. PLC v. UPS Supply Chain Solutions, 2011 WL 3874878 (S.D.N.Y.): The court held that a statement by a participant in an accident, taken by a police officer who visited the participant an hour after the accident, was admissible under Rule 807. The court explained as follows:

The fact that Crews provides the only eyewitness account of the accident, the severity of the accident, and the timing of the interview are all indicia of the statement's materiality and trustworthiness. As discussed above, only a short interval of time had elapsed between when the statement was made and when Crews suffered life-threatening injuries, making it less likely he fabricated a story. The statement is also material and probative, as the decision regarding whether Crews was at fault for the collision is vital to both parties' claims and any negligence determination. The inclusion of the statement best serves the interest of justice, as the unfortunate fact that Crews succumbed to his injuries should not preclude IMSCO from introducing statements from the only available eyewitness.

Reporter's comment: Here the “interests of justice” factor is that the witness has died and there is no other evidence. But that is just another way of saying that the evidence is “more probative” than any other evidence reasonably available. So the interests of justice language adds nothing and in fact confuses the court, because the court should have been applying the “more probative” language.

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Fed. R. Evid. 801(d)
Date: October 1, 2016

Over the last few meetings, the Committee has been considering the possibility of expanding substantive admissibility of certain prior statements of testifying witnesses --- the rationale of that expansion being that unlike other forms of hearsay, the declarant is subject to cross-examination about the statement. At the Symposium on Hearsay in October, 2015, a panel was devoted to treatment of prior witness statements.

I. Previous Committee Discussions on the Substantive Admissibility of Prior Witness Statements

The Committee's discussions at the previous three meetings have served to narrow the Committee's focus on any possible amendment that would expand the substantive admissibility of prior witness statements. Here is a synopsis of the Committee's conclusions to date:

- While there is a good argument that prior inconsistent statements should not be treated as hearsay at all, amending the hearsay rule itself (Rule 801(a)-(c)) is not justified. That rule is iconic, and amending it to exclude prior witness statements from the definition will be difficult and awkward. Most importantly there is a good reason to limit the admissibility of some prior witness statements, as discussed below. Therefore any amendment should focus on broadening the exemption provided by Rule 801(d)(1).

- The focus on Rule 801(d)(1) should be narrowed further to the subdivision on prior inconsistent statements: Rule 801(d)(1)(A). The current provision on prior consistent statements --- Rule 801(d)(1)(B) --- was only recently amended, and that amendment properly captures the statements that should be admissible for their truth. Any expansion of Rule 801(d)(1)(B) would untether the rule from its grounding in rehabilitating the witness, and would allow parties to strategically create evidence for

trial. Likewise, the current provision of prior statements of identification --- Rule 801(d)(1)(C) --- has worked well and is not controversial; there is no reason, or even a supporting theory, to expand admissibility of such statements.

- There are concerns about admitting a prior inconsistent statement for substantive effect in situations where there is a dispute about whether the statement was ever made. The concern is that prior inconsistent statements might be made up or misreported by the adversary, and it would be difficult to cross-examine the declarant about a statement that he disputes having made. It may also be costly and distracting to prove up a prior inconsistent statement when there is a dispute about what the declarant said. Thus, the Committee has up to now rejected an amendment that would follow the California rule of substantive admissibility of all prior inconsistent statements.

That much has been agreed upon by the Committee. But there is disagreement about whether substantive admissibility of prior inconsistent statements should be expanded to situations in which there is no meaningful dispute about whether the content of the statement and that it was made. That dispute is recounted in the minutes of the Spring, 2016 meeting:

The Committee next turned its discussion to allowing substantive admissibility of prior inconsistent statements where there is in fact proof that it was made --- such as a statement that was recorded or was signed by the witness. Several members noted that where a statement is made at a police station, even if it is signed or audio recorded, the witness might have an argument that it was made under pressure --- and that many people who confess at the station do in fact repudiate their statements once they get a lawyer. Others responded that while audio recordings and signed statements are subject to argument as to how and perhaps even whether they were made, the same is not true for video recordings. A statement that is recorded on video might be explained away by the witness at trial --- which is perfectly suited to the trial context --- but it is all but impossible to deny that a statement was made when it has been video recorded. Moreover, any indication of police pressure or overreaching is likely to be presented in the video itself. Other members noted that allowing substantive admissibility of videotaped inconsistent statements could lead to more statements being videotaped in expectation that they might be useful substantively--- which is a good result even beyond its evidentiary consequences.

Finally, a number of Committee members noted that one of the major costs of the current rule is that a confounding limiting instruction must be given whenever a prior inconsistent statement is admissible for impeachment purposes but not for its substantive effect. That cost may be justified when there is doubt that a prior statement was fairly made, but it may well be unjustified when the prior statement is on video --- as there is easy proof of the statement and its circumstances if the witness denies making it or tries to explain it away.

The Committee took a straw vote and five members of the Committee voted in favor of an amendment to Rule 801(d)(1)(A) that would provide for substantive admissibility of a prior inconsistent statement if it was video recorded. Three

members were opposed. The Committee resolved to take up the matter in the next two meetings to determine whether an amendment would be formally proposed for issuance for public comment in the Fall of 2017.

II. Working Draft of an Amendment to Rule 801(d)(1)(A)

The working draft of an amendment that would allow for substantive admissibility for videotaped prior inconsistent statements provides as follows:

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

(ii) was video-recorded and is available for presentation at trial; 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.

A working draft of the Committee Note provides as follows:

The amendment provides for greater substantive admissibility of inconsistent statements of a testifying witness, which is appropriate because the declarant is by definition testifying under oath and is subject to cross-examination about the statement. The requirement that the statement be made under oath at a former proceeding is unnecessarily restrictive. That requirement stemmed mainly from a concern that it was necessary to regulate the possibility that the prior statement was never made or that its presentation in court is inaccurate. But as shown in the practice of some states, there are less onerous alternatives that can assure that what is introduced is exactly what the witness said. The best proof of what the witness said, and that the witness said it, is when the statement is video-recorded. That is the safeguard provided by the amendment.

There is overlap between subdivisions (A)(i) and (A)(ii). For example, a videotaped deposition is potentially admissible under both provisions. But the Committee decided to retain the longstanding original provision, as it has been the subject of extensive case law that should not be discarded. Rather than replace the original ground of substantive admissibility, the decision has been made to add a new, if somewhat overlapping, ground.

While the amendment allows for substantive admissibility for more prior inconsistent statements than previously, it does not affect the use of any prior inconsistent statement for impeachment purposes. A party may wish to introduce an inconsistent statement not to show that the witness's testimony is false and prior statement is true, but rather to show that neither is true. Rule 801(d)(1)(A) does not apply if the proponent is not seeking to admit the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment and because it was false, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

At the Fall meeting, Committee discussion can continue about whether to allow substantive admissibility of videotaped prior inconsistent statements. Part of the miniconference to be held before the meeting will be devoted to this topic --- so the Committee can hear from judges, academics and litigators, and exchange ideas with them.

The remainder of this memo is to provide background for the Committee's discussion at the miniconference and the meeting. It essentially reproduces the background material that the Committee has received at prior meetings. Hopefully it will be helpful for refreshing recollection, and it can serve as an introduction to the new members and as background for the conference participants.

III. Prior Inconsistent Statements

A. 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."¹ 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."

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

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

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.² 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 pretty 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 in a criminal case) 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:

- excluding testimony as hearsay even though the declarant can be cross-examined;
- 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;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 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);⁴ and

² 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.

³ Notably, in 2014 the Advisory Committee promulgated an amendment to Rule 801(d)(1)(B) --- covering prior *consistent* statements --- with the specific goal of eliminating confusing instructions regarding the difference between substantive and impeachment use of those prior statements of testifying witnesses.

⁴ 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

- raising the possibility that prior inconsistent statements not admissible for truth under Rule 801(d)(1)(A) will be found admissible for truth under the residual exception anyway.⁵

One further consequence of the Congressional limitation in criminal cases was discussed at the Hearsay Symposium: prosecutors have an incentive to bring “wobblers” into the grand jury in order to lock in their prior statement as substantive evidence if they renege at trial. On the one hand, this could be looked at as an inconvenient and cumbersome result --- having to call witnesses to the grand jury that would otherwise not be called. On the other hand, it could be looked at as a good if unintended consequence of the Congressional limitation. The limitation ends up providing more evidence to the grand jury, and also more disclosure of information to the defendant in advance of trial.

III. State Variations on Rule 801(d)(1)(A)

In deciding whether to expand the substantive admissibility of prior inconsistent statements, there are reference points provided in the state rules of evidence. Quite a few states have either rejected or tempered the congressional limitation on substantive admissibility of prior inconsistent statements. The state deviation is greater than that with respect to most of the other Federal Rules of Evidence.

A. Rejection of Congressional Limitation in Rule 801(d)(1)(A)

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

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”).

⁵ *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.”).

Alaska⁶
Arizona⁷
California⁸
Colorado⁹
Delaware¹⁰
Georgia¹¹
Montana¹²
Nevada¹³
Rhode Island¹⁴
South Carolina¹⁵
Wisconsin¹⁶

At the Symposium, Professor Dan Blinka reported on Wisconsin's experience with its rule providing for substantive admissibility of all prior inconsistent statements. He noted that the rule has only rarely been the subject of appellate decisions, and that practitioners have had no problem adjusting to and applying the rule.¹⁷

6. ALASKA R. EVID. 801(d)(1)(A).

7. ARIZ. R. EVID. 801(d)(1)(a).

8. CAL. EV. CODE § 1235.

9. COLO. R. EVID. 801(d)(1)(A).

10. DEL. R. EVID. 801(d)(1)(A).

11. GA. R. EVID. 801(d)(1)(A).

12. MONT. R. EVID. 801(d)(1)(A).

13. 4 NEV. STAT. § 51.035(2)(A).

14. R.I. R. EVID. 801(d)(1)(A).

15. S.C. R. EVID. 801(d)(1)(A).

16. WIS. R. EVID. 801(d)(1)(A).

¹⁷ An example of the operation of the Wisconsin rule is seen in the Netflix documentary "Making a Murderer." Brandon Dassey confessed to police officers that he took part in a murder. He challenged his confession before the jury on the ground that the officers essentially tricked and browbeat him into making it. The confession was critical to the prosecution as there was no forensic evidence or eyewitness testimony tying Dassey to the murder. The government called Brandon's cousin Kayla. Previously she had stated that Brandon confessed to her. At trial she repudiated that statement, saying that Brandon had never confessed to her. Under the Wisconsin rule, her prior statement about Brandon's confession was admitted as substantive evidence, and that was critical to the trial court's denial of a directed verdict. (Subsequently a new trial was ordered on the ground that the police officers coerced the confession in violation of Brandon's due process rights).

B. Variations Short of Outright Rejection of the Congressional Limitation

Other states provide less onerous alternatives to the congressional restriction on substantive admissibility of prior inconsistent statements. For example, Arkansas requires prior oath at a formal proceeding for civil cases only.¹⁸ And 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.¹⁹

Requirements (B) and (C) in the Connecticut rule are surplusage because they are covered by other rules (authentication by Rule 901 and personal knowledge by Rule 602). But the Connecticut version does suggest a compromise approach that might be employed—which would expand substantive admissibility 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, et cetera should do much to satisfy those whose concern is about witnesses (such as police officers) cooking up prior inconsistent statements of other witnesses.

Hawaii similarly expands the exception beyond the congressional limitation, while still addressing 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 or approved 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.”²⁰

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.”²¹ Illinois thus adds an interesting addition—the statement does not need to be recorded if the declarant, when testifying, acknowledges making the prior statement. That is a completely justifiable proposition because there should be no doubt about the prior statement if the declarant actually acknowledges making it. (Thus far the Advisory Committee has not

18. ARK. R. EVID. 801(d)(1)(i).

19. CONN. CODE EVID. R. 8-5.

20. HAWAII R. EVID. 802.1(1)(B)–(C).

21. ILL. R. EVID. 801(d)(1)(A).

adopted such a provision. The expressed concern is that the signing of the statement may be as coerced as the making of the statement itself).

Louisiana does not permit substantive use of prior inconsistent statements in a civil case.²² Prior inconsistent statements are admissible substantively in a criminal case, “provided that the proponent has first fairly directed the witness’[s] 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.”²³

New Jersey provides for substantive admissibility of all prior inconsistent statements of a witness called by an opposing party (somewhat like a party-opponent statement). However, if the witness is called by the proponent --- and so the inconsistent statement is offered against the opponent --- 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.”²⁴ The New Jersey structure recognizes a risk that the prior statement was never made, but allocates that risk to the party-opponent when that party calls a witness who has made a prior inconsistent statement that the adversary can use.

North Dakota applies the congressional limitation in Rule 801(d)(1)(A) to criminal cases only.²⁵

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.²⁶

22. LA. CODE EVID. 801(d)(1)(A).

23. MD. R. EVID. 5-802.1.

24. N.J. R. EVID. 803(a)(1).

25. N.D. R. EVID. 801(d)(1)(A).

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 forgotten²⁷

Wyoming applies the congressional limitation only in criminal cases.²⁸

IV. The Expressed Concerns About Expanding Substantive Admissibility of Prior Inconsistent Statements

A. Concerns About False Testimony Regarding the Making or Content of the Prior Statement

The classic hypothetical for this concern arises when the government calls a police officer who testifies that the defendant previously made a statement inconsistent with his in-court testimony denying guilt --- but the defendant argues that the testimony inaccurately recounts the statement, or that the statement was never made. As discussed above, concern over a false report about the prior statement was the principal reason for the limitation on substantive admissibility imposed by Congress.

There are several arguments that can be made in response to the concern over false testimony about a prior inconsistent statement:

- First, the possibility of lying about a prior statement does not present a hearsay problem at all. If a witness testifies falsely about a prior inconsistent statement, that lie is made in court, under oath and subject to cross-examination, with a view of demeanor.

- Second, the risk that a witness might be inaccurate about a statement is not limited to prior inconsistent statements. It could apply to any oral statement admissible

26. PA. R. EVID. 803.1.

27. UTAH R. EVID. 801(d).

28. WYO. R. EVID. 801(d)(1)(A).

under a hearsay exception or as not hearsay. For example, a witness might testify that he heard a victim make an excited utterance, or a dying declaration. There is of course a risk that the witness might be making up the statement or inaccurately reporting it. But the system leaves that risk to be regulated by cross-examination of the witness testifying under oath. We do not respond to the concern by requiring excited utterances or statements to doctors or any other statement admissible under a hearsay exception to be made under oath at a formal proceeding. We don't even impose such a requirement for a prior *consistent* statement, even though it may well be that the witness is testifying falsely about it. What's so different about the making (or not making) of prior inconsistent statements that requires regulation about the accuracy of a witness's testimony about it?

- Third, it is notable that there is no requirement of oath at a formal proceeding for prior inconsistent statements that are admissible solely for impeachment. But why are we not concerned about *those* prior inconsistent statements being inaccurately reported? The impact of a prior inconsistent statement, even if offered only for impeachment, can be devastating. It is surely possible that the statement will be (mis)used by the jury for its truth. It doesn't appear to make sense to have an abiding concern about inaccurate testimony about prior inconsistent statements in one context but not the other, when the only difference is that one is given substantive effect. Put another way, the extra added substantive effect of a prior inconsistent statement under Rule 801(d)(1)(A) is an insufficient reason to provide draconian procedural requirements when the same risk of fabrication applies to impeachment-only inconsistent statements.

- Finally, even if the concern over inaccurate testimony about inconsistent statements is one that should be addressed in a hearsay rule, there are (as demonstrated by some of the states) less onerous ways to regulate the problem of inaccuracy. Thus, the working draft provides for substantive admissibility in one situation in which fabrication of inconsistent statements is essentially impossible --- when the statement has been video-recorded.

B. Concerns About the Difficulty of Cross-Examination When the Witness Contests the Accuracy of the Testimony Concerning the Inconsistent Statement

It can be argued that the premise of having a hearsay exception for prior inconsistent statements --- the ability to cross-examine the person who made the statement --- is faulty when the declarant simply denies having said what the witness reported. How do you cross-examine the witness about the prior statement if the witness denies saying that?

It is surely true that there are special challenges in cross-examining a witness who denies the assertion that is sought to be tested. But those challenges would not seem as significant when the prior statement has been videotaped. This is true for at least three reasons. First, the *likelihood* of the witness denying that he made a videotaped statement would appear to be quite low. The witness is essentially risking a perjury charge by doing so. Second, a witness who

denies making a videotaped statement is testifying so implausibly that the cross-examination of the witness's motives and recall should be pretty straightforward and effective. Third, the hearsay problem --- that the jury is unable to assess the credibility of the person who made the out-of-court statement --- is quite attenuated because the jury has everything it needs to assess the witness's credibility when the prior statement is videotaped and the witness has testified at trial.

There are a couple of other arguments that could favor substantive admissibility for videotaped prior inconsistent statements:

- It seems a questionable policy to preclude substantive admissibility of a prior inconsistent statement simply because the witness denies making it. That gives the witness veto power over admissibility.

- A prior inconsistent statement is admissible for impeachment even though the witness denies making it. The challenges of cross-examination are exactly the same. Why should substantive admissibility be any different?

C. The Concern About Proving a Prior Inconsistent Statement to Show That Neither the Statement Nor the Testimony is True.

At the Symposium, A.J. Kramer observed that sometimes a cross-examiner raises a prior inconsistent statement not to show that it is true, but to show that *nothing* the witness has said is true. A.J.'s example was of drugs found in a car, and the government wants to place the defendant in the car. A witness testifies that the defendant was in the back seat of the car. He has made a prior inconsistent statement (videotaped for purposes of the discussion) that the defendant was in the front passenger seat and another statement (again, videotaped for purposes of the discussion) that the defendant was driving. The point of introducing the inconsistencies would be to show that the witness is all over the place (literally) with his story and in fact he is lying about the defendant being in the car at all. But A.J.'s concern is that if the prior inconsistent statements are admissible as proof of a fact, then defense counsel, when offering the statements, will have proved as a fact that the defendant was (somewhere) in the car.

It would of course be a bad state of affairs if an amendment to Rule 801(d)(1)(A) would mean that a party, who was only seeking to use the inconsistent statement for impeachment, could end up proving the adversary's case with substantive evidence. The question is how to allow a party to use a prior inconsistent *only* for impeachment if that is their election, even though it could be used substantively under an expanded rule.

One factor tempering the concern about unintended substantive use is that when the cross-examiner is trying to prove that the witness had never told the truth, the prior statement on direct has already been made and is admissible as substantive evidence. Thus, in the car hypothetical, it is the direct testimony that has put the defendant in the car as a matter of

substantive evidence. So the cross-examiner's attack really *does* go to impeachment and has no real substantive impact.

More broadly nothing in the hearsay rule or Rule 801(d)(1)(A) *requires* a proponent to offer the inconsistent statement for its truth --- even if to do so is permitted by the Rule, that doesn't mean that the proponent can't control the use of the statement by offering it for a limited purpose. Conceptually, the situation is analogous to a party who is offering an out-of-court statement for its effect on the listener, or for context, rather than for the truth. The party controls the use of the evidence by articulating the purpose, so long as that purpose is plausible. So it would seem that a proponent could avoid a substantive evidence trap in the car hypothetical by making it clear to the court and the jury that the inconsistent statement is offered not to prove that the defendant was in the car but rather to prove that the witness is lying about the defendant being in the car. It seems unlikely that a trial court would find that a defense counsel who was simply trying to show that a witness was lying should be held to have proven the truth of an adverse fact.

That said, it would be prudent in any amendment to mention and provide guidance on the possible use of inconsistent statements solely for impeachment. There are of course two possibilities --- adding to text and adding to Committee Note. Adding to the Committee Note would seem preferable because nothing in the text of the rule needs to be changed to make the point that a party does not *have to* offer a statement for its truth --- if the statement is not offered for its truth, it doesn't satisfy the definition of hearsay in Rule 801(c), and so Rule 801(d)(1)(A) cannot be applicable. Moreover, it would be difficult to add a condition to the rule that would be anything more than restating the condition of the hearsay rule itself. Something like "is inconsistent . . . and the proponent offers the statement for the truth of the matter asserted" would not seem helpful.

The working draft Committee Note contains the following language to cover the question that arises when a prior inconsistent statement is explicitly offered not for its truth but to show that it was a lie. It provides as follows:

While the amendment expands the substantive admissibility for prior inconsistent statements, it does not affect the use of any prior inconsistent statement for impeachment purposes. A party may wish to introduce an inconsistent statement not to show that the witness's testimony is false and prior statement is true, but rather to show that *neither* is true. Rule 801(d)(1)(A) does not apply if the proponent is not seeking to admit the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment and because it was false, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

D. The Concern In Civil Cases That Parties Will Avoid Summary Judgment By Filing an Affidavit With an Inconsistent Statement

At the Symposium the concern was expressed that if prior inconsistent statements are given substantive effect, a party could avoid summary judgment simply by filing an affidavit with an inconsistent statement. The example provided was as follows: a party has made a concession in a deposition that essentially ends its case. The opponent then moves for summary judgment on the basis of the statement. The party, in opposition to the motion, files an affidavit that contradicts the deposition. If that affidavit must be given substantive effect due to an expansion of substantive admissibility under Rule 801(d)(1)(A), then the thinking is that the court would have to deny the motion. In contrast, if it were admissible only for impeachment then it would have no effect, because the court considers only substantive evidence on summary judgment.

If the scenario presented above were an inevitable outcome from an amendment to Rule 801(d)(1)(A), then the amendment would probably need to be rejected, or limited to criminal cases, or subject to an exception that would prohibit the practice. That is to say, it is a bad result to propose an amendment that would provide undeserving parties a shady means to escape summary judgment.

But on closer inspection it appears that the risk of misuse of substantive admissibility of prior inconsistent statements on summary judgment is far less likely than it sounds. That is so for two reasons:

- First, the scenario painted at the Symposium can occur *today* --- no amendment is necessary for a party to file an affidavit averring to an inconsistent statement as a means of forestalling summary judgment. This is because an affidavit containing a statement is an assertion that the affiant will testify at trial to that statement, i.e., it will be presented in admissible form at trial. Fed.R.Civ.P. 56(c). So if, for example, a party makes a statement at the deposition that he didn't read the prospectus, but then files an affidavit saying that he did, he is averring that he will testify at trial that he did. That will be substantive evidence at trial, regardless of Rule 801(d)(1)(A). The same would hold true if the statement presented to forestall summary judgment is in an affidavit of a non-party that contradicts a statement the non-party previously made. The non-party's averment of an inconsistent statement must be treated as substantive evidence because it will be provided in an admissible form at trial, i.e., as in-court testimony. That rule has nothing to do with the substantive admissibility of a prior inconsistent statement because the inconsistency will be presented at trial in the form of testimony.

Thus, the only risk of abuse that could possibly be *added* by an expansion to Rule 801(d)(1)(A) is quite narrow: Assume that a statement by a non-party in a deposition would terminate the case; but instead of the non-party filing an affidavit with an inconsistent statement, the *party* files an affidavit averring that the non-party made an inconsistent statement, and the non-party will be unavailable to testify at trial. In that case, under the existing Rule 801(d)(1)(A), the non-party's inconsistent statement would be admissible only to impeach the deposition testimony under Rule 806 (and so cannot be

considered on summary judgment) because it is not presented in a form that would be admissible substantively at trial (i.e., the party's testimony about the inconsistent statement would be hearsay). Under a rule providing for greater substantive admissibility of prior inconsistent statements, that inconsistent statement would have to be considered by the court in opposition to summary judgment.

The narrowness of the problem of expanded substantive use of prior inconsistent statements on summary judgment is borne out by Ken Broun's research of summary judgment in states that provide a hearsay exception for all prior inconsistent statements. Ken concluded that the problem of prior inconsistent statements on summary judgment in these states rarely arises in reported cases, and when it does, it is exclusively the situation in which a party files an affidavit averring to a statement made by a *non-party* that is inconsistent with the statement that the non-party made at a deposition.

The problem becomes even narrower under an amendment that would allow substantive admissibility only for prior statements that are videotaped. In that case, a party would have to aver that the non-party made a *videotaped* statement that was inconsistent with his deposition testimony. If not videotaped, it could only be admissible for impeachment and therefore could not be considered by the court on summary judgment. Thus, the putative bad actor trying to forestall summary judgment would have to get the non-party to make a videotape of a statement that is inconsistent with his deposition testimony --- that is going a long way to forestall summary judgment.

- Second, even if expanded substantive admissibility of prior inconsistent statements might lead a party in bad faith to think about forestalling summary judgment by creating such a statement, it wouldn't work. There is already substantial case law in place to prevent parties from submitting "sham affidavits." Case law in every circuit establishes a "sham affidavit" rule. See Edward Brunet, John Parry, & Martin Redish, *Summary Judgment: Federal Law and Practice* § 8:10 (citing cases from every circuit providing authority of district courts to strike sham affidavits). A sham affidavit "is an affidavit that is inadmissible because it contradicts the affiant's previous testimony . . . unless the earlier testimony was ambiguous, confusing, or the result of a memory lapse." *Pourghoraishi v. Flying J., Inc.*, 449 F.3d 751, 759 (7th Cir. 2006). Thus if a party submits an affidavit solely to contradict a previous statement, it will be rejected on summary judgment even if it is substantively admissible. See also *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1237 (11th Cir. 2010) ("[a] court may determine that an affidavit is a sham when it contradicts previous deposition testimony and the party submitting the affidavit does not give any valid explanation for the contradiction"); *Brown v. Henderson*, 257 F.3d 246, 252 (2^d Cir. 2001) (affirming summary judgment for employer in a Title VII sex discrimination case, finding the trial court properly rejected the plaintiff's affidavit that directly conflicted with her own prior deposition testimony); *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703 (3^d Cir. 1988) (trial court properly disregarded the plaintiff's affidavit "submitted only after [she] faced almost certain defeat in summary judgment," finding that the affidavit "flatly contradicted no less than eight of her prior sworn statements"); *Halperin v. Abacus Technology Corp.*,

128 F.3d 191, 198 (4th Cir. 1997) (affirming summary judgment in an employment discrimination case and finding that the trial court properly disregarded the affidavit of the nonmovant that “contradicts his prior deposition testimony”); *Dotson v. Delta Consol. Industries, Inc.*, 251 F.3d 780, 781(8th Cir. 2001) (affirming summary judgment in a Title VII race discrimination case and rejecting nonmovant's argument that his affidavit created an issue of fact with his earlier conflicting deposition “because we have held many times that a party may not create a question of material fact, and then forestall summary judgment, by submitting an affidavit contradicting his own sworn statements in a deposition”); *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1138 (9th Cir. 2000) (“[G]enerally, a nonmoving party may not create an issue of fact for summary judgment purposes by means of an affidavit contradicting that party's prior deposition testimony.”).

Thus, the concern that expansion of substantive admissibility of prior inconsistent statements would create a crisis for summary judgment cases is belied both by the narrowness of the problem and, more importantly, by existing law that would prohibit a party from manufacturing an inconsistent statement in an effort to forestall summary judgment.

V. Recap --- the Working Draft

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

(ii) was video-recorded and is available for presentation at trial; 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.

A working draft of the Committee Note provides as follows:

The amendment provides for greater substantive admissibility of inconsistent statements of a testifying witness, which is appropriate because the declarant is by definition testifying under oath and is subject to cross-examination about the statement. The requirement that the statement be made under oath at a former proceeding is unnecessarily restrictive. That requirement stemmed mainly

from a concern that it was necessary to regulate the possibility that the prior statement was never made or that its presentation in court is inaccurate. But as shown in the practice of some states, there are less onerous alternatives that can assure that what is introduced is exactly what the witness said. The best proof of what the witness said, and that the witness said it, is when the statement is video-recorded. That is the safeguard provided by the amendment.

There is overlap between subdivisions (A)(i) and (A)(ii). For example, a videotaped deposition is potentially admissible under both provisions. But the Committee decided to retain the longstanding original provision, as it has been the subject of extensive case law that should not be discarded. Rather than replace the original ground of substantive admissibility, the decision has been made to add a new, if somewhat overlapping, ground.

While the amendment allows for substantive admissibility for more prior inconsistent statements that previously, it does not affect the use of any prior inconsistent statement for impeachment purposes. A party may wish to introduce an inconsistent statement not to show that the witness's testimony is false and prior statement is true, but rather to show that neither is true. Rule 801(d)(1)(A) does not apply if the proponent is not seeking to admit the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment and because it was false, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

Reporter's Note

As the draft note recognizes, there is some overlap between (A)(i) and (A)(ii). For example, if an inconsistent statement was made at a videotaped deposition, it would be

substantively admissible under both provisions. But the Congressional language has been in place for 40 years and there is case law on it. Moreover it covers different factual situations --- because formal proceedings are not always videotaped and, conversely, videotaped statements are not always formal. 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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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Public comment suggesting an amendment to Rule 702
Date: October 1, 2016

Two members of the public --- Professor David Bernstein and Eric Lasker, Esq.--- have submitted a proposal to amend Evidence Rule 702. It is the Committee's responsibility to consider suggestions from the public for change to the Evidence Rules. This memo is designed to assist the committee in exercising that responsibility.

The proposal to amend Rule 702 is set forth in an article in 57 William and Mary Law Review 1 (2015). This memo summarizes the suggestions for change and the stated reasons for change, and analyzes whether an amendment may be necessary. The memo is divided into three parts. Part One discusses the 2000 amendment to Rule 702, which is the focus of the article. Part Two discusses the author's complaints about case law that ignores or misapplies Rule 702 as it has been amended, and sets forth the authors' proposed amendment to Rule 702, which is intended to bring wayward courts back into line. And Part Three provides the Reporter's observations on the authors' proposed amendments.

I. The 2000 Amendment to Rule 702

The authors focus on the section of Rule 702 that was amended in 2000, in response to *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), and its progeny. That part of Rule 702 sets forth the following reliability-based requirements for expert testimony to be admissible:

- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

The 2000 amendment was designed to distill and codify the many strands of doctrine that started in *Daubert* and that were developed in later case law in both the Supreme Court (*General Electronic v. Joiner* and *Kumho Tire v. Carmichael*) and in the lower courts. The goal was to provide some structure for courts and litigants, so that they would not have to trudge through all the case law to determine what standards needed to be met before the trial judge could admit expert testimony.¹

Admissibility Requirements Added by the 2000 Amendment:

The 2000 amendment added three admissibility requirements to Rule 702. As restyled, these are subdivisions (b), (c) and (d). Strictly speaking, only subdivision (c), requiring reliable principles and methods, can be found explicitly in *Daubert*. But when the Advisory Committee looked over the vast post-*Daubert* case law, as well as the underlying principles in *Daubert*, *Joiner* and *Kumho*, it saw that the other two requirements had been established as well. The other two requirements --- sufficient basis and proper application --- are obviously required if the goal is to assure that expert testimony must be reliable to be admissible. They are really inseparable from the requirement of reliable principles and methods. A short discussion of these factors will explain the point.

Subdivision (b) --- Sufficient facts or data: The requirement of sufficient facts or data means that an expert’s opinion must be grounded in sufficient investigation or research. Some have called it the “homework” requirement --- the expert must have done her homework before testifying. To take a simple example, an expert should not be permitted to testify to causation in a toxic tort case on the basis of studies that have been conducted, if she has only looked at a small percentage of those studies. Reviewing studies might well be a reliable method for coming to a conclusion, but if you don’t read enough of them --- or if you cherry-pick them --- the opinion that is drawn will be unreliable. Similarly, assume that a hydrologist is called to testify that contaminated water from an industrial plant flowed into the plaintiff’s well four miles away. The reliable method for that conclusion is to take samples at various points to track the underground water flow. But if the expert has taken only one sample, she would be relying on insufficient facts or data. Finally, assume that an accidentologist would testify to the cause of an accident, but never bothered to view the accident scene. No matter how reliable the methodology, the claim can be made that the opinion is speculative because it is insufficiently grounded in the facts or data. *See, e.g., Pelletier v. Main Street Textiles, LP*, 470 F.3d 48 (1st Cir. 2006) (expert on safety practices was properly excluded because he never inspected the facilities and equipment at issue, and so he lacked sufficient facts or data on which to base an opinion).

¹ Another goal, frankly, was to issue a Committee Note that would provide substantial and detailed guidance into the meaning of *Daubert* and its progeny; that would instruct on how to use the *Daubert* factors; and that would assist courts and litigants in determining which questions about experts would go to weight and which to admissibility. Because a Committee Note cannot be freestanding, an amendment was necessary; the amendment was intended to codify, not to depart from *Daubert*. The Rule 702 Committee Note, by the way, has been cited by courts more times than any other Committee Note in the Evidence Rules.

Subdivision (d) --- Reliable application: The Court in *Daubert* declared that the “focus, of course, must be solely on principles and methodology, not on the conclusions they generate.” 509 U.S. at 595. Yet as the Court later recognized, “conclusions and methodology are not entirely distinct from one another.” *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Under the amendment, as under *Joiner*, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would never reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. As the Advisory Committee Note states, the amendment “specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case.” This insight --- about the need for court review of how the method was applied --- came from Judge Becker, in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994), where he stated that “any step that renders the analysis unreliable . . . renders the expert’s testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.”

In sum, the 2000 amendment specifies that sufficient basis and application of method are admissibility requirements --- the judge must be satisfied by a preponderance of the evidence that the expert has relied on sufficient facts or data, and that the expert has reliably applied the methods. It is not the case that the judge can say, “I see the problems, but they go to the weight of the evidence.” After a *preponderance* is found, then any slight defect in either of these factors becomes a question of weight. But not before.

II. The Case for an Amendment to Rule 702

Bernstein and Lasker’s primary complaint is that some lower courts have essentially ignored Rule 702 subdivisions (b) and (d). The authors state that despite the Rules Committee’s clear instruction that sufficient facts or data and reliable application are both admissibility requirements (to be established to the court by a preponderance of the evidence), some courts have treated them as questions of weight --- so any doubt about foundation or application go to the jury. The authors conclude that while the 2000 amendment “appeared sufficient at the time to rein in recalcitrant judges who had tried to evade the *Daubert* trilogy’s exacting admissibility standards, with the benefit of hindsight, it is now clear that the Judicial Conference failed to account for the tenacity of those who prefer the pre-*Daubert* approach to expert testimony.”

The authors conclude, rather insultingly, that “the partial failure of the 2000 amendments can be attributed to faulty draftsmanship, because the amendments’ language is insufficiently blunt to restrain judges who are inclined to resist a strong gatekeeper rule.”²

² It’s nice, though, that they say that the Advisory Committee, in promulgating the 2000 amendment, “had no discernable agenda beyond improving the quality of expert testimony admitted in American courts.” Nice, but not quite accurate. The correct statement is that the Committee “had no discernable agenda other than implementing the standards of *Daubert* and its progeny and providing a uniform structure for assessing expert testimony in light of all the case law.” There is a difference in the two descriptions. Any attempt to “improve the quality of expert testimony” came from the courts, not the Advisory Committee. Many public comments argued that the 2000 amendments favored defendants in civil cases because of its strict standards. The response from the Committee was

A. Examples of Wayward Case Law

The authors cite a number of instances in which lower courts have appeared to disregard either Rule 702(b) or Rule 702(d), ending up with rulings that are “far more lenient about admitting expert testimony than any reasonable reading of the Rule would allow.” Here are some examples provided:

1. Rule 702(b) (Sufficient Basis) Examples:

Milward v. Acuity Specialty Products Group, Inc., 639 F.3d 11 (1st Cir. 2011): Here the court states that “when the factual underpinning of an expert’s opinion is weak it is a matter affecting the weight and credibility of the testimony --- a question to be resolved by the jury.”

Kuhn v. Wyeth, Inc., 686 F.3d 618, 633 (8th Cir. 2012): An expert who ignored studies was excluded by the district court, but the court of appeals found an abuse of discretion, holding that the sufficiency of an expert’s basis is a question of weight and not admissibility. *See also United States v. Finch*, 630 F.3d 1057 (8th Cir. 2011) (the sufficiency of the factual basis for an expert’s testimony goes to credibility rather than admissibility, and only where the testimony “is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded”).

In re Chantix Prods. Liab. Litig., 889 F.Supp.2d 1272, 1288 (N.D. Ala. 2012) (finding that an expert’s decision to ignore data from clinical trials “is a matter for cross-examination, not exclusion under *Daubert*”).

In re Urethane Antitrust Litig., 2012 WL 6681783, at *3 (D.Kan.) (“The extent to which [an expert] considered the entirety of the evidence in the case is a matter for cross-examination.”).

Bouchard v. Am. Home Prods. Corp., 2002 WL 32597992, at *7 (N.D. Ohio) (“If the plaintiff believes that the expert ignored evidence that would have required him to substantially change his opinion, that is a fit subject for cross-examination.”).

that any complaint about rigorous standards should be addressed to the Court --- as they came from the Court in the *Daubert* trilogy.

2. Rule 702(d) (Reliable Application) Examples:

City of Pomona v. SQM N.Am. Corp. 750 F.3d 1036, 1047 (9th Cir. 2014): The case involved contamination of water, and the City’s expert conducted a test to determine the source of the contaminant. There are protocols for conducting such testing and the expert deviated from the protocols. The court found that “expert evidence is inadmissible where the analysis is the result of a faulty methodology or theory as opposed to imperfect execution of laboratory techniques whose theoretical foundation is sufficiently accepted in the scientific community to pass muster under *Daubert*.” For this proposition the court relied on pre-2000 9th Circuit case law. The court reversed a lower court decision to exclude the expert.

Walker v. Gordon, 46 F. App’x 691, 696 (3rd Cir. 2002)(“because [plaintiff] objected to the application rather than the legitimacy of [the expert’s] methodology, such objections were more appropriately addressed on cross-examination and no *Daubert* hearing was required”).

United States v. Gipson, 383 F.3d 689, 696 (8th Cir. 2004): The court drew a distinction between “on the one hand, challenges to a scientific methodology, and, on the other hand, challenges to the application of that methodology.” It stated that “when the application of a scientific methodology is challenged as unreliable under *Daubert* and the methodology itself is otherwise sufficiently reliable, outright exclusion of the evidence in question is warranted only if the methodology was so altered by a deficient application as to skew the methodology itself.” The court relied on pre-2000 authority for this proposition.

Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1343 (11th Cir. 2003): The court found it “important to be mindful” of a distinction between the reliability of a methodology and of the application of the methodology in the case, and rejected a *Daubert* challenge based on unreliable application, relying on case law that preceded *Daubert*.

United States v. McCluskey, 954 F.Supp.2d 1227, 1247-48 (D.N.M. 2013) (“the trial judge decides the scientific validity of underlying principles and methodology” and “once that validity is demonstrated, other reliability issues go to the weight --- not the admissibility --- of the evidence”).

Proctor & Gamble Co. v. Haugen, 2007 WL 709298, at *2 (D.Utah) (“Where the court has determined that plaintiffs have met their burden of showing that the methodology is reliable, the expert’s application of the methodology and his or her conclusions are issues of credibility for the jury.”).

Oshana v. Coca-Cola Co., 2005 WL 1661999, at *4 (N.D.Ill.) (“Challenges addressing flaws in an expert’s application of reliable methodology may be raised on cross-examination.”).

United States v. Adam Bros. Farming, 2005 WL 5957827, at *5 (C.D.Cal.) (“Defendants’ objections are to the accuracy of the expert’s application of the methodology, not the methodology itself, and as such are properly reserved for cross-examination.”).

See also Faigman, Slobogin and Monahan, *Gatekeeping Science: Using the Structure of Scientific Research to Distinguish Between Admissibility and Weight in Expert Testimony*, 11 Nw. U.L.Rev. 860, 863 (2016):

Only a minority of courts have required that the judge preliminarily determine that the expert’s conclusion was reliably reached using a reliable methodology. Most courts hold that the judge’s sole concern is whether the expert followed an acceptable methodology, and other decisions have even punted some types of methodological issues to the jury.

3. Other Complaints of Judicial Non-compliance

The authors have a few other complaints about some of the post-2000 cases:

a. Erroneous standard of review:

Some appellate courts have allegedly failed to apply the abuse of discretion standard to trial court determinations excluding expert testimony. The example that the authors give is *Johnson v. Mead Johnson & Co.*, 745 F.3d 557, 562 (8th Cir. 2014), where the court stated that the “liberal admission of expert testimony” called for by *Daubert* “creates an intriguing juxtaposition with our oft-repeated abuse-of-discretion standard of review.” The authors accuse the court of “paying lip service” to the abuse of discretion standard but actually applying de novo review to the trial court’s exclusion of expert testimony. If courts in fact are abandoning the abuse of discretion standard, that would be clear error, because the central holding of *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) is that appellate courts must apply the abuse of discretion standard of review to the trial court’s decision to admit or exclude expert testimony.

b. Failure to regulate the reliability of the expert’s basis:

Some courts have allegedly failed to assess the reliability of the information on which an expert relies. This would be a misapplication not of Rule 702, but rather of Rule 703, which requires experts to limit consideration of facts or data to that which is reasonably relied upon by other experts in the field. As *Daubert* noted, Rule 702 must be read together with Rule 703. The Committee Note to the 2000 amendment to Rule 702 clarifies the relationship between these two rules in regulating the facts or data on which an expert relies:

When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a *sufficient* basis of information -- - whether admissible information or not --- is governed by the requirements of Rule 702.

In other words, with regard to the expert's basis of information, Rule 702 imposes a *quantitative* requirement, while Rule 703 imposes a *qualitative* requirement. The authors, however, argue that this nuance is lost on some courts, and that "despite the direction in *Daubert* that Rule 702 be read in tandem with Rule 703, Rule 703 is frequently ignored in *Daubert* analyses." The authors cite as an example the Seventh Circuit case of *Manpower, Inc., v. Ins. Co. of Pa.*, 732 F.3d 796, 808 (7th Cir. 2013), where the court stated that "the reliability of data and assumption used in applying a methodology is tested by the adversarial process and determined by the jury; the court's role is generally limited to assessing the reliability of the methodology."

c. Failure to require testing:

As the 2000 Committee Note emphasizes, an important factor set forth in *Daubert* (and thus in the Rule) is that the expert's methodology must be subject to testing. They note correctly that the Advisory Committee chose not "to delineate specific standards that courts must employ in regulating expert testimony, and it did not add any specific language about the scientific method or testability to amended Rule 702." Rather, testability is found in *Daubert* itself and in the Committee Note.

The Committee has always avoided setting forth lists of relevant factors in the text Evidence Rules, on the ground that a Rule is not a treatise, and any list is bound to be underinclusive. Also, adding something specific about scientific expert testimony would have been odd because one of the major points of the amendment was to make clear that the *Daubert* gatekeeping standards apply to *all* expert testimony, scientific and nonscientific.

In any case, the authors contend that the Committee's decision not to explicit add testability to a list of relevant factors "arguably opened the door for a renewed assault on the scientific methodology requirement for the admission of scientific testimony." The example given for this "assault" is the First Circuit's decision in *Milward v. Acuity Specialty Products Group, Inc.* 639 F.3d 11 (1st Cir. 2011), in which the court allowed an expert to opine about the cause of leukemia by using a "weight of the evidence" methodology. According to the authors, the weight of the evidence methodology is not scientific because it is only a hypothesis and it is not subject to testing.

B. The Authors' Proposed Solution

The authors propose the following amendments to Rule 702, designed to prevent the judicial waywardness that they criticize:

Rule 702. Testimony by Expert Witnesses.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the testimony satisfies each of the following requirements:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on ~~sufficient~~ facts or data that reliably support the expert's opinion;

(c) the testimony is the product of reliable and objectively reasonable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case and reached a³ conclusion without resort to unsupported speculation.

Appeals of district court decisions under this Rule are considered under the abuse-of-discretion standard. Such decisions are evaluated with the same level of rigor regardless of whether the district court admitted or excluded the testimony in question.

This Rule supersedes any preexisting precedent that conflicts with any⁴ section of this Rule.⁵

Reading from the top, the explanation for the changes is as follows:

Amendment 1 (to the introduction) is to correct any possible misimpression that it is enough for admissibility to satisfy any one of the requirements, i.e., to emphasize that each of the requirements must be met.

³ The authors use the word "his" but the Federal Rules are gender-neutral.

⁴ The authors had "any or all" but I am pretty sure that Joe Kimball would say that any means all.

⁵ These hanging, unnumbered and unlettered paragraphs are a stylistic no-no. They would have to be reconfigured if they were going to be added to the rule.

Amendment 2 (to subdivision (b)) is to require courts to assure that experts are basing their information on reliable facts or data --- a qualitative assessment.

Amendment 3 (to subdivision (c)) purports to add a specific requirement that the expert's methodology be subject to testing.

Amendment 4 (to subdivision (d)) is apparently intended to reinforce the point that the trial court must evaluate application as well as methodology.

Amendment 5 (first hanging paragraph) would codify the *Joiner* abuse of discretion standard of review.

Amendment 6 (second hanging paragraph) would prohibit courts from relying on pre-amendment case law that conflicts with the Rule's requirements.

III. Reporter's Comments

The authors are absolutely right that there are a number of lower court decisions that do not comply with Rule 702(b) or (d). As seen above, courts have defied the Rule's requirements -- - which stem from *Daubert*--- that the sufficiency of an expert's basis and the application of methodology are both admissibility questions requiring a showing to the court by a preponderance of the evidence.

One question is whether the underlying premises should be reconsidered in light of the wayward case law --- should the questions of sufficient basis and reliable application continue to be considered questions of admissibility rather than weight? There is a strong argument that the Committee's substantive decisions were correct then and remain correct now. The requirements stem from *Daubert's* conclusion that it is the trial judge who is the gatekeeper of reliability. It is hard to see how expert testimony is reliable if the expert has not done sufficient investigation, or has cherry-picked the data, or has misapplied the methodology. The same "white lab coat" problem --- that the jury will not be able to figure out the expert's missteps --- would seem to apply equally to basis, methodology and application. So the question seems to be not whether the Rule should be changed substantively, but whether the Rule can be usefully changed to make sure that courts apply it in the way it was intended to be applied.

A look at the case law indicates that wayward courts are not confused by what Rule 702(b) and (d) say. It does not appear to be a matter of vague language. The wayward courts simply don't follow the rule. They have a different, less stringent view of the gatekeeper function. So it would seem that any language change would not be one of clarification of text, but rather one which ends up to be something like:

"We weren't kidding. We really mean it. Follow this rule or else."

No amendment to the Evidence Rules comes to mind that is tasked with that mission. As will be seen in the discussion of the specific amendments proposed, nothing in those proposals does anything to clarify vague language. It is all in the nature of telling courts what they should already know.

So let's discuss the specific suggestions for amending Rule 702:

Amendment 1 --- Specifying that each of the subdivisions must be met is what the stylists call a "redundant intensifier." The Rule as it exists makes it perfectly clear that each of the subdivisions must be satisfied before an expert's testimony can be admitted. The connector is "and"; it is not "or."

It can be argued that adding the intensifier couldn't hurt. But actually it could. There could be a collateral effect, across the rules --- no other Rule has such a provision saying that all factors apply when they are connected by "and". See, e.g., Rules 701, 804(b)(1), 804(b)(3) ---

each of which have several admissibility requirements in subdivisions, with an “and” connector. A lawyer reading those rules, which do not contain an intensifier, could after this amendment to Rule 702 make the argument that he only had to satisfy one, or a few, of the requirements in these other rules. In other words, if superfluous language is going to be added to Rule 702, why not to all the other rules that are similarly structured?

Amendment 2 --- The amendment would add a reliability component to the basis requirement. The problem with that is that Rule 703 *already* contains a reliability component that regulates an expert’s basis. It should be noted that an earlier draft of the Rule 702 amendment *did* set forth a reliability component to the basis requirement. Public commentary indicated that this would create difficulty for courts and litigants in trying to unpack two separate rules that would each deal with the reliability of information relied upon by an expert. After extensive discussion and review, the Committee determined that the best course would be to place the quantitative requirement in Rule 702, while retaining the qualitative requirement in Rule 703. And the Committee Note, as set forth above, explained the different emphasis of each Rule. There doesn’t seem to be any need to revisit that decision. Moreover, the courts that refuse to consider the reliability of an expert’s basis do not seem to be confused by the text of the Rules. They simply are disregarding the Rules. So it would seem to be futile to try to fix that recalcitrance with a textual change.

Finally, the proposed amendment is quizzical because it eliminates the word “sufficient” from Rule 702(b) --- thus taking the quantitative regulator out of the rule. There seems to be no reason to do that.

Amendment 3 --- Adding “and objectively reasonable” to the methodology requirement is an attempt to emphasize the *Daubert* requirement of testing. One possible problem with this change, however, is that it is targeted mainly to scientific expert testimony. But Rule 702 applies to all expert testimony, and while testing is important across the board, it can be less important for modes of analysis that are based on experience and judgment (such as expertise that operates mainly on experience). So adding “objectively reasonable” is unlikely to do much good --- because everyone knows that for scientific experts, testing is important, and those courts that backslide are not doing so with lack of knowledge but rather from a more liberal and flexible view of *Daubert* that is unlikely to change simply because of an amendment. And the change may do some harm in application to non-scientific methodologies.

It could be argued that adding a reference to “objective reasonableness” might have been a good idea in 2000. But whether adding it now --- at most a mild improvement --- is worth the cost of amending the Rule is another thing.

Amendment 4 --- Adding a prohibition on speculative opinions to subdivision (d) is somewhat confounding. An expert’s opinion might also be speculative because he relies on insufficient information (e.g., he never investigated the accident scene), or because his methodology is unreliable. Speculativeness is not unique to misapplication. So it is unclear why

a reference to speculativeness should be located in subdivision (d). Put another way, all three requirements are essentially designed to prevent the expert from providing speculative testimony.

Second, the authors' complaint about subdivision (d) is that courts are just not following it --- they are treating challenges to application as going to the weight and not the admissibility of the expert's opinion. Adding a prohibition on speculative testimony does not address that problem at all. What would directly address the problem is "we really mean it" language. That language would address the problem of recalcitrance --- but would it solve the problem?

Amendment 5 --- Codifying Supreme Court case law on abuse of discretion review can be criticized on four grounds. First, the Advisory Committee has never found it necessary to codify a single, clear case decided by the Supreme Court. What would be the point? It is true that Rule 702 is a codification of *Daubert and its progeny*. But that is a different enterprise --- trying to provide a structure to understand three Supreme Court cases and dozens of lower court cases is unlike codifying a single Supreme Court case with a clear holding. Moreover, if the courts are not following a directly applicable Supreme Court precedent, what would make them follow the text of a rule?

Second, the Federal Rules of Evidence generally govern trial courts. They do not cover appellate courts. There are exceptions, such as Rule 201, which covers judicial notice by appellate courts, and Rule 103, which to some extent governs appellate courts by setting standards for preserving claims of trial error. But there is nothing in the Rules of Evidence about standards of review. There would seemingly have to be a stronger reason to go down that road than the fact that a few courts are allegedly paying "lip service" to the abuse of discretion standard.

Third, there is a risk of collateral consequences if an abuse of discretion standard is added to Rule 702. Why not add the same requirement to Rule 403, or the hearsay rule? By negative inference, confusion will be raised if the abuse of discretion standard is added to Rule 702 and nowhere else.

Fourth, the case has not really been made that the courts are ignoring *Joiner* or the abuse-of-discretion standard, at least in any way that can be regulated. In the allegedly offending *Johnson* case, discussed above, the court specifically states that it *is* applying the abuse of discretion standard. The court provides a little thought piece of how that standard might be affected by liberal standards of admissibility of expert testimony, but in the end it says it is applying the abuse of discretion standard. Even if that is "lip service" how does adding an abuse of discretion standard to the rule prevent the court from coming to the same exact result, and writing the same exact opinion? What the authors are really asking for is a rule that says: "Don't say you are applying the abuse of discretion standard when you are not really doing that." That kind of instruction does not sound like a proper subject for an evidence rule.

Amendment 6 --- A provision that the rule supersedes pre-amendment conflicting case law is very problematic, because it goes to the fundamental nature of codification. When a rule is

enacted, *by definition* it supersedes prior case law that conflicts with the new rule. Otherwise, why write the rule? Adding a supersession clause to Rule 702 again raises a negative inference as to other rules --- in this case, not only as to Evidence Rules, but as to all other national rules.

IV. Conclusion

It is certainly a problem when Evidence Rules are disregarded by courts. And while the authors in some instances might be overstating the degree of judicial waywardness, the fact remains that some courts are ignoring the requirements of Rule 702(b) and (d). That is frustrating. It is what Rick Marcus refers to as “the Rulemaker’s Lament.” As Rick states, “[t]he rulemakers may endorse one view and disapprove another; for a judge who embraced the disapproved view, there may be a tendency to resist the rule, or at least not to embrace its full impact.”⁶ But it is hard to conclude that the problem of courts straying from the text will be solved by more text.

This is not to say that it would be a mistake for the Committee to revisit Rule 702 and to propose possible amendments. While reaffirming the Rule 702 amendments might not be reason enough, that project might be coupled with other possible changes. If the Committee does want to look at Rule 702, a stronger reason for doing so would be to determine whether changes are necessary in light of recent public reports challenging the reliability of various forms of forensic evidence. The National Academy of Science and, more recently, the President’s Council of Advisors on Science and Technology (PCAST) has examined the scientific validity of forensic-evidence techniques— fingerprint, bitemark, firearm, footwear and hair analysis --- and has concluded that virtually all of these methods are unscientific and insufficiently standardized. Perhaps it would be fruitful to consider whether these recent findings might support amending Rule 702 to provide textual restrictions on such techniques. If that project would be useful, then adding some emphatic text to Rules 702(b) and (d) might be made part of the package.

⁶ Richard Marcus, *The Rulemakers’ Laments*, 81 Fordham L. Rev. 1639, 1643 (2013). Rick provides a number of examples of judicial reluctance to implement rule amendments, including amendments to Civil Rule 26, and the addition of Evidence Rule 502, as to which some courts have taken “too stingy a view of the rule’s protections.”

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BEST PRACTICES FOR AUTHENTICATING DIGITAL EVIDENCE

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BEST PRACTICES FOR AUTHENTICATING DIGITAL EVIDENCE

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BEST PRACTICES FOR AUTHENTICATING DIGITAL EVIDENCE

I. Introduction

Digital evidence is now offered commonly at trial. Examples include emails, spreadsheets, evidence from websites, digitally-enhanced photographs, PowerPoint presentations, texts, tweets, Facebook posts, and computerized versions of disputed events. Does the fact that an item is electronic raise any special challenges in authenticating that item?

In Federal Courts, authenticity is governed by Rule 901(a), which requires that to establish that an item is authentic, a proponent must produce admissible evidence “sufficient to support a finding that the item is what the proponent claims it is.”¹ Rule 901(b) provides many examples of evidence that satisfies the standard of proof for establishing authenticity, including testimony of a witness with knowledge,² circumstantial evidence,³ and evidence describing a process or system that shows that it produces an accurate result.⁴ The standards and examples provided by Rule 901(a) and (b) are flexible enough to adapt to all forms of electronic evidence.

That does not mean that authenticating digital evidence is automatic. There are a large number of cases dealing with authentication of digital evidence over the last 15 years; and such evidence can present challenges in establishing that it has not been altered and that it comes from a certain source. The Judicial Conference Advisory Committee on Evidence Rules, surveying this case law, determined that the Bench and Bar would be well-served by a Best Practices Handbook that would provide guidance on factors that should be taken into account for authenticating each of the major new forms of digital evidence that are being offered in the courts. The idea for such a Handbook grew out of a symposium sponsored by the Advisory Committee on the challenges of electronic evidence. After that Symposium, the Reporter to the Advisory Committee began to work with two noted authorities on electronic evidence—Hon. Paul Grimm and Gregory P. Joseph, Esq. The result is this Best Practices Handbook; it is the work of the authors alone.

This Handbook begins with an analysis by Judge Grimm of the basic rules on authenticating evidence, with a focus on digital evidence and the interplay between Evidence Rules 104(a) (providing that the judge is to decide admissibility factors by a preponderance of the evidence) and Rule 104(b) (providing that for questions of conditional relevance—such as authenticity—the standard of proof for admissibility is enough evidence sufficient to support a finding).

Following Judge Grimm’s introduction, Part Two of the Handbook sets forth some guidelines on authentication of the kinds of electronic evidence

¹ Evidence proffered to support authenticity of a challenged item must itself be admissible. See, e.g., *United States v. Bonds*, 608 F.3d 495 (9th Cir. 2010) (records could not be authenticated where the only basis for authentication was a hearsay statement not admissible under any exception).

² Fed.R.Evid. 901(b)(1).

³ Fed.R.Evid. 901(b)(4).

⁴ Fed.R.Evid. 901(b)(9).

that are most frequently offered in litigation today: 1) emails; 2) texts; 3) chatroom conversations; 4) web postings; and 5) social media postings.⁵ In Part Three, we consider whether and when the proponent might argue that the court can take judicial notice of the authenticity of certain digital evidence. Finally, Part Four provides an extensive discussion of two amendments to the Federal Rules of Evidence—Rules 902(13) and (14)—scheduled to go into effect on December 1, 2017, that will ease the burden of authenticating electronic evidence.

At the outset it is important to emphasize that the standard for establishing authenticity of digital evidence is the same mild standard as for traditional forms of evidence. None of the checklists set forth below are going to be required to be met *in toto* before digital evidence is found authentic. They are just relevant factors, and usually satisfying one or two of any of the listed factors will be enough to convince the court that a juror could find the digital evidence to be authentic. But the factors will need to be applied case-by-case.

II. An Introduction to the Principles of Authentication for Electronic Evidence: The Relationship Between Rule 104(a) and 104(b)

This Handbook is designed to provide answers to the fundamental evidentiary questions of how to authenticate digital evidence. But before turning to the authentication rules themselves, there are two preliminary rules that must be discussed and understood, because without them, authentication decisions are apt to be erroneous. These rules are Fed.R.Evid. 104(a) (which states the general rule governing preliminary questions about the admissibility of evidence) and Fed.R.Evid. 104(b) (the so-called “conditional relevance” rule⁶). Understanding these two rules is essential to making correct decisions about the authentication of digital evidence.

We start with Rule 104(a). Its text is deceptively straightforward: “[t]he 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.” (emphasis added). Most decisions about admissibility of evidence, whether digital or otherwise, are made by the judge alone. They include decisions about whether evidence is relevant, constitutes hearsay (or fits within one of the many hearsay exceptions), or is excessively prejudicial when compared to its probative value, whether experts are qualified and the extent of opinion testimony that will be allowed, and most questions regarding application of the original writing rule. When the judge makes a ruling under Rule 104(a) he or she is the sole decision maker as to whether the evidence may be heard by the jury. If admitted, of course, the jury is free to give the evidence whatever weight (if any) they think it deserves. This is familiar turf to trial judges, but with

⁵ This Best Practices Handbook covers the relatively new forms of electronic communications. Parties have been authenticating more traditional forms of electronic evidence for many years—examples include telephone conversations, audiotapes, and video recordings. See, e.g., *United States v. Taylor*, 530 F.2d 639 (5th Cir. 1976). (video evidence from a bank security camera was properly authenticated where testimony revealed the camera was present on the day in question and was facing the events of an armed robbery, and was functioning properly). This pamphlet does not cover such traditional forms of electronic communication. For more on authentication of such information, see Saltzburg, Martin & Capra, *Federal Rules of Evidence Manual* § 901 (11th ed. 2015), which provides relevant case law and commentary.

⁶ Fed.R.Evid. 104(b) (1972) Advisory Note.

digital evidence, there is a greater likelihood that the judge alone may not be the final decision maker regarding admissibility. The jury also may have a part to play in the admissibility decision, and this is where Rule 104(b) comes in.

Rule 104(b) qualifies Rule 104(a). It provides “[w]hen 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.” Read in isolation, Rule 104(b) seems too abstract to be helpful. But, in the case of disputes over the authenticity of digital evidence, it can be an important qualifier to the general rule of 104(a) that the trial judge decides questions about the admissibility of evidence. An illustration will help bring things into focus. Imagine the following variations of a common theme. In an employment discrimination case the plaintiff, a woman, alleges that her supervisor, a man, intentionally discriminated against her in deciding to promote a lesser qualified man to a position that the plaintiff sought. As evidence of intentional discrimination, the plaintiff wants to introduce an email that she asserts her supervisor sent to her that says: “Jane, stop bugging me about the sales supervisor position. Your track record compared to the men in our sales group is terrible, and confirms what I always have suspected. Women just don’t have the stuff it takes to get out there and sell our products. You should be glad you still have your sales job, and quit trying to be something you can never do well. Bob.” The email is from the company email account (Bob@company.com), addressed to the plaintiff (Jane@company.com), apparently signed by the supervisor (Bob), discusses a subject matter about which the supervisor has knowledge, and is dated on a day and time the supervisor was known to be at the office. Plaintiff contends that the email is “smoking gun” evidence of intentional gender discrimination.

Imagine further the following scenarios when the plaintiff offers the email into evidence at trial. One: the defense attorney objects to the introduction of the email, the judge asks for the basis of the objection, and the defense attorney says “inadequate foundation”. Two: the defense attorney objects, the judge asks for the basis of the objection, and the defense attorney says “Judge, this is an email, there is no evidence that the supervisor was the one who actually wrote it. It was found on a company computer, anyone in the company had access to that computer, including the plaintiff herself, whose office was right next to his, and my client is often away from his desk during the day, and he does not log out of his computer. Plaintiff hasn’t shown that someone else didn’t send that email pretending to be my client, and everyone knows how easy it is to fake an email.” Three: the defense attorney objects, the judge asks for the basis of the objection, and the defense attorney says “Judge, my client will testify that on the day and time stated on the email he was at a sales meeting with the other supervisors and the president of the company. Five other people saw him there at that day and time and will testify that they did. During those meetings, no one is allowed to use their smart phone or to send or receive emails, on pain of being fired if the president sees them looking at their phones. The location of the meeting was on a different floor from where my client and the plaintiff work. He will testify that he did not send the email, and that when he leaves his office he does not log out, his computer stays on, and anyone can access it without a password and use his office email account. He also will testify that when he came back from the meeting, the plaintiff looked at him in a strange way, and said “I wouldn’t look so smug if I were you. You might not be that way for very long.”

With these scenarios in mind, what is the interplay between Rule 104(a) and 104(b) in determining whether the email may be admitted at trial and considered by the jury? In the first scenario, no explanation was given by the defense attorney for excluding the email other than the conclusory statement that the plaintiff had not laid a sufficient foundation. Here, the trial judge alone decides, under Rule 104(a), whether an adequate foundation has been established. If the foundation was deficient, the judge will require the plaintiff's lawyer to make a fuller showing, and allow or exclude the email accordingly. Rule 104(b) is not implicated.

In the second scenario, the defense attorney has made a conclusory legal argument that provides no facts showing that the supervisor did not author the email, but rather speculates that it *could have* been written by someone else. The argument invites the trial judge to require the plaintiff's lawyer to "prove a negative"—that no one but the supervisor was the author. But this is not the burden that the plaintiff must meet under Rule 104(a) to establish the admissibility of the email. Rather, all that plaintiff must do is to meet the obligation imposed by Rule 901(a), which is to "produce evidence sufficient to support a finding that the item is what the proponent claims it is." Certainty is not required. All that is needed is evidence sufficient to convince a reasonable juror that, more likely than not, the email is what the plaintiff claims it is—an email her supervisor drafted. And, under the hypothetical facts of the second scenario, the defense counsel is wrong in saying the plaintiff has offered no evidence that the email came from the supervisor. She has shown that the email came from the supervisor's email address, on the company email server, on a day when the supervisor was at the office, discussing a topic about which the supervisor had knowledge, and is signed with his name. Certainly this would be an example of authentication under Rule 901(b)(4), where the "appearance, contents, substance . . . or other distinctive characteristics of the item, taken together with all the circumstances" tend to show that the supervisor authored the email.

The second scenario also raises only Rule 104(a) issues for the trial judge alone to determine admissibility. The facts, under which admissibility must be judged, are undisputed. If the trial judge concludes (as she should under these facts) that a reasonable juror *could* find from the foundation presented that it is more likely than not that the supervisor wrote the email, it is admissible. Defense counsel's speculation about what "could" have happened is reserved for argument to the jury about how much weight (if any) to give to the email. Absent from scenario two is evidence that the supervisor in fact did not author the email, to contradict the undisputed facts introduced by the plaintiff regarding the distinctive characteristics of the email that associate it with the supervisor.

Scenario three does introduce facts contradicting the evidence the plaintiff introduced about the distinctive characteristics of the email tying it to the supervisor. The defense attorney has proffered that he will introduce evidence (the supervisor, the five witnesses who corroborate that he was with them at the time the email was sent, the policy prohibiting use of cell phones during meetings with the company president, the meeting's location on a different floor of the building). Now the trial judge is presented with competing evidence that the supervisor did, and did not, author the email. If the plaintiff's evidence is accepted over that of the defendant, then it is more likely than not that the supervisor is the author, and the email is relevant to show his discriminatory intent. But, if the defendant's version of the facts is accepted over those offered by the plaintiff, then the supervisor did not author the email, and it is irrelevant to prove his state of mind. The relevance of the

email turns on whether the plaintiff's version or the defendant's version is accepted, and this falls squarely within the scope of Rule 104(b). The relevance of the email depends on the existence of a disputed fact—authorship of the email. Who decides between the competing versions? If the case is tried before a jury, it is the jury, not the judge, who must resolve the dispute.⁷ The judge's role under Rule 104(a) is to evaluate whether a reasonable jury *could* find (more likely than not) either that the supervisor did, or did not, author the email. If either version is plausible, then the judge conditionally admits the email, but at the time it is introduced instructs the jury that if they find that the plaintiff has shown that the supervisor more likely than not authored the email, they may consider it as evidence and give it the weight that they feel it is entitled to. Contrastingly, if they find that the defendant has persuaded them that, more likely than not, he did not author the email, they must disregard it entirely, and give it no weight in their deliberations. The final decision about whether the email has been admitted (and can be considered by the jury) or excluded (and disregarded by the jury) must await the jury's deliberation on the merits of the case. The judge makes a preliminary assessment of whether the evidence is one-sided or two, and if the latter, submits it to the jury for their decision. The issue of conditional relevance generated by disputed facts regarding the authenticity (and hence, relevance) of evidence is especially prevalent with digital evidence.

It is important for judges to distinguish between which of the scenarios listed above is presented to them when ruling on admissibility of digital evidence. For scenario one situations, the judge alone decides whether the proponent has laid a proper foundation to authenticate the digital evidence. Most often, the judge will consider whether one or more of the illustrations of how to authenticate found at Fed.R.Evid. 901(b)⁸ or 902⁹ has been shown.

⁷ Fed.R.Evid. 104(b) (1972) Advisory Note (“If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration.”).

⁸ For digital evidence, the most useful authentication rules within Rule 901(b) are: 901(b)(1) (a witness with personal knowledge that the evidence is what it purports to be); 901(b)(3) (comparison of the evidence with an authenticated specimen by an expert witness or the finder of fact); 901(b)(4) (the appearance, contents, substance, internal patterns or other distinctive characteristics of the item, taken together with all the circumstances); 901(b)(5) (for audio recordings, an opinion identifying a person's voice, whether heard firsthand or through electronic transmission or recording, based on having heard that voice in the past); and 901(b)(9) (evidence describing a process or system of showing that it produces an accurate result).

⁹ Fed.R.Evid. 902 provides examples of self-authentication, where no extrinsic evidence or testimony is needed to authenticate. The following self-authentication rules may be helpful for digital evidence; 902(5) (A book, pamphlet, or other publication purporting to be issued by a public authority. Most public authorities have web sites and post publications relating to their fields of jurisdiction.); 902(6) (Printed material purporting to be a newspaper or periodical. Most newspapers and periodicals have “on line editions”, and this rule potentially is available to self-authenticate.); 902(11) and (12) (certified copy of domestic and foreign records of regularly conducted activities); proposed Rule 902(13) (certified copy of machine-generated information); and proposed Rule 902(14) (certified copy

For scenario two situations, the judge alone makes the decision whether to admit or exclude. In doing so, he must be careful not to let unparticularized and conclusory argument by the party objecting to the introduction of the digital evidence about what “might” or “could have happened” lead him to impose on the proponent of the evidence a burden of proof greater than that ordinarily required by Rule 104(a)—a showing that the evidence more likely than not is what it purports to be. It is a mistake for a judge to require the party introducing digital evidence to prove that no one other than the purported maker could have created the evidence if the introducing party has shown that, more likely than not, it was created by a particular person, unless there is evidence (not argument) that some other person could have done so.¹⁰ Finally, for scenario three situations, where the judge is faced with competing facts plausibly showing that the digital evidence was, and was not, created by the person claimed by the proponent, then she should allow the evidence to be admitted “conditionally” under Rule 104(b), and instruct the jury that if they find that the evidence that the person claimed to have created the evidence did not do so is more believable than the evidence that he did, they must disregard it and give it no weight in their deliberations.

Careful attention to the interplay between Rule 104(a) and 104(b), as well as consideration of the abundant authentication tools identified in Rules 901(b) and 902, will go a long way towards removing the mystery about authenticating digital evidence, even when the technology at play is unfamiliar to the judge. In the end, technical expertise is not needed. Rather, an awareness of the fundamental evidence rules governing admissibility and authentication of any evidence, whether digital or not, is all that is needed. And this Handbook aims to provide illustrations to make the effort even easier.

III. Relevant Factors for Authenticating Digital Evidence

What follows are general guidelines and lists of relevant factors for authenticating the basic forms of digital evidence that have developed over the last 20 years. The lists of relevant factors do not purport to be exclusive. There is no attempt to weigh the factors, or to take a cumulative approach, as the importance of any factor will be case-dependent. And there is no intent to imply that all of the factors listed must be met before the proffered digital evidence can be found authentic.

In evaluating all the factors below, it is important to remember that the threshold for the court’s determination of authenticity under Rule 901 is not high: “the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so.”¹¹ The possibility of alteration “does not and cannot be the basis for excluding ESI as unauthenticated as a matter of course, any more that it can be the rationale for excluding paper documents.”¹²

of computer generated or stored information). Authentication under Rules 902(13) and (14) is discussed in a separate section, *infra*.

¹⁰ Grimm, et al, *Authentication of Social Media Evidence*, 36 American Journal of Trial Advocacy 433, 459 (2013) (“A trial judge should admit the evidence if there is plausible evidence of authenticity produced by the proponent of the evidence and only speculation or conjecture—not facts—by the opponent of the evidence about how, or by whom, it ‘might’ have been created.”).

¹¹ United States v. Safavian, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

¹² *Id.* at 40.

Generally speaking, it will be a rare case in which an item of digital evidence *cannot* be authenticated. The question is whether the proponent is willing and able to expend the resources necessary to do so.¹³ The factors set forth below are intended to direct litigants to ways in which resources can be usefully spent on authenticating digital evidence—and on ways to avoid such costs in certain situations.

A. Emails

The authentication questions for email most commonly focus on whether the email was sent or received by the person whom the party claims sent or received it. There are a number of factors that will assist the proponent in establishing authenticity for either or both of these purposes. Among them are:

1. A Witness with Personal Knowledge May Testify to Authenticity¹⁴

Possibilities include:

- The author of the email in question testifies to its authenticity.¹⁵
- A witness testifies that s/he saw the email in question being authored/received by the by the person who the proponent claims authored/received it.¹⁶

2. Business Records

The custodian of records of a regularly conducted activity testifies to a foundation, or certifies, in accordance with Fed.R.Evid. 902(11) or (12), that an email satisfies the criteria of Fed.R.Evid. 803(6). It should be noted, however, that emails—even of a business, do not automatically qualify as business records.¹⁷

¹³ See Jeffrey Bellin and Andrew Guthrie Ferguson, *Judicial Notice in the Information Age*, 108 Nw. U. L.Rev. 1137, 1157 (2014) (“Although much is made of [the authentication] hurdle in the Information Age, it is * * * an easy one to surmount. Success generally depends not on legal or factual arguments, but rather the amount of time and resources a litigant devotes to the problem.”)

¹⁴ See Fed.R.Evid. 901(b)(1).

¹⁵ See, e.g., *Anderson v. United States*, 2014 U.S. Dist. LEXIS 166799, at *13 (N.D. Ga. Dec. 2, 2014) (defendant-witness acknowledged that the documents in question contained emails he sent to an undercover agent, the emails were sent from his email address, and the document contained the entirety of his email exchange with the undercover agent; this was a sufficient showing of authenticity). See also *Citizens Bank & Trust v. LPS Nat’l Flood, LLC*, 2014 U.S. Dist. LEXIS 134933, at *12 (N.D. Ala. Sept. 25, 2014) (witness’s personal knowledge of email contents and her affidavit authenticating emails as the ones she sent sufficient for admissibility).

¹⁶ *United States v. Fluker*, 698 F.3d 988 (7th Cir. 2012) (the court, in outlining the variety of ways 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)).

¹⁷ See, e.g., *United States v. Cone*, 714 F.3d 197, 220 (4th Cir. 2013):

While properly authenticated e-mails may be admitted into evidence under the business records exception, it would be insufficient to survive a hearsay challenge simply to say that since a business keeps and receives e-mails, then ergo all those e-mails are business records falling within the ambit of Rule 803(6)(B). “An e-mail created within a business entity does not, for that reason alone, satisfy the business records exception of the hearsay rule.” *Morisseau v. DLA Piper*, 532 F. Supp. 2d 595, 621 n. 163 (S.D.N.Y. 2008).

3. Jury Comparison with Other Authenticated Emails¹⁸

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.¹⁹

4. Production in Discovery

If a document request is sufficiently descriptive, production in response to that request may serve in itself to authenticate the email, as the act of production may be a concession that the document is what the party asked for—and thus is what the party says it is. The act of production can constitute a statement of a party-opponent and consequently admissible evidence of authenticity. See Fed.R.Evid. 801(d)(2).²⁰ Authentication has also been found when 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.²¹

5. Circumstantial Evidence²²

Applying Rule 901(b)(4)—covering authentication on the basis of “appearance, contents, substance, internal patterns, or other distinctive characteristics of the item”—requires consideration of the “totality of circumstantial evidence.”²³ 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.”²⁴

Set forth below are factors that can, alone or in conjunction (depending on the case), establish authenticity. Different circumstantial factors may be relevant depend on whether the authenticity dispute is over whether a person sent or received the email.

It is probably fair to state that emails and social media postings will often be prepared too casually and irregularly to be admissible as business records. But this is not inevitably so, and again if the electronic communication does fit the admissibility requirements it is just as admissible as a hardcopy record.

¹⁸ Fed.R.Evid. 901(b)(3).

¹⁹ *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.”).

²⁰ See, e.g., *AT Engine Controls Ltd. v. Goodrich Pump & Engine Control Sys., Inc.*, 2014 U.S. Dist. LEXIS 174535 (D. Conn. Dec. 18, 2014) (collecting cases holding that production of emails in discovery constitutes a concession of authenticity); *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”).

²¹ *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 are 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).

²² Fed.R.Evid. 901(b)(4).

²³ *United States v. Henry*, 164 F.3d 1304, 1305 (10th Cir. 1999).

²⁴ *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 546 (D. Md. 2007).

a. Authenticating Authorship Circumstantially

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:

- the purported author's known email address;²⁵
- the author's electronic signature;
- the author's name;²⁶
- the author's nickname;²⁷
- the author's screen name;
- the author's initials;
- the author's moniker;²⁸
- the author's customary use of emoji or emoticons;
- the author's use of the same email address elsewhere;
- a writing style similar or identical to the purported author's manner of writing;
- reference to facts only the purported author or a small subset of individuals including the purported author would know;²⁹
- reference to facts uniquely tied to the author—*e.g.*, contact information for relatives or loved ones; photos of the author or items of importance to the author (*e.g.*, car, pet); the author's personal information, such as a cell phone number, social security number, etc.³⁰

²⁵ See, *e.g.*, *United States v. Siddiqui*, 235 F.3d 1318, 1322 (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 was considered sufficiently authenticated).

²⁶ See, *e.g.*, *United States v. Fluker*, 698 F.3d 988, 999–1000 (7th Cir. 2012) (emails sent from a "More Than Enough, LLC" (MTE) email address were sufficiently authenticated when the purported author was an 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."); *Safavian*, 435 F. Supp. 2d at 40 (email messages held properly authenticated when containing distinctive characteristics, including email addresses and name of the person connected to the address).

²⁷ *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014) (use of fake name commonly used by defendant).

²⁸ See *United States v. Simpson*, 152 F.3d 1241 (10th Cir. 1998) (chatroom log where user "Stavron" identified himself as the defendant and shared his email address was used to authenticate subsequent emails from that email address).

²⁹ See *United States v. Siddiqui*, 235 F.3d 1318, 1322 (11th Cir. 2000) (messages that referred to facts only the defendant was familiar with were ruled admissible).

³⁰ *Commonwealth v. Amaral*, 78 Mass. App. Ct. 671, 674–675, 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") (citing Mass. G. Evid. § 901(b)(6)).

Factors outside the content of the email itself can establish authenticity of authorship circumstantially. For example:

- a witness testifies that the author told him to expect an email prior to its arrival;³¹
- the purported author acts in accordance with, and in response to, an email exchange with the witness;
- the author orally repeats the contents soon after the email is sent;
- the author discusses the contents of the email with a third party;
- the author leaves a voicemail with substantially the same content.

Forensic information may be used to support a circumstantial showing that the email was sent by the purported author. Forensic sources include:

- an email's hash values;³²
- testimony from a forensic witness that an email issued from a particular device at a particular time.³³

b. Authenticating Receipt Circumstantially

The following factors can be probative in authenticating an email as having been received by a particular person:

- a reply to the email was received by the sender from the email address of the purported recipient;
- the subsequent conduct of the recipient reflects his or her knowledge of the contents of the sent email;
- subsequent communications from the recipient reflects his or her knowledge of the contents of the sent email;
- the email was received and accessed on a device in the possession and control of the alleged recipient.

³¹ State v. Ruiz, 2014 Mich. App. LEXIS 855 (Mich. Ct. App. May 15, 2014) (interpreting MRE 901) (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 email subsequently received).

³² 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.” Federal Judicial Center, Managing Discovery of Electronic Information: A Pocket Guide for Judges, Federal Judicial Center, 2007 at 24. See also Lorraine v. Markel American Ins. Co, 241 F.R.D. 534, 547 (D. Md. 2007) (noting 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).”).

³³ Lorraine, 241 F.R.D. 534 at 547–48 (because 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)).

Finally, while it is true that an email may be sent by anyone who, with a password, gains access to another's email account, similar questions (of possible hacking) could be raised with traditional documents. Therefore, there is no need for separate rules of authenticity for emails. And importantly, the mere fact that hacking, etc., is possible is not enough to exclude an email or any other form of digital evidence. If the mere possibility of electronic alteration were enough to exclude the evidence, then no digital evidence could ever be authenticated.³⁴

B. Text Messages

Text messages are not different in kind from email and so the rules and guidelines on authentication are similar. Here are some of the relevant factors for authenticating text messages:³⁵

1. A Witness with Personal Knowledge May Testify to Authenticity

Possibilities include:

- The author of the text in question testifies to its authenticity.
- A witness testifies that s/he saw the text in question being authored/received by the person who the proponent claims authored/received it.³⁶

2. Jury Comparison with Other Authenticated Texts

3. Production in Discovery

4. Establishing That an Electronic System of Recordation Records Accurately

This process of illustration, authorized by Fed.R.Evid. 901(b)(9), can be useful if the objection to authenticity is that the original text has been altered in some way. For example, in *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. A SkyTel records-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 devices belonging to the defendants, they are automatically saved on SkyTel's server with no capacity for editing. The court ruled that this showing was sufficient,

³⁴ See, e.g., *Interest of F.P.*, 878 A.2d 91 (Pa. Super. 2005) (just as an email can be faked, a "signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationery can be copied or stolen. We believe that e-mail messages and similar forms of electronic communication can be properly authenticated within the existing framework of Pa. R.E. 901 and Pennsylvania case law.").

³⁵ The case law cited under the various factors discussed in the section on emails should be equally useful as supportive citations for the similar (or identical) factors supporting authentication of texts.

³⁶ *United States v. Barnes*, 803 F.3d 209 (5th Cir. 2015) (government laid a proper foundation to authenticate Facebook and text messages as having been sent by the defendant; the defendant was a quadriplegic, but the witness who received the messages testified she had seen the defendant use Facebook, she recognized his Facebook account, and the Facebook messages matched the defendant's manner of communicating: "[a]lthough she was not certain that Hall [the defendant] authored the messages, conclusive proof of authenticity is not required for admission of disputed evidence").

under Fed.R.Evid. 901(b)(9), to establish authenticity over a claim that the messages had been altered.

It should be noted that the showing as to the process or system in *Kilpatrick* will be able to be made by a certificate of the foundation witness—substituting for live testimony—under an amendment to the Evidence Rules that is scheduled to take effect on December 1, 2017.³⁷

5. Circumstantial Evidence

a. Authenticating Authorship Circumstantially

The inclusion of some or all of the following in a text can be sufficient to authenticate the text as having been sent by a particular person:

- the purported author’s ownership of the phone or other device from which the text was sent;³⁸
- the author’s possession of the phone;
- the author’s known phone number;
- the author’s name;
- the author’s nickname;³⁹
- the author’s initials;
- the author’s moniker;
- the author’s name as stored on the recipient’s phone;
- the author’s customary use of emoji or emoticons;
- the author’s use of the same phone number on other occasions;
- a writing style similar or identical to the purported author’s manner of writing;
- reference to facts only the purported author or a small subset of individuals including the purported author would know;
- reference to facts uniquely tied to the author—*e.g.*, contact information for relatives or loved ones; photos of author or items of importance to author (e.g., car, pet); author’s personal information, such as contact information, social security number, etc.; receipt of messages addressed to the author by name or reference.⁴⁰

³⁷ The proposed amendments would add two new subdivisions to Rule 902, which provides for various forms of self-authentication. See Section IV, *infra*, for a full discussion of the use to which these new proposals can be put.

³⁸ *United States v. Mebrtatu*, 543 F. App’x 137, 140–141 (3d Cir. 2013) (phone was in the purported sender’s possession; phone contains texts sent to and signed with the purported author’s first name, including texts from her boyfriend professing love and other texts whose content links them to her; texts sufficiently authenticated as hers).

³⁹ *United States v. Kilpatrick*, 2012 U.S. Dist. LEXIS 110166, at *11 (E.D. Mich. Aug. 7, 2012)(the court outlined a number of distinctive characteristics that established the authenticity of the pager and cellphone text messages at issue; among these factors were the defendants’ use of their names (Kilpatrick) and nicknames (“Zeke” or “Zizwe”) to sign the messages they sent).

⁴⁰ *United States v. Benford*, 2015 U.S. Dist. LEXIS 17046, at *16–*17 (W.D. Okla. Feb. 12, 2015) (in establishing that text messages from a device were authored by the defendant, the prosecution pointed to 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); *United States v. Ellis*, 2013 U.S. Dist. LEXIS 73031, at *3–*4 (E.D. Mich. May

Factors outside the content of the text itself can establish authenticity of authorship circumstantially. For example:

- a witness testifies that the author told him to expect a text message prior to its arrival;
- the purported author acts in accordance with a text exchange;
- the purported author orally repeats the contents soon after the text message is sent or discusses the contents with a third party.

b. Authenticating Receipt Circumstantially

The following factors can be probative in authenticating a text as having been received by a particular person:

- a reply to the text message was received by the sender from the purported recipient's phone number;
- the subsequent conduct of the recipient reflects his or her knowledge of the sent message's contents;
- subsequent communications from the recipient reflect his or her knowledge of the contents of the sent text message;
- the text message was received and accessed on a device in the possession and control of the alleged recipient.

C. Chatroom and Other Social Media Conversations

By definition, chatroom postings and other social media communications are made by third parties, not the owner of the site. Further, chatroom participants usually use screen names (pseudonyms) rather than their real names. Thus the authenticity challenge is to provide enough information for a juror to believe that the chatroom entry or other social media communication is made by a particular person.

Simply to show that a posting appears on a particular user's webpage is insufficient to authenticate the post as one written by the account holder. Third party posts, too, must be authenticated by more than the names of the purported authors reflected on the posts. Evidence sufficient to attribute a social media or chat room posting to a particular individual may include, for example:

- testimony from a witness who identifies the social media account as that of the alleged author, on the basis that the witness on other occasions communicated with the account holder;
- testimony from a participant in the conversation based on firsthand knowledge that the transcript fairly and accurately captures the conversation;⁴¹

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 the same phone).

⁴¹ See, e.g., *United States v. Lebowitz*, 676 F.3d 1000 (11th Cir. 2012) (internet chat authenticated by credible testimony of one participant); *United States v. Lundy*, 676 F.3d 444 (5th Cir. 2012) (testimony by one party to chat that the chats are as he recorded them is enough to meet the low threshold for authentication); *United States v. Barlow*, 568 F.3d 215, 220 (5th Cir. 2009) ("English, as the other participant in the year-long 'relationship,'

- evidence that the purported author used the same screen name on other occasions;
- evidence that the purported author acted in accordance with the posting (e.g., when a meeting with that person was arranged in a chat room conversation, he or she attended);
- evidence that the purported author identified himself or herself as the individual using the screen name;
- an admission that the computer account containing the chat is that of the purported author;⁴²
- use in the conversation of the customary signature, nickname, or emoticon associated with the purported author;
- disclosure in the conversation of particularized information that is either unique to the purported author or known only to a small group including the purported author;
- evidence that the purported author had in his or her possession information given to the person using the screen name;
- evidence from the hard drive of the purported author's computer reflecting that a user of the computer used the screen name in question;
- evidence that the chat appears on the computer or other device of the account owner and purported author;
- evidence that the purported author elsewhere discussed the same subject matter.

Authentication as Business Records?

Note that an attempt to authenticate social media messaging as business records will, of necessity, be limited to the timestamps, metadata, etc. maintained by the owner. The content of the messages themselves will not qualify as business records and accordingly cannot be authenticated as business records under Rule 902(11). For example, in *United States v. Browne*, 2016 U.S. App. LEXIS 15668 (3rd Cir.), the government contended that Browne engaged in incriminating conversations over Facebook Messenger. The government sought to authenticate the records with a certificate of a records custodian of Facebook. The custodian certified that the records “were made and kept by the automated systems of Facebook in the course of regularly conducted activity as a regular practice of Facebook.” The court held correctly that this showing was insufficient to authenticate the messages as having come from the defendant—whether the defendant made the communications involved another level of hearsay, and the custodian had no personal knowledge of the authorship of the messages. Thus, the certificate could authenticate only the fact of that the message was sent at a certain time from one address to another.

had direct knowledge of the chats. Her testimony could sufficiently authenticate the chat log presented at trial”).

⁴² *United States v. Manley*, 787 F.3d 937, 942 (8th Cir. 2014) (“the government presented testimony of a law enforcement officer who helped to execute the search warrant, and the officer testified that the defendant admitted adopting the username ‘mem659’ for his computer account. The username for his computer account was the same one used in some of the chats.”).

The *Browne* court held, however, that any in admitting the records with an inadequate authentication was harmless, because there was sufficient extrinsic evidence to authenticate Browne as the author of the messages: the people that he communicated with testified at trial consistently with the communications; Browne “made significant concessions that served to link him to the Facebook conversations”; the content of the conversation indicated facts about the sender that linked to Browne; and the government “supported the accuracy of the chat logs by obtaining them directly from Facebook and introducing a certificate attesting to their maintenance by the company’s automated systems.”

D. Internet, Websites, etc.

Websites present authenticity issues because they are dynamic. If the issue is what is on the website at the time the evidence is being proffered, then there are no authenticity issues because the court and the parties can simply access the site and see what the website says.⁴³ But proving up historic information on the website raises the issue of whether the information was actually posted as the proponent says it was.⁴⁴

1. Rule 901 Authentication Standards as Applied to Dynamic Website Information

In applying Rule 901 authentication standards to website evidence, there are three questions that must be answered:

- What was actually on the website?
- Does the exhibit or testimony accurately reflect it?
- If so, is it attributable to the owner of the site?

A sufficient showing of authenticity of dynamic website information is usually found if a witness testifies—or certifies in compliance with a statute or rule—that:

- the witness typed in the Internet address reflected on the exhibit on the date and at the time stated;
- the witness logged onto the website and reviewed its contents; and
- the exhibit fairly and accurately reflects what the witness perceived.⁴⁵

⁴³ Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 Nw. U.L.Rev. 1137, 1157 (2014) (“It is hard to imagine many good faith disputes about whether proffered evidence really is a page from Google Maps or WebMD. Malfeasance would be foolish. The opposing party can simply go to the website to verify its authenticity, and if fraud is detected, the consequences for the offering party are dire.”). See also *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 2015 U.S. Dist. LEXIS 115610, at*21–22 (S.D.N.Y. Aug. 31, 2015) (confirming that authenticity of existing website information could be determined by conducting a “basic Internet search.”).

⁴⁴ See, e.g., *Adobe Sys. v. Christenson*, 2011 U.S. Dist. LEXIS 16977, at *29 (D. Nev. Feb. 7, 2011) (“[a]lthough Defendants can probably determine, with little difficulty, whether a current Google search for the search terms ‘software surplus’ provides links on the first page [of a website], this would not prove that such a search would have resulted in such a link at a prior point in time.”).

⁴⁵ See, e.g., *Estate of Konell v. Allied Prop. & Cas. Ins. Co.*, 2014 U.S. Dist. LEXIS 10183 (D. Or. Jan. 28, 2014) (“To authenticate a printout of a web page, the proponent must offer evidence that: (1) the printout accurately reflects the computer image of the web page as of a specified date; (2) the website where the posting appears is owned or controlled by a particular person or entity; and (3) the authorship of the web posting is reasonably

The exhibit should bear the Internet address and the date and time the webpage was accessed and the contents downloaded.⁴⁶

When evaluating the proffer, the court may consider the following factors as circumstantial indications that the information was posted by the owner of the site, under Rule 901(b)(4):

- distinctive website design, logos, photos, or other images associated with the website or its owner;⁴⁷
- the contents of the webpage are of a type ordinarily posted on that website or websites of similar people or entities;
- the owner of the website has elsewhere published the same contents, in whole or in part;
- the contents of the webpage have been republished elsewhere and attributed to the website; and
- the length of time the contents were posted on the website.

Other possible means of authenticating website postings are as follows:

- testimony of a witness who created or is in charge of maintaining the website. That witness may testify on the basis of personal knowledge that the printout of a webpage came from the site.⁴⁸
- a printout obtained from the Internet Archive’s “wayback machine.” The Internet Archive documents and stores all websites and the “wayback machine” can retrieve website information from any particular time.⁴⁹ Some courts require a witness from the Internet archive to testify to establish that the “wayback machine” employs a process that produces accurate results under Rule 901(b)(9).⁵⁰ Other courts, as discussed *infra*, take judicial notice of the reliability of the “wayback machine.”

attributable to that person or entity”); *Buzz Off Insect Shield, LLC v. S.C. Johnson & Son, Inc.*, 2009 U.S. Dist. LEXIS 17530 (M.D.N.C. Mar. 6, 2009) (“[defendant] could authenticate its printouts of various websites by calling witnesses who could testify that they viewed and printed the information, or supervised others in doing so, and that the printouts were accurate representations of what was displayed on the listed website on the listed day and time”); *Rivera v. Inc. Village of Farmingdale*, 29 F. Supp. 3d 121 (E.D.N.Y. 2013) (internet postings offered to show community bias in Fair Housing Act case; testimony that witness “personally downloaded all of the postings and confirmed the identities of the key posters . . . [suffices to show] a ‘reasonable likelihood’ that they were actually posted on the internet by members of an online community comprised of the Village’s own residents”).

⁴⁶ See, e.g., *Foreword Magazine, Inc. v. OverDrive Inc.*, 2011 U.S. Dist. LEXIS 125373, at *8–*11 (W.D. Mich. Oct. 31, 2011) (admitting screenshots from websites, accompanied only by the sworn affidavit of an attorney, given “other indicia of reliability (such as the Internet domain address and the date of printout)”).

⁴⁷ See, e.g., *Metcalf v. Blue Cross Blue Shield of Mich.*, 2013 U.S. Dist. LEXIS 109641 (D. Or. Aug. 5, 2013). (authenticity of website information of an organization’s purported website was established by logos or headers matching those of the organization).

⁴⁸ *St. Luke’s Cataract & Laser Inst., P.A. v. Sanderson*, 2006 U.S. Dist. LEXIS 28873 (M.D. Fla. May 12, 2006) (web master’s testimony can authenticate a printout).

⁴⁹ Another example of a website that allows users to access archival copies of webpages is www.viewcached.com, which allows users to employ one interface to search three different archival services—the Wayback Machine, Google Cache, and Coral Cache.

⁵⁰ See, e.g., *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, No. 02 C 3293, 2004 WL 2367740, at 6* (N.D. Ill. Oct. 15, 2004) (approving the use of the Internet Archive’s

The opponent of the evidence is free to challenge authenticity of dynamic website data by adducing facts showing that the exhibit does not accurately reflect the contents of a website, or that those contents are not attributable to the ostensible owner of the site. There may be legitimate questions concerning the ownership of the site or attribution of statements contained on the site to the ostensible owner.

2. Self-Authenticating Website Data

Under Fed.R.Evid. 902, three types of webpage exhibits are self-authenticating—meaning that a presentation of the item itself is sufficient to withstand an authenticity objection from the opponent.

a. Government Websites

Under Rule 902(5) data on governmental websites are self-authenticating.⁵¹ As discussed below, courts regularly take judicial notice of these websites.

b. Newspaper and Periodical Websites

Under Rule 902(6) (*Newspapers and Periodicals*), “[p]rinted material purporting to be a newspaper or periodical” is self-authenticating. This includes online newspaper and periodicals, because Rule 101(b)(6) provides that any reference in the Rules to printed material also includes comparable information in electronic form. Thus all newspaper and periodical material is self-authenticating whether or not it ever appeared in hard copy.⁵²

c. Websites Certified as Business Records

Rules 902(11) and (12) render self-authenticating business (organizational) records that are certified as satisfying Rule 803(6) by “the custodian or another qualified person.” Exhibits extracted from websites that are maintained by, for, and in the ordinary course of, a business or other regularly conducted activity can satisfy this rule.⁵³

“wayback machine” to authenticate websites as they appeared on various dates relevant to the litigation). Compare *Open Text S.A. v. Box, Inc.*, 2015 U.S. Dist. LEXIS 11312 (N.D. Cal. Jan. 30, 2015) (court was unwilling to accept a screenshot from the Wayback Machine into evidence without testimony from a representative of the Internet Archive confirming its authenticity).

Under a proposed amendment to the Federal Rules of Evidence, the reliability of the wayback machine process could be established by a certificate of the Internet Archive official, rather than in-court testimony). See Proposed Rule 902(13) (allowing proof of authenticity of electronic information produced by a process leading to an accurate result to be established by the certificate of a knowledgeable witness). That proposed amendment is scheduled to become effective on December 1, 2017.

⁵¹ See, e.g., *Williams v. Long*, 585 F. Supp. 2d 679, 686–88 & n. 4 (D. Md. 2008) (collecting cases indicating that postings on government websites are self-authenticating).

⁵² See, e.g., *White v. City of Birmingham*, 2015 U.S. Dist. LEXIS 39187 (N.D. Ala. Mar. 27, 2015) (noting sua sponte that news articles from Huntsville Times website (AL.com) “could be found self-authenticating at trial”).

⁵³ See, e.g., *United States v. Hassan*, 742 F.3d 104, 132–134 (4th Cir. 2014) (Facebook posts, including YouTube videos were self-authenticating under Rule 902(11) where accompanied by certificates from Facebook and Google custodians “verifying that the Facebook pages and YouTube videos had been maintained as business records in the course of regularly conducted business activities”); *Randazza v. Cox*, 2014 U.S. Dist. LEXIS 49762 (D. Nev. April 10, 2014) (videos posted to YouTube “are self-authenticating as a certified

3. Authenticating the Date of Information Posted on a Website

In some cases, a party may need to show not only that a posting was made on a website, but also the date on which the information was generated—this can be a distinct question from establishing what the website looked like at a particular time, which can be shown by the methods discussed above. Assume, for example, that a video is posted on YouTube on January 1, 2016. If the proponent wants to prove that it was posted on that day, this can be done by a person with knowledge, circumstantial evidence, etc. It is a different question if the proponent needs to show that the information itself was *generated* on a certain day. That will not be shown by proving it was posted on a certain date. For example, in *Sublime v. Sublime Remembered*, 2013 U.S. Dist. LEXIS 103813 (C.D. Cal. July 22, 2013), the plaintiffs brought suit against the defendant for violating a court order prohibiting defendant from performing songs belonging to the plaintiffs. As evidence, the plaintiffs sought to admit a YouTube video of the defendant performing the prohibited music. The court ruled that the video was not properly authenticated without evidence that it was recorded *after* the court order was issued. The mere fact that it was *posted* after the court order was issued was not enough to establish that the video was what the proponent said it was—performance of the music after the court order was entered.

Establishing that a video (or any other kind of information posted on a website) was *prepared* on—or before or after—a certain date thus presents a separate question of authenticity. But it is a question that can be addressed through the same factors discussed above: for example, by a person with personal knowledge, a forensic expert, and/or circumstantial evidence. Illustrative is *United States v. Bloomfield*, 591 Fed.Appx. 847, 848–49 (11th Cir. 2014), in which the defendant was convicted of felon-firearm possession. The government offered a YouTube video which showed the defendant discharging an AR–15 rifle in front of Fowler Firearms. The date that the video was made was obviously critical. If it was made before the defendant was a convicted felon, then it depicted no crime. The government was not required, necessarily, to prove that the video was taken on a specific day, but it was required to establish that the video was taken after the defendant was convicted of a felony. And the date that the video was posted on YouTube was not the relevant date. The court found the date was properly authenticated in the following passage:

- Fowler Firearms’s manager testified that Broomfield was a Fowler Firearms member, that on January 21, 2011, Broomfield purchased two boxes of PMC .223 ammunition, and that he had not purchased that ammunition at any other time. Dezendorf stated that the only firearm Fowler Firearms rented to customers at the time that used PMC .223 ammunition was the AR–15 rifle.
- An employee who had worked at Fowler Firearms for ten years testified that he could discern the approximate date the video was taken. He explained that the video showed side deflectors and lights on the gun range, which Fowler Firearms had installed in late 2010 or early 2011. He also testified that Fowler Firearms paints its floors and walls at the beginning of the season, and the freshly-painted floor and walls seen in the video indicated that the footage was filmed close to the start of 2011.

domestic record of a regular conducted activity if their proponent satisfies the requirements of the business-records hearsay exception.”).

- A witness who operated a maintenance business that provided repair and maintenance to Fowler Firearms testified that he installed the lighted baffles shown in the video, in late September or early October of 2010.

All this was more than enough to indicate that the video was taken around the beginning of 2011—post-dating the defendant’s felony status—and so depicted the crime of felon-firearm possession.

E. Social Media Postings

“Social media” is defined as “forms of electronic communications (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content.”⁵⁴ Parties have increasingly sought to use social media evidence to their advantage at trial. A common example would be a picture or entry posted on a person’s Facebook page, that could be relevant to contradict that person’s testimony at trial. If the entry is challenged for authenticity, the proponent must present a prima facie case that the evidence is what the party says it is—e.g., that it is in fact a posting on the person’s Facebook page. If the goal is to prove that the page or a post is that of a particular person, authenticity standards are not automatically satisfied by the fact that the post or the page is in that person’s name, or that the person is pictured on the post.⁵⁵ That is because someone can create a Facebook or other social media page in someone else’s name. Moreover, one person may also gain access to another’s account.

What more must be done to establish authenticity of a social media page? Most courts have found that it is enough for the proponent to show that the pages and accounts can be tracked through internet protocol addresses associated with the person who purportedly made the post.⁵⁶

⁵⁴ Definition of Social Media, Merriam-Webster, <http://www.merriam-webster.com/dictionary/social%20media#> (last visited January 16, 2016).

⁵⁵ See, e.g., *United States v. Vayner*, 769 F.3d 125, 132 (2d Cir. 2014), where the court held that a page on the Russian version of Facebook was not sufficiently authenticated simply by the fact that it bore the name and picture of the purported “owner” Zhylytsou:

It is uncontroverted that information about Zhylytsou appeared on the VK page: his name, photograph, and some details about his life consistent with Timku’s testimony about him. But there was no evidence that Zhylytsou himself had created the page or was responsible for its contents. Had the government sought to introduce, for instance, a flyer found on the street that contained Zhylytsou’s Skype address and was purportedly written or authorized by him, the district court surely would have required some evidence that the flyer did, in fact, emanate from Zhylytsou. Otherwise, how could the statements in the flyer be attributed to him?

Essentially the court in *Vayner* held that a Facebook page is not self-authenticating. Compare *United States v. Encarnacion-LaFontaine*, 2016 WL 611925 (2d Cir. Feb. 16, 2016) (threatening Facebook posts were properly authenticated where “the Government introduced evidence that (1) the Facebook accounts used to send the messages were accessed from IP addresses connected to computers near Encarnacion’s apartment; (2) patterns of access to the accounts show that they were controlled by the same person; (3) in addition to the Goris threats, the accounts were used to send messages to other individuals connected to Encarnacion; (4) Encarnacion had a motive to make the threats, and (5) a limited number of people, including Encarnacion, had information that was contained in the messages.”).

⁵⁶ *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014) (the trial court did not abuse its discretion in admitting Facebook pages purportedly maintained by two of the defendants; the trial court properly determined that the prosecution had satisfied its burden under Rule 901(a) “by tracking the Facebook pages and Facebook accounts to Hassan’s and Yaghi’s email addresses via internet protocol addresses”); *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014) (Facebook account linked to the defendant’s email).

Other factors that can be relied upon to support authentication of social media postings include the following:⁵⁷

- testimony from the purported creator of the social network profile and related postings;
- testimony from persons who saw the purported creator establish or post to the page;
- testimony of a witness that she often communicated with the alleged creator of the page through that account;
- expert testimony concerning the results of a search of the social media account holder's computer hard drive;⁵⁸
- testimony about the contextual clues and distinctive aspects in the messages themselves tending to reveal the identity of the purported author;
- testimony regarding the account holder's exclusive access to the originating computer and social media account;
- information from the social media network that links the page or post to the purported author;
- testimony directly from the social networking website that connects the establishment of the profile to the person who allegedly created it and also connects the posting sought to be introduced to the person who initiated it;
- expert testimony regarding how social network accounts are accessed and what methods are used to prevent unauthorized access;
- production pursuant to a document request;
- whether the purported author knows the password to the account, and how many others know it as well;
- that the page or post contains some of the factors previously discussed as circumstantial evidence of authenticity of texts, emails, etc., including:
 - nonpublic details of the purported author's life;
 - other items known uniquely to the purported author or a small group including him or her;
 - references or links to, or contact information about, loved ones, relatives, co-workers, others close to the purported author;
 - photos and videos likely to be accessed by the purported author;

⁵⁷ See generally Honorable Paul W. Grimm, *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 433 (2013); Richard Raysman and Peter Brown, *Authentication of Social Media Evidence*, New York Law Journal, November 11, 2011, p. 3.

⁵⁸ Honorable Paul W. Grimm, *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 433, 468 (2013) ("A computer forensic expert can frequently authenticate the maker of social media content. Obviously, you will need to retain the proper expert and ensure that he or she has enough time and information to make the identification. Advance planning is essential, and be mindful of the potentially substantial cost.").

- biographical information, nicknames, not generally accessible;
- the structure or style of comments that are in the style of the purported author;
- that the purported author acts in accordance with the contents of the page or post.

Finally, a social media post meeting the foundational requirements of a business record under Fed.R.Evid. 803(6) may be self-authenticating under 902(11). While this may not be enough to authenticate the *identity* of the person posting,⁵⁹ it will be enough to establish that the records were not altered in any way after they were posted.⁶⁰

IV. Judicial Notice of Digital Evidence

This Best Practices Handbook has discussed the many ways that new forms of digital evidence might be authenticated. Almost all of these methods require expenditure of resources. Courts and parties have begun to realize that some of this new digital evidence has reached the point of being an undisputed means of proving a fact. In these circumstances, judicial notice may be used to alleviate the expenditure of resources toward authentication.

Under Fed.R.Evid. 201(b) a court may judicially notice a fact if it is not subject to reasonable dispute. An example of a court taking judicial notice of a fact obtained through an electronic process is found in *United States v. Brooks*, 715 F.3d 1069, 1078 (8th Cir. 2013). The defendant in a bank robbery prosecution challenged the admissibility of GPS data that was obtained from a GPS tracker that the teller placed in the envelope of stolen money. The trial court took judicial notice of the accuracy and reliability of GPS technology. The court of appeals found no error:

We cannot conclude that the district court abused its discretion in taking judicial notice of the accuracy and reliability of GPS technology. Commercial GPS units are widely available, and most modern cell phones have GPS tracking capabilities. Courts routinely rely on GPS technology to supervise individuals on probation or supervised release, and, in assessing the Fourth Amendment constraints associated with GPS tracking, courts generally have assumed the technology’s accuracy.

⁵⁹ See *United States v. Browne*, 2016 U.S. App. LEXIS 15668 (3rd Cir.), where the court found that a Rule 902(11) certification by a Facebook custodian concerning Facebook posts was not sufficient authentication that the post was made by a certain individual:

Facebook does not purport to verify or rely on the substantive contents of the communications in the course of its business. At most, the records custodian employed by the social media platform can attest to the accuracy of only certain aspects of the communications exchanged over that platform, that is, confirmation that the depicted communications took place between certain Facebook accounts, on particular dates, or at particular times. This is no more sufficient to confirm the accuracy or reliability of the contents of the Facebook chats than a postal receipt would be to attest to the accuracy or reliability of the contents of the enclosed mailed letter.

⁶⁰ See, e.g., *United States v. Hassan*, 742 F.3d 104, 134 (4th Cir. 2014):

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.

Another common example of judicial notice of digital information is that courts take judicial notice of distances, locations, and the physical contours of an area by reference to Google Maps.⁶¹

What follows are some examples of judicial notice of digital information.

1. Government Websites

Judicial notice may be taken of postings on government websites,⁶² including:

- Federal, state, and local court websites.⁶³
- Federal, state, and local agency, department and other entities' websites.⁶⁴
- Foreign government websites.⁶⁵
- International organization websites.⁶⁶

2. Non-Government Websites

Generally, courts are reluctant to take judicial notice of non-governmental websites because the Internet “is an open source” permitting anyone to “purchas[e] an internet address and create a website” and so the information recorded is subject to dispute.⁶⁷ A few websites, however, as discussed above, have become a part of daily life—their accuracy is both objectively verifiable and actually verified millions of times a day. Other websites are the online versions of sources that courts have taken judicial notice of for years, and the courts find little reason to distinguish a reputable web equivalent from a reputable hard copy edition.

⁶¹ See, e.g., *United States v. Burroughs*, 810 F.3d 833, 835, n.1 (D.C.Cir. 2016) (“We grant the government’s motion to take judicial notice of a Google Map. It is a ‘source whose accuracy cannot be reasonably questioned,’ at least for the purpose of identifying the area where Burroughs was arrested and the general layout of the block.”); *McCormack v. Hiedeman*, 694 F.3d 1004, 1008 (9th Cir. 2012) (relying on Google Maps to determine the distance between two cities; the court held that Google Maps was a website whose accuracy could not reasonably be questioned under Fed.R.Evid. 201(b)(2)). See also *Cline v. City of Mansfield*, 745 F. Supp. 2d 773, 800 n.23 (N.D. Ohio 2010) (the court took judicial notice that the sun set at 7:47 pm on a particular date according to www.timeanddate.com).

⁶² See, e.g., *United States v. Head*, 2013 U.S. Dist. LEXIS 151805, at *7 n.2 (E.D. Cal. Oct. 22, 2013) (“The court may take judicial notice of information posted on government websites as it can be ‘accurately and readily determined from sources whose accuracy cannot reasonably be questioned.’ ”); *Puerto Rico v. Shell Oil Co. (In re MTBE Prods. Liab. Litig.)*, 2013 U.S. Dist. LEXIS 181837, at *16 (S.D.N.Y. 2013) (“Courts routinely take judicial notice of data on government websites because it is presumed authentic and reliable”).

⁶³ See, e.g., *Feingold v. Graff*, 516 Fed. App’x 223, 226 (3d Cir. 2013).

⁶⁴ See, e.g., *United States v. Iverson*, 818 F.3d 1015, 1022 (9th Cir. 2016) (noting that “courts have considered the FDIC website so reliable that they have taken judicial notice of information on it”; citing cases); *Lawrence v. Fed. Home Loan Mortg. Corp.*, 2015 U.S. Dist. LEXIS 40012 (W.D. Tex. Mar. 30, 2015) (federal government’s agreement with national bank as posted on government website); *Flores v. City of Baldwin Park*, 2015 U.S. Dist. LEXIS 22149 (C.D. Cal. Feb. 23, 2015) (municipal police department website).

⁶⁵ See, e.g., *United States v. Broxmeyer*, 699 F.3d 265, 296 (2d Cir. 2012) (websites of governments of Vietnam and Brazil).

⁶⁶ See, e.g., *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1367 (2013) (World Bank website).

⁶⁷ *United States v. Kane*, 2013 U.S. Dist. LEXIS 154248 (D. Nev. Oct. 28, 2013).

Examples of Information Found Authentic on Non-Governmental Websites Through Judicial Notice:

- Internet maps (e.g., Google Maps, MapQuest).
- Calendar information.⁶⁸
- Newspaper and periodical articles.⁶⁹
- Online versions of textbooks, dictionaries, rules, charters.⁷⁰

Most non-Governmental websites, even if familiar, are of debatable authenticity and therefore not appropriately the object of judicial notice. Wikipedia is a prime example. Courts have declined requests to take judicial notice of the contents of Wikipedia entries,⁷¹ except for the fact that the contents appear on the site as of a certain date of access.⁷²

3. Wayback Machine

Archived versions of websites as displayed on the “wayback machine” (www.archive.org) are frequently the subject of judicial notice,⁷³ but this is not always the case.⁷⁴ Note that it is only the contents of the archived pages that may warrant judicial notice—the dates assigned to archived pages may not apply to images linked to them, and more generally, links on archived pages may direct to the live web if the object of the old link is no longer available.

⁶⁸ See, e.g., *Tyler v. United States*, 2012 U.S. Dist. LEXIS 184007, at *9–*10 n.6 (N.D. Ga. Dec. 6, 2012); *Local 282, Int’l Bhd. of Teamsters v. Pile Found. Constr. Co.*, 2011 U.S. Dist. LEXIS 86644, at *17–*18 n.5 (E.D.N.Y. Aug. 5, 2011).

⁶⁹ See, e.g., *Ford v. Artiga*, 2013 U.S. Dist. LEXIS 106805, at *19 n.5 (E.D. Cal. July 30, 2013); *HB v. Monroe Woodbury Cent. Sch. Dist.*, 2012 U.S. Dist. LEXIS 141252 (S.D.N.Y. Sept. 27, 2012).

⁷⁰ See, e.g., *United States v. Mosley*, 672 F.3d 586, 591 (8th Cir. 2012) (PHYSICIANS’ DESK REFERENCE); *Shuler v. Garrett*, 2014 U.S. App. LEXIS 2772, at *7 (6th Cir. Feb. 14, 2014) (OXFORD ENGLISH DICTIONARY); *Dealer Computer Servs. v. Monarch Ford*, 2013 U.S. Dist. LEXIS 11237, at *11 & n.3 (E.D. Cal. Jan. 25, 2013) (American Arbitration Association rules); *Morgan Stanley Smith Barney LLC v. Monaco*, 2014 U.S. Dist. LEXIS 149419 (D. Colo. Aug. 26, 2014) (FINRA rules); *Famous Music Corp. v. 716 Elmwood, Inc.*, 2007 U.S. Dist. LEXIS 96789, at *12–*13 n.7 (W.D.N.Y. Dec. 28, 2007) (Articles of Association of ASCAP).

⁷¹ See, e.g., *Blanks v. Cate*, 2013 U.S. Dist. LEXIS 11233, at *8 n.4 (E.D. Cal. Jan. 28, 2013) (refusing to take judicial notice of a Wikipedia entry “as such information is not sufficiently reliable”); *Stein v. Bennett*, 2013 U.S. Dist. LEXIS 126667, at *20–21 n.10 (M.D. Ala. Sept. 5, 2013) (“Wikipedia is not a source that warrants judicial notice”); *Gonzales v. Unum Life Ins. Co. of Am.*, 861 F. Supp. 2d 1099, 1104 n.4 (S.D. Cal. 2012) (“The Court declines Plaintiff’s request to take judicial notice of the Wikipedia definition of Parkinson’s Disease because the internet is not typically a reliable source of information”).

⁷² See, e.g., *McCrary v. Elations Co., LLC*, 2014 U.S. Dist. LEXIS 8443, at *4–5 n.3 (C.D. Cal. Jan. 13, 2014) (“While the court may take judicial notice of the fact that the internet, Wikipedia, and journal articles are available to the public, it may not take judicial notice of the truth of the matters asserted therein”).

⁷³ See, e.g., *Under a Foot Plant Co. v. Exterior Design, Inc.*, 2015 U.S. Dist. LEXIS 38190 (D. Md. Mar. 25, 2015) (“District courts have routinely taken judicial notice of content from The Internet Archive”).

⁷⁴ See, e.g., *Open Text S.A. v. Box, Inc.*, 2015 U.S. Dist. LEXIS 11312 (N.D. Cal. Jan. 30, 2015) (proffered Wayback Machine printouts not authenticated absent certification from representative of InternetArchive.org).

V. Authenticating Electronic Evidence by Way of Certification—New Amendments to the Federal Rules of Evidence, Scheduled to Go into Effect on December 1, 2017

The Rules Committee of the Judicial Conference has unanimously approved a proposal from the Advisory Committee on Evidence to add two new subdivisions to Rule 902, the rule on self-authentication. The first provision would allow self-authentication of machine-generated information, upon a submission of a certification prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, medium 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. Barring any unforeseen developments, these new rules would go into effect on December 1, 2017.

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 Advisory Committee concluded that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it has often been 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 regarding the described electronic evidence.

These new amendments do not change the *standards* for authentication of electronic evidence. Rather, they change the *manner* in which the proponent’s submission on authenticity can be made. Instead of calling a witness, the proponent can provide a certificate prepared by the witness of the submission that he would have made if required to testify. Of course, if that submission would be insufficient if he *had* testified, these new amendments will be of no use. An insufficient showing of authenticity does not somehow become better by way of a certificate in lieu of testimony.

Applications of Rules 902(13) and (14)

In order to assist the Bench and the Bar in evaluating how these new self-authentication rules can be used, the Reporter to the Advisory Committee, with the assistance of John Haried, an attorney from the Justice Department, prepared the following illustrative examples:

Examples of how Rule 902(13) can be used:

1. Proving that a USB device was connected to (i.e., plugged into) a computer: In a hypothetical civil or criminal case in Chicago, a disputed issue is whether Devera Hall used her computer to access files stored on a USB thumb drive owned by a co-worker. Ms. Hall’s computer uses

the Windows operating system, which automatically records information about every USB device connected to her computer in a database known as the “Windows registry.” The Windows registry database is maintained on the computer by the Windows operating system in order to facilitate the computer’s operations. A forensic technician, located in Dallas, Texas, has provided a printout from the Windows registry that indicates that a USB thumb drive, identified by manufacturer, model, and serial number, was last connected to Ms. Hall’s computer at a specific date and time.

Without Rule 902(13): Without Rule 902(13), the proponent of the evidence would need to call the forensic technician who obtained the printout as a witness, in order to establish the authenticity of the evidence. During his or her testimony, the forensic technician would typically be asked to testify about his or her background and qualifications; the process by which digital forensic examinations are conducted in general; the steps taken by the forensic technician during the examination of Ms. Hall’s computer in particular; the process by which the Windows operating system maintains information in the Windows registry, including information about USB devices connected to the computer; and the steps taken by the forensic examiner to examine the Windows registry and to produce the printout identifying the USB device.

Impact of Rule 902(13): With Rule 902(13), the proponent of the evidence could obtain a written certification from the forensic technician, stating that the Windows operating system regularly records information in the Windows registry about USB devices connected to a computer; that the process by which such information is recorded produces an accurate result; and that the printout accurately reflected information stored in the Windows registry of Ms. Hall’s computer. The proponent would be required to provide reasonable written notice of its intent to offer the printout as an exhibit and to make the written certification and proposed exhibit available for inspection. If the opposing party did not dispute the accuracy or reliability of the process that produced the exhibit, the proponent would not need to call the forensic technician as a witness to establish the authenticity of the exhibit. (There are many other examples of the same types of machine-generated information on computers, for example, internet browser histories and wifi access logs.)

2. Proving that a server was used to connect to a particular webpage: Hypothetically, a malicious hacker executed a denial-of-service attack against Acme’s website. Acme’s server maintained an Internet Information Services (IIS) log that automatically records information about every internet connection routed to the web server to view a web page, including the IP address, webpage, user agent string and what was requested from the website. The IIS logs reflected repeated access to Acme’s website from an IP address known to be used by the hacker. The proponent wants to introduce the IIS log to prove that the hacker’s IP address was an instrument of the attack.

Without Rule 902(13): The proponent would have to call a website expert to testify about the mechanics of the server’s operating system; his search of the IIS log; how the IIS log works; and that the exhibit is an accurate record of the IIS log.

With Rule 902(13): The proponent would obtain the website expert’s certification of the facts establishing authenticity of the exhibit

and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the registry key, then the proponent would not need to call the website expert to establish authenticity.

3. Proving that a person was or was not near the scene of an event: Hypothetically, Robert Jackson is a defendant in a civil (or criminal) action alleging that he was the driver in a hit-and-run collision with a U.S. Postal Service mail carrier in Atlanta at 2:15 p.m. on March 6, 2015. Mr. Jackson owns an iPhone, which has software that records machine-generated dates, times, and GPS coordinates of each picture he takes with his iPhone. Mr. Jackson's iPhone contains two pictures of his home in an Atlanta suburb at about 1 p.m. on March 6. He wants to introduce into evidence the photos together with the metadata, including the date, time, and GPS coordinates, recovered forensically from his iPhone to corroborate his alibi that he was at home several miles from the scene at the time of the collision.

Without Rule 902(13): The proponent would have to call the forensic technician to testify about Mr. Jackson's iPhone's operating system; his search of the phone; how the metadata was created and stored with each photograph; and that the exhibit is an accurate record of the photographs.

With Rule 902(13): The proponent would obtain the forensic technician's certification of the facts establishing authenticity of the exhibits and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the iPhone's logs, then the proponent would not have to call the technician to establish authenticity.

4. Proving association and activity between alleged co-conspirators: Hypothetically, Ian Nichols is charged with conspiracy to commit the robbery of First National Bank that occurred in San Diego on January 30, 2015. Two robbers drove away in a silver Ford Taurus. The alleged co-conspirator was Dain Miller. Dain was arrested on an outstanding warrant on February 1, 2015, and in his pocket was his Samsung Galaxy phone. The Samsung phone's software automatically maintains a log of text messages that includes the text content, date, time, and number of the other phone involved. Pursuant to a warrant, forensic technicians examined Dain's phone and located four text messages to Ian's phone from January 29: "Meet my house @9"; "Is Taurus the Bull out of shop?"; "Sheri says you have some blow"; and "see ya tomorrow." In the separate trial of Ian, the government wants to offer the four text messages to prove the conspiracy.

Without Rule 902(13): The proponent would have to call the forensic technician to testify about Dain's phone's operating system; his search of the phone's text message log; how logs are created; and that the exhibit is an accurate record of the iPhone's logs.

With Rule 902(13): The proponent would obtain the forensic technician's certification of the facts establishing authenticity of the exhibit and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the iPhone's logs, then the court would make the Rule 104 threshold authenticity finding and admit the exhibits, absent other proper objection.

Hearsay Objection Retained: Under Rule 902(13), the opponent—here, criminal defendant Ian—would retain his hearsay objections to the text messages found on Dain’s phone. For example, the judge would evaluate the text “Sheri says you have some blow” under F.R.E. 801(d)(2)(E) to determine whether it was a coconspirator’s statement during and in furtherance of a conspiracy, and under F.R.E. 805, to assess the hearsay within hearsay. The court might exclude the text “Sheri says you have some blow” under either rule or both.

Example of how Rule 902(14) can be used:

In the armed robbery hypothetical, above, forensic technician Smith made a forensic copy of Dain’s Samsung Galaxy phone in the field. Smith verified that the forensic copy was identical to the original phone’s text logs using an industry standard methodology (e.g., hash value or other means). Smith gave the copy to forensic technician Jones, who performed his examination at his lab. Jones used the copy to conduct his entire forensic examination so that he would not inadvertently alter the data on the phone. Jones found the text messages. The government wants to offer the copy into evidence as part of the basis of Jones’s testimony about the text messages he found.

Without Rule 902(14): The government would have to call two witnesses. First, forensic technician Smith would need to testify about making the forensic copy of information from Dain’s phone, and about the methodology that he used to verify that the copy was an exact copy of information inside the phone. Second, the government would have to call Jones to testify about his examination.

With Rule 902(14): The proponent would obtain Smith’s certification of the facts establishing how he copied the phone’s information and then verified the copy was true and accurate. Before trial the government would provide the certification and exhibit to the opposing party—here defendant Ian—with reasonable notice that it intends to offer the exhibit at trial. If Ian’s attorney does not timely dispute the reliability of the process that produced the Samsung Galaxy’s text message logs, then the proponent would only call Jones.

The Committee Note approved by the Committee emphasizes that the goal of the amendment is narrow one: to allow authentication of electronic information that would otherwise be established by a witness, instead to be established through a certification by that same witness. The Note makes clear that these are authentication-only rules and that the opponent retains all objections to the item other than authenticity—most importantly that the item is hearsay or that admitting the item would violate a criminal defendant’s right to confrontation.

What follows is the text of the new rules and the Committee Notes:

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 of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

COMMITTEE NOTE

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 Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable—the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly

retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

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

* * *

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

Committee Note

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 number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. 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.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the

requirements of Rule 803(6). Rule 902(14) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. 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.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

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

APPENDIX

Federal Rules of Evidence Most Commonly Used to Establish Authenticity of Digital Evidence

Rule 901. Authenticating or Identifying Evidence

- (a) **In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
- (b) **Examples.** The following are examples only—not a complete list—of evidence that satisfies the requirement:
- (1) ***Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.

* * *

- (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.
- (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.

* * *

- (9) ***Evidence About a Process or System.*** Evidence describing a process or system and showing that it produces an accurate result.

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:

* * *

- (5) ***Official Publications.*** A book, pamphlet, or other publication purporting to be issued by a public authority.

- (6) ***Newspapers and Periodicals.*** Printed material purporting to be a newspaper or periodical.

* * *

- (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.
- (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).

Proposed Additions to Rule 902, Projected Effective Date December 1, 2017:

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

Rule 201. Judicial Notice of Adjudicative Facts

- (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.

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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: October 1, 2016

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 Jeffrey Bellin, in which he argued that such an exception was necessary to allow admission of reliable electronic communications --- particularly texts, tweets and Facebook posts – 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, tweets, and Facebook posts 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, or improperly admitted under other exceptions.

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 [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,¹ etc.).

Before getting to the cases, though, there is one interesting addition to the argument about the potential unreliability of social media communications and the need for contemporaneity. The FJC report on excited utterances and present sense impressions --- reviewed by the Committee at the last meeting --- cites a study indicating that it is easier to lie if the communicants are not face to face:

Lying appears to be more difficult when conducted in personal settings; for example, the decision to lie has been observed to take twice as much time when testing is conducted person-to-person instead of by computer.

The FJC cites Jeffrey J. Walczyk et al., *Lying Person-to-Person about Life Events: A Cognitive Framework for Lie Detection*, 58 *Pers. Psychol.* 141, 159–60 (2005) for this proposition. A hearsay exception for recent perceptions, basically geared toward electronic communications, would be in tension with these findings. If the findings are correct, there should be less time permitted between the event and the electronic communication, not more.

The FJC also makes the point that it is difficult to lie if the statement is being made to a person who can also perceive the event. (That is part of the reliability-grounding for present sense impressions). But the problem with electronic communications is that they are often *not* made to one with personal knowledge of the event described. This could be thought to be another reason to be cautious before adopting a hearsay exception for recent perceptions, as applied to electronic communications.

¹ The phrase “overusing the residual exception” is intended to mean use of the residual exception beyond the narrow application that Congress intended. If, however, the Committee decides to expand the coverage of the residual exception --- a topic taken up in another memo of this agenda book --- then it is possible that the exception properly could cover a fair amount of electronic communications that are not admitted under other exceptions. It might be that an expanded residual exception would make it unnecessary to take up the possibility of a recent perceptions exception.

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

Threats: *United States v. Encarnacion-LaFontaine*, 639 Fed. Appx. 710 (2d Cir. 2016): The defendant, appealing convictions for drug crimes and extortion, argued that threatening Facebook messages should not have been admitted because they were hearsay. The court stated: “His hearsay challenge is easily dismissed because the messages * * * were not admitted for the truth of the matters asserted in them. See Fed.R.Evid. 801(c)(2); see also *United States v. Bellomo*, 176 F.3d 580, 586 (2d Cir.1999) (‘Statements offered as evidence of ... threats ... rather than for the truth of the matter asserted therein, are 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.*, No. 2:13-cv-00109, 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); *Hayes v. Sotera Def. Solutions Inc.*, No. 1:15cv1130 (JCC/IDD), 2016 U.S. Dist. LEXIS 63559 (E.D. Va. May 12, 2016) (emails containing information on how to reapply for a position in an age discrimination case were admitted because they were being offered to show the effect on the listener, not the truth of the matter asserted, that these were the actual procedures).

Effect on the listener, and context: *United States v. Farley*, 2015 WL 6871920 (N. D. Cal. November 9, 2015): In a felon-firearm case, text messages received by the defendant on his cellphone, concerning arrangements to set up gun sales, were found admissible both for effect on the listener and to put the defendant's own statements in context.

Verbal acts: *Turner v. Am. Building Condo. Corp.*, 2014 U.S. Dist. LEXIS 15804 (S.D. Ohio Feb. 7, 2014): Emails in a contract case 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."

Incoming texts requesting drugs are admissible for the fact they were made: *United States v. Ellis*, 626 Fed. Appx. 148 (6th Cir. 2015): The court found no error in the lower court's ruling that incoming text messages were not hearsay because "they were used to prove that individuals repeatedly contacted Ellis for narcotics purchases, not for their truth. *See, e.g., United States v. Rodriguez-Lopez*, 565 F.3d 312, 315 (6th Cir.2009) ('Even if the statements were assertions, the government offers them, not for their truth, but as evidence of the fact that they were made. The fact that Rodriguez received ten successive solicitations for heroin is probative circumstantial evidence of his involvement in a conspiracy to distribute heroin.')."

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 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. It was not offered to prove that the victim was actually located at a certain place.

Circumstantial evidence of state of mind: *United States v. Churn*, 800 F.3d 768 (6th Cir. 2015): In a bank fraud prosecution, the court admitted emails sent to the defendant by a loan officer, in which the officer reported his concerns about the truthfulness of some of the defendant's representations in obtaining bank loans. The emails were not offered for the truth of any fact, but only to show the officer's state of mind and her concern over whether she was receiving inaccurate information. *See also Hopkins v. Amtrak*, 2016 U.S. Dist. LEXIS 57236 (E.D.N.Y.): When the plaintiff was subject to an electric shock after climbing on top of a train, the court admitted text messages sent to the plaintiff as circumstantial evidence of the state of

mind of the sender, that they thought the plaintiff was acting erratically and were concerned. The text messages were not admitted to prove the truth of the matter asserted.

Non-assertive communication: *United States v. Gill*, 2016 U.S. App. Lexis 9178 (9th Cir.): On an appeal for conspiracy to distribute methamphetamine, the court admitted several text messages because they were statements of a party opponent or a co-conspirator. The Defendant challenged the admission of the name on the text messages (“Gill Mark”) claiming that the name was inadmissible hearsay. The court held that a name is not an assertion, and therefore not hearsay.

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*, 611 Fed. Appx. 572 (11th Cir. 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.) (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)); *Hopkins v. Amtrak*, 2016 U.S. Dist. LEXIS 57236 (E.D.N.Y.) (Facebook posts were admissible as statements of party opponent as long as the statements by other individuals were redacted before the Facebook posts were admitted); *United States v. Browne*, 2016 U.S. App. LEXIS 15668 (3d Cir.) (holding that the four Facebook chats that involved the defendant, and that were properly authenticated were admissible party-opponent statements).

Texts are party-opponent statements where the government presents evidence that they were more likely than not made by the defendant: *United States v. Ellis*, 2015 WL 5637551 (6th Cir.): “The government used Ellis’s outgoing messages to prove his intent to distribute the marijuana found in his possession. Ellis maintains that the phone’s outgoing messages constitute hearsay statements, inadmissible as admissions of a party-opponent * * * because the government failed to show that Ellis is in-fact the declarant. But Ellis cannot point to any clear error in the district court’s preliminary finding that it was more likely than not that he made the statements in question. *See Fed.R.Evid. 104(a)*. As the court noted, several pieces of evidence supported that finding: the phone was in his possession, contained photographs of Ellis and text messages addressed to “J” and “Javon,” and listed his brother and girlfriend as contacts.”

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: "Some of the Facebook posts at issue here are in the nature of a conversation between Lemons and third parties, and the district court could reasonably have believed that review of [the complete conversation] would enlighten the jury about the meaning of admissions by Lemons." 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); ***United States v. Wright***, 2016 U.S. Dist. LEXIS 87938 (N.D. Iowa) (holding that text messages regarding agreements to provide drugs were admissible as statements by co-conspirators and other text

messages were admitted because they were offered for the effect on the listener or were otherwise not offered for the truth of the matter asserted).

Public Record: *United States v. Iverson*, 818 F.3d 1015 (10th Cir. 2016): The government proved that a bank was FDIC insured through testimony of an agent who viewed that fact on the FDIC website. The court found no error because, while the statement on the FDIC website was offered for its truth, the statement was a public report admissible under Rule 803(8). The court noted that government reports “are continually being placed on the internet to allow easy access to the general public. Their electronic format does not, by itself, prevent them from qualifying as public records.” As authority the court cited Fed. R.Evid. 101(b)(6), the rule added in the restyling, providing that any reference to a writing includes electronic information. The court also noted that “courts have considered the FDIC website so reliable that they have taken judicial notice of information on it.”

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 dis-serving 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 That Was Admitted On Improper Grounds, But Proper Grounds for Admissibility Existed

Text Messages Admitted As Business Records Instead of Non-Hearsay: *United States v. Caraballo*, 2016 U.S. App. LEXIS 13857 (2d Cir.): When appealing a murder conviction, the defendant argued that a series of text messages between the victim and her bail bondsmen were inadmissible hearsay. While the Court of Appeals concluded that the text messages were erroneously admitted under the business records exception, they were still admissible because the government was not offering the text messages for their truth. Rather, the government was offering the text messages to show that the bail bondsmen were in contact with the victim until she stopped responding. So the admission of the text messages was not error.

V. Hearsay Improperly Found Inadmissible

Text Messages that should not have been considered hearsay: *United States v. Rowland*, 826 F.3d 100 (2d Cir. 2016): A former governor was found to have falsified his relationship with two congressional candidates. He challenged a number of rulings, including the decision to exclude emails and text messages that he wanted to introduce involving his discussion with Apple's Chief Operating Officer. The district court concluded that the text messages and emails were hearsay and excluded the evidence. The circuit court found that the emails were not being offered for the truth, but instead to show communications with the Apple COO. However, as the emails were allowed to be used to refresh the witness's recollection and did not appear to have any other impact on the jury, the improper exclusion was considered harmless error.

VI. 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.

Email on an Employee's Activity: *United States v. Lloyd*, 807 F.3d 1128 (9th Cir. 2015): Two of five defendants convicted of selling unregistered securities appealed their convictions and sentences. The court agreed with one defendant that the trial judge abused discretion in admitting an e-mail from the office manager where the defendant worked as a telemarketer, to a third party, stating that the defendant had been given five warnings to stop

giving potential investors false information. Although the government argued the e-mail was admissible to prove the defendant's state of mind, the court reasoned that it could not prove his state of mind unless the content of the e-mail were used for its truth.

The manager's email was a summary of information occurring over a year after the recounted events. Hopefully it is not the kind of email that would be admitted under a "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). *See also Roberts Tech. Grp., Inc. v. Curwood, Inc.*, 2016 U.S. Dist. LEXIS 64538 (E.D. Pa.) (holding that the emails did not fall under the business records exception. Additionally because the emails were written after the relevant phone calls, and close to litigation, they did not meet the present sense impression exception and would be unlikely to qualify under a recent perceptions exception); *Marine Power Holding, L.L.C., v. Malibu Boats, L.L.C.*, 2016 U.S. Dist. LEXIS 98722 (E.D. La.) (holding that the emails were speculation because the authors' lacked personal knowledge of the events and even if the emails were not speculation they were hearsay that did not qualify under the business record exception); *Applebaum v. Target Corp.*, No. 16a0182p.06, 2016 U.S. App. LEXIS 14049 (2d Cir.) (holding that emails that were written after the lawsuit commenced did not qualify as business records).

VII. Hearsay Found Inadmissible That Might Be Admissible Under a Statement of Recent Perceptions Exception

Defendant's exculpatory text after an alleged sexual attack: *United States v. Harry*, 816 F.3d 1268 (10th Cir. 2016): The defendant was charged with sexually assaulting a woman at a party hosted by his friend. After the sex act, the defendant had a text conversation with the friend, and in one text he stated that the complainant was "all over me" during the party. The court held that this text message was properly excluded as hearsay. It might have qualified as a statement of recent perception because it was made only an hour or so after the sex act. It can be debated whether it is a good idea to sponsor a hearsay exception that would admit exculpatory statements of defendants accused of sexual assault, an hour or so after the alleged act.

Text indicating a payment arrangement held inadmissible hearsay: *United States v. Thomas*, 2015 WL 237337 (D. Conn.): 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 admissions because the defendant, by his responses, indicated assent. But one text from the minor, which indicated that the defendant

paid for the minor's cross-country trip, was found 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.

Text messages between the defendant and the witness on the day of the crime: *United States v. Rolle*, 2015 WL 7444844 (2d Cir.): The defendant, charged with violating the Hobbs Act, argued that the trial court erred in prohibiting him from cross-examining a prosecution witness with text messages that he had sent to the witness on the day of the crime. The court found no error, as the statements were hearsay --- they could not be admitted in his favor under Rule 801(d)(2)(A) because they were his own statements. The court's analysis is sparse, and there is no description of what the texts actually were. But as they were sent on the day of the crime, they might well have qualified as statements of recent perception. Whether that would have been a good result is another question. The defendant's own exculpatory statements on the day of the crime don't sound very reliable.

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.

Facebook messages and tweets relevant to an employment action: *Herster v. Board of Supervisors*, 2015 WL 5443673 (M.D. La.): The defendant, LSU, moved to exclude Facebook comments and tweets that were made in support of the plaintiff in her disputes with LSU. The comments and tweets were hearsay, and LSU argued that they did not fall under the present sense impression exception to hearsay because it was impossible to know whether the comments were made while or immediately after the declarants learned of the events related. The court agreed with LSU and excluded the evidence. It is unclear, but at least possible, that the court would have been more forgiving of the lack of a showing of timing under a recent perceptions exception. But on the other hand, the case presents the classic kind of "crowdsourcing" social media communications that may not be based on personal knowledge.

Facebook Messages About an “Almost Rape”: *United States v. Browne*, 2016 U.S. App. LEXIS 15668 (3d Cir.). The defendant was on trial for child pornography and other sexual offenses. The government sought to introduce several Facebook chats. While four out of the five chats were admissible because they were statements of a party-opponent, a Facebook chat between two of the victims discussing an “almost rape” of one of the victims was held inadmissible hearsay. Because the two individuals who participated in that chat testified at trial, the messages would not have been admissible under a Rule 804 exception because the witnesses were available. However, had the witnesses been unavailable, and the timing of the messages been more explicit than in the current opinion, it is possible they would have been admitted under a recent perceptions exception instead of being deemed inadmissible hearsay.

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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 15, 2016

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 "testimonial." As shown in the outline below, the Court has found a statement to be testimonial when the "primary 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 to law enforcement. The defendant argued that the reporting requirement rendered the teachers agents of law enforcement.

The Supreme Court in *Clark*, 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 rulings 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 formal in 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).

¹All 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. 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 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.

2) 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 "subterfuge" 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 "targeting 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 "primary 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 --- as permitted by Fed.R.Evid. 703 --- 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 "more compatible with *Crawford* than others" and some of which "seem more easily considered by a rules

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 nonetheless, 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 "formalized." 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 might be necessary for the government to comply with the rather amorphous standards for "informality" established by Justice Thomas. Thus, if the government offers hearsay that would be testimonial under the Kagan view of "primary 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 can be argued that the government must establish that the hearsay is not tantamount to a formal affidavit --- 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.

There is a strong argument, though, that counting Justices after *Williams* is a fool's errand for now --- because of the death of Justice Scalia and the uncertainty over his replacement. What can at least be said is that Justice Alito's opinion becomes more viable on both points --- use of experts and a requirement of targeting for testimoniality --- at least for now, because if *Williams* were retried today Justice Alito's opinion would not be rejected by a majority of the Court.

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.

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 “I’ve just been shot by Bill. Call an ambulance.” Surely that statement --- admissible against the accused as an excited utterance --- 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 satisfies the less restrictive Alito view. Thus Justice Thomas’s “formality” 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 “bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.”).

Similarly, there is extensive case law both before and after *Williams* allowing admission of testimonial statements on the ground that they are not offered for their truth. For example, if a statement is legitimately offered to show the background of a police investigation, or offered to show that the statement is in fact false, then it is not hearsay and it also does not violate the right to confrontation. This is because if the statement is not offered for its truth, there is no reason to cross-examine the declarant, and cross-examination is the procedure right that the Confrontation Clause guarantees. As will be discussed further below, while both Justice Thomas and Justice Kagan in *Williams* 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 “does 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 --- 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.

II. Post-*Crawford* Cases Discussing the Relationship Between the Confrontation Clause and the Hearsay Rule and its Exceptions, Arranged By Subject Matter

“Admissions” --- 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 “for 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): “The 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 “not hearsay” under Rule 801(d)(2)(A), and “[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 “not hearsay” its admission does not violate the Confrontation Clause. (See the many cases collected under the “not hearsay” headnote, *infra*). But party-opponent statements are only technically “not hearsay.” They are in fact hearsay because they are offered for their truth --- 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 “not 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* --- 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 "*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 "against" the defendant within the meaning of the Confrontation Clause. *See also Chrysler v. Guiney*, 806 F.3d 104 (2nd Cir. 2015) (noting that if an accomplice confession is properly redacted to satisfy *Bruton*, then *Crawford* is not violated because the accomplice is not a witness "against" 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): "[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 "no 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 --- 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 admitted at trial. But after *Crawford* there can be no confrontation violation unless the hearsay statement is testimonial.

***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 (because he has no right to confront himself); nor did it displace the case law under *Bruton* allowing limiting instructions to protect the non-confessing defendants under certain circumstances. The court found that the reference to the other defendants 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 "against" 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 "against" 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 "powerfully incriminating" as the confession in *Bruton*. The court concluded that because "the 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* "is 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 "statements 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 --- *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 "witness against" the defendant. "Because 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 "*Bruton* applies only to testimonial statements" and the statements were made between coconspirators dividing up the proceeds of the crime and so "were 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.

Following *Clark*, the court finds that a report of sex abuse to a nurse by a 4½ year old child is not testimonial: *United States v. Barker*, 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark*. The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

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* "explicitly 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 "by their nature" not testimonial because they are "made 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 testimonial 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) ("Because 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 "presented by the government for their testimonial value." Accepting that definition would mean that all hearsay is testimonial simply by being offered at trial. The court observed that "*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 it was not written with the intent that it 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 “has 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*, “co-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 “by their nature are not testimonial”) *United States v. Tragas*, 727 F.3d 610 (6th Cir. 2013) (“As 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 “*Crawford* 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*, “the Supreme Court specifically cited *Bourjaily* --- which as here involved a coconspirator’s statement made to a government informant --- 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 to be admissible must be made during the course and in furtherance of the conspiracy, they cannot be 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 “co-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) (“co-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 “confrontation 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 “were 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 narcotics prosecution, 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 “clearly were not made under circumstances which would have led [Darryl] 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 “bragging 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 --- who was unavailable for the second trial --- 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 constitutionally ineffective 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 --- that court found “baseless” 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 “[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 “adequate opportunity to cross-examine” the witness: enough to provide the jury with “sufficient 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 “the 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 “there is some question whether a preliminary hearing necessarily offers an adequate opportunity to cross-examine for Confrontation Clause purposes” but concluded that there was “reasonable room for debate” on the question, and therefore the state court’s decision to align itself on one side of the argument was 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 "to 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 "not 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 officer---the 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* --- it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" 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 found 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 two criminal associates in a prison yard. The court held that the statements were non-testimonial, because neither of the declarants "held 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 “only 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: “To 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, by 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 --- 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 “intent 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 --- and that all of them must be primarily motivated to have the statement used in a criminal prosecution for the statement to be testimonial.

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 --- 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, were 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*: “There 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 “stressed 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 “the 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 “the 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 “would 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 “they 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 “and 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, “under *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: “A 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 “is 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 “looks like a casual, confidential discussion between co-conspirators.”

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 fiancée 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 “not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks.”

Accomplice statements to cellmate were 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.

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 “[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.

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 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. And 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 “part 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 one of 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 --- or even all conceivable statements in response to police interrogation --- 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 --- and admitted as an excited utterance under a state rule of evidence --- was not testimonial under *Davis* and *Crawford*. The Court applied the test for testimoniality established by *Davis* --- whether the primary motive for making the statement was to have it used in a criminal prosecution --- 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 “ongoing emergency” at the time of the encounter is among the most important circumstances informing the interrogation's primary 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 --- 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 “primary 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 “primary purpose” was “to 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 primary purpose “to 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 “to meet an ongoing emergency” --- 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 --- apprehending a suspect with a gun --- 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 --- 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 “in real time, as she witnessed them transpire”; 2) she specifically requested police assistance; 3) the dispatcher’s questions were tailored to identify “the location of the emergency, its nature, and the perpetrator”; and 4) the daughter was “hysterical 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 “primary 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 “legal 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 “usually 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 “just” 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 “imminent personal peril” when the call was made and therefore her report was not testimonial. The court also found that the 911 operator’s questioning of the caller did not make the answers testimonial, because “it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher --- a question that only momentarily interrupted an otherwise continuous stream of consciousness.”

911 call --- including statements about the defendant’s felony status --- was 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 “primary 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 --- 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 “each caller simply reported his observation of events as they unfolded”; the 911 operators were not attempting to “establish or prove past events”; and “the 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 "fixing 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 "a 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 "that'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 "testimonial" 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 --- 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: “In 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 testimonial because it was not the kind of statement that was equivalent to courtroom testimony. The court had “no 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 “was 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 --- and thus the report about it to the police officers --- was to rescue the son. The court noted that throughout the event the mother was "very nervous, shaking, and crying in response to continuous ransom demands and threats to her son's life." Thus the agents faced an "emergency situation" and "the 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 "primarily 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 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 --- 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 over cases that present the same facts as *Williams*. And many 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. Law*, 528 F.3d 888 (D.C. Cir. 2008): The court found that an expert's testimony about the typical practices of narcotics dealers did not violate *Crawford*. While the testimony was based on interviews with informants, "Thomas testified based on his experience as a narcotics investigator; he did not relate statements by out-of-court declarants to the jury."

Note: This opinion precedes *Williams* and is questionable if you count the votes in *Williams*. But the case is quite consistent with the Alito opinion in *Williams* and many --- allowing the expert to use testimonial hearsay as long as the hearsay is not introduced at trial and the expert is not simply parroting the hearsay. And 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 than 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) (“[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) (“ [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 “say what are the results of the test,” and he did exactly that, responding “[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 *Ramos-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 “it 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.

See also Barbosa v. Mitchell, 812 F.3d 62 (1st Cir. 2016): On habeas review, the court found it not clearly established that expert reliance on a testimonial lab report violates the Confrontation Clause. The defendant was convicted in the time between *Melendez-Diaz* and *Williams*. The Court held that, “[t]o the contrary, four Justices [in *Williams*] later read *Melendez-Diaz* as not establishing at all, much less beyond doubt” the principle that such testimony violates the Confrontation Clause.

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 "it 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 "only if he communicated out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion." *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).

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 "pure instrument read-out." The court stated that "[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*: "[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 recognized that it is “appropriate 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. “Instead, each expert presented his independent judgment and specialized understanding to the jury.” Because the experts “did not become mere conduits” for the testimonial hearsay, their consideration of that hearsay “poses no *Crawford* problem.” *Accord United States v. Ayala*, 601 F.3d 256 (4th Cir. 2010) (no violation of the Confrontation Clause where the experts “did 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 “did 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.

Note: These cases are in doubt if you count the votes in *Williams*, but most courts have come to the same result after *Williams*: Finding no confrontation problem where an expert relies on testimonial hearsay, so long as the hearsay is not admitted into evidence and the expert draws his own conclusion from the data (rather than just parroting it).

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 “the question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay.” In this case, “we 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 as 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 “[t]he record is devoid of evidence that this was, in fact, the sequence of Dayton’s analysis, to Garcia’s prejudice.”

Police officer’s reliance on statements from people he had arrested for drug crimes did not violate *Crawford*: *United States v. Collins*, 799 F.3d 554 (6th Cir. 2015): In a trial involving manufacture of methamphetamine, a law enforcement officer testified as an expert on the conversion ratio between pseudoephedrine and methamphetamine. He relied in part on statements from people he had interviewed after he had arrested them for manufacturing

methamphetamine. The court found no plain error because there was “no evidence that the suspected methamphetamine manufacturers Agent O’Neil questioned throughout his career ‘intended to bear testimony’ against Collins or his co-defendants.” Thus the expert was not relying on testimonial hearsay.

Note: The court appears to be applying --- maybe without realizing it --- Justice Alito’s definition of testimoniality in *Williams*. The court is saying that the arrestees did not *target* their testimony toward the defendant. But under the view of five Justices in *Williams*, the statements of the arrestees would probably be testimonial, as they were under arrest --- just like Mrs. Crawford --- and the statements could be thought to be motivated toward *some* criminal prosecution.

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 “data 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 “insist 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* --- 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 rely 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 “notes” 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 --- 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 --- 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 “casts 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, "Block 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 "certified" and so was formal under the Thomas view. But the court noted that the analysts did not formally certify the results --- 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 "both 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 “Maxwell 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 --- whether the composite tested by the expert witness was in fact derived from what was found in the car --- and the court observed that "it 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 "chain of custody alone does not implicate the Confrontation Clause" as it is "not 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 "is 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 "was 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 --- which the court found to be permissible under Rule 703. The court observed that "[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 "simply 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 “we 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 “might find” that the expert’s reliance on the lab test in this case was for its truth. But “we 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 “solemnity” 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 “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 4-1-4 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, where expert applied his own expertise. *United States v. Kamahale*, 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 "only when the expert is simply parroting a testimonial fact." The court noted that in this case the expert "applied 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. *Compare United States v. Garcia*, 793 F.3d 1194 (10th Cir. 2015) (gang-expert's testimony violated the Confrontation Clause, where he parroted statements from former gang members that were testimonial hearsay: "The government cannot plausibly argue that Webb applied his expertise to this statement. It involves no interpretation of gang culture or iconography, no calibrated judgment based on years of experience and the synthesis of multiple sources of information. He simply relayed what DV gang members told him. Admission of the testimony violated the Confrontation Clause.").

Forfeiture

Constitutional standard for forfeiture --- like Rule 804(b)(6) --- 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 invoke the Confrontation Clause, because he murdered 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 "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial --- 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 --- 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 "surely 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 "perverse 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* "foreclose" 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, "the 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 "Bass 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*, “the 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* “strongly suggest, if not squarely hold, that the preponderance standard applies.” On the facts, the court concluded that “the 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 to 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, with the intent to keep the witness from testifying.

Note: The court says that a defendant’s mere “acquiescence” is not enough to justify forfeiture. That language might raise a doubt as to 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.

A different panel of the Ninth Circuit, in a case decided around the same time as *Carlson*, upheld a finding of forfeiture based on conspiratorial liability. See *United States Cazares*, 788 F.3d 956 (9th Cir. 2015).

The *Carlson* court noted that the restyled Rule 804(b)(6) provides that mere passive agreement with the wrongful act of another is not enough to find forfeiture, but that that forfeiture can be found if a defendant “acquiesced in wrongfully causing” the absence of the witness --- and that would include joining a conspiracy where one of the foreseeable consequences is to kill witnesses. The court found the restyling to be a helpful clarification of what the original rule meant by “acquiescence.”

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: “any 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 “prior testimony that the defendant was unable to cross-examine” is one of the “core 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 “testimonial” (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 "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. 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 narcotics prosecution, 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 “produced” 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 --- contradictions, hesitations, and other clues often used to test credibility --- are lost, and instead a veneer of objectivity conveyed.

* * *

Whatever locution is used, out-of-court statements admitted at trial are “statements” 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 “out-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 that a statement is 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 “in 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 “to 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, "anything he said was meant not as an accusation in its own right but as bait."

Note: Other courts, as seen in the "Not 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 --- 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 "a declarant's understanding that a statement could potentially serve as criminal evidence does not necessarily denote testimonial intent" and that "just because recorded statements are used at trial does not mean they were created for trial." The court also noted that a prison "has significant institutional reasons for recording phone calls outside or procuring forensic evidence --- i.e., policing its own facility by monitoring prisoners' contact with individuals outside the prison."

Following *Clark*, the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker*, 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark*. The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

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 “unknowingly 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 “narrow characterization of nontestimonial statements.” The court relied on the statement in *Giles v. California* that “statements 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 “statements 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 “reasonably anticipate” that the note would be passed on to law enforcement --- especially because the declarant was a former police officer.

Note: The court’s “reasonable 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 “primary motivation” of the speaker. In this case, the “primary 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 --- 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 “solemn declaration” or a “formal statement.” Rather, Johnson was more likely making a casual remark to an acquaintance. We simply cannot conclude Johnson made a “testimonial” 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 “statements 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 “testimonial” 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 "mere 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, "the 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); *United States v. Aifang Ye*, 808 F.3d 395 (9th Cir. 2015) (adhering to pre-*Crawford* case law that a translator acting as a language conduit does not implicate the Confrontation Clause, because that case law "is not clearly irreconcilable with *Crawford*"; finding on the facts that the translator was a language conduit, by applying the four-factor test from *Orm Hieng*). .

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, Tips to Law Enforcement, 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 "testimonial," 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 --- 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 "the term 'testimonial' at a minimum applies to police interrogations." The court also noted that the statement was sworn and that a person who "makes 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).

Circuit Court's opinion that an anonymous tip to law enforcement is testimonial was reversed by the Supreme Court on AEPDA grounds: *Etherton v. Rivard*, 800 F.3d 737 (6th Cir. 2015), *rev'd sub nom.*, *Woods v. Etherton*, 136 S.Ct. 1149 (2016): On habeas review, the court held that an anonymous tip to law enforcement, accusing the defendant of criminal misconduct, was testimonial. It further held that the defendant's right to confrontation was violated at his trial where the tip was admitted into evidence for its truth. It noted that "[t]he prosecutor's repeated references both to the existence and the details of the tip went far beyond what was necessary for background --- thereby indicating the content of the tip was admitted for its truth." **But the Supreme Court, in a per curiam opinion, reversed the Sixth Circuit**, holding that it gave insufficient deference to the state court's determination that the anonymous tips were properly admitted for the non-hearsay purpose of explaining the context of the police investigation. The Court stated that a "fairminded jurist" could conclude "that repetition of the tip did not establish that the uncontested facts it conveyed were submitted for their truth. Such a jurist might reach that

conclusion by placing weight on the fact that the truth of the facts was not disputed. No precedent of this Court clearly forecloses that view.”

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 --- that she did not have access to the floor safe --- 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, “How 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 “testimony 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.

Investigative Reports

Reports by a law enforcement officer on prior statements made by a cooperating witness were testimonial: *United States v. Moreno*, 809 F.3d 766 (3rd Cir. 2016): After a cooperating witness testified on direct, defense counsel attacked his credibility on the ground that he had made a deal. On redirect, the trial court allowed the witness to read into evidence the reports of a law enforcement officer who had interviewed the witness. The reports indicated that the witness had made statements consistent with his in-court testimony. The court of appeals found a violation of the Confrontation Clause, because the officer's hearsay statements (about what the witness had told him) were testimonial and the officer was not produced for cross-examination. The court found that the reports were "investigative reports prepared by a government agent in actual anticipation of trial."

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 "does 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 “no 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 “was not made in anticipation of future litigation”).

Law Enforcement Involvement

Following *Clark*, the court finds that a report of sex abuse to a nurse by a 4 ½ year old child is not testimonial: *United States v. Barker*, 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4 ½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark*. The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse's primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

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 “extract 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 “were 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 “this 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 found it important that 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 “was 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, and the court did not do this.

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: “Where 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 “medical statements” and distinguishing *Bordeaux* and *Bobodilla* as cases where statements were essentially made to law enforcement officers and not for treatment purposes).

Machine-Generated Information

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 --- 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 alcohol, 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 "statements" of the machines themselves, not their operators. But "statements" 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 "pure instrument read-out" did not violate the Confrontation Clause because such a read-out is not "testimony").

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 "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone."

Google satellite images, and machine-generated location markers, are not hearsay and therefore, even if prepared for trial, their admission does not violate the Confrontation Clause: *United States v. Lizarraga-Tirado*, 789 F.3d 1107 (4th Cir. 2015): The defendant was convicted of illegal entry as a previously removed alien. The defendant contended that when he was arrested, he was still on the Mexican side of the border. At trial the arresting officer testified that she contemporaneously recorded the coordinates of the defendant's arrest using a handheld GPS device. To illustrate the location of these coordinates, the government introduced a Google Earth satellite image. The image contained a "tack" showing the location of the coordinates to be on the United States side of the border. There was no testimony on whether the tack was automatically generated or manually placed and labeled. The defendant argued that both the satellite image and the tack were inadmissible hearsay and that their admission violated his right to confrontation. As to the satellite image itself, the court found that "[b]ecause a satellite image, like a photograph, makes no assertion, it isn't hearsay." The court found the tack to be a more difficult question. It noted that "[u]nlike a satellite image itself, labeled markers added to a satellite image do make clear assertions. Indeed, that is what makes them useful." The court concluded that if a tack is placed manually and then labeled, "it's classic hearsay" --- for example, a dot manually labeled with the name of a town "asserts that there's a town where you see the dot." On the other hand, "[a] tack placed by the Google Earth program and automatically labeled with GPS coordinates isn't hearsay" because it is completely machine-generated and so no assertion is being made.

In this case, the court took judicial notice that the tack was automatically generated because the court itself accessed Google Earth and typed in the same coordinates to which the arresting officer testified --- which resulted in a tack identical to the one shown on the satellite image admitted at trial. Thus the program "analyze[d] the GPS coordinates and, without any human intervention, place[d] a labeled tack on the satellite image." The court concluded that "[b]ecause the program makes the relevant assertion --- that the tack is accurately placed at the labeled GPS coordinates --- there's no statement as defined by the hearsay rule." The court noted that any issues of malfunction or tampering present questions of authenticity, not hearsay, and the defendant made no authenticity objection. Finally, "[b]ecause the satellite images and tack-coordinates pair weren't hearsay, their admission also didn't violate the Confrontation Clause."

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 "the witnesses with whom the Confrontation Clause is concerned are *human* witnesses" and that the purposes of the Confrontation Clause "are 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 “incorporates 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 “primary 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 --- 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.

Following *Clark*, the court finds that a report of sex abuse to a nurse by a 4½ year old child is not testimonial: *United States v. Barker*, 820 F.3d 167 (5th Cir. 2016): The court held that a statement by a 4½ year-old girl, accusing the defendant of sexual abuse, was not testimonial in light of *Ohio v. Clark*. The girl made the statement to a nurse who was registered by the state to take such statements. The court held that like in *Clark* the statement was not testimonial because: 1) it was made by a child too young to understand the criminal justice system; 2) it was not made to law enforcement; 3) the nurse’s primary motive was to treat the child; and 4) the fact that the nurse was required to report the abuse to law enforcement did not change her motivation to treat the child.

Statements admitted under Rule 803(4) are presumptively non-testimonial: *United States v. Peneaux*, 432 F.3d 882 (8th Cir. 2005): “Where 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 “Made 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. Pflizer*, 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 “were 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 “watershed” 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* is not retroactive (the holding in *Bochtig*) 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 “confronted.” [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 “statement” to include “nonverbal conduct,” but only if the person whose conduct it was “intended it as an assertion.” We can’t fit the videotape in 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 “testimony” as “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” The photographs did not meet that definition because they “were not ‘witnesses’ against Brooks. They did not ‘bear testimony’ by declaring or affirming anything with a ‘purpose.’”

See also the cases under the heading “Machine-Generated Evidence” supra.

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 admitting the informant's part of the conversation violated his right to confrontation because the informant was motivated to develop the conversation 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 statements regarding the drug transaction. (And the defendant had no right to confront his own statements). 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* --- 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* "does 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 "but 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 not admitted for its truth. The question from *Williams* is whether those five Justices (now four, actually) 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 “was 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 “[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 “to 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 “not-for-truth” argument. Both Justices Kagan and Thomas agree with the Court’s statement in *Crawford* that the Confrontation Clause “does 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 “not-for-truth” headnote are probably unaffected by *Williams*, as they largely permit admission of testimonial statements as offered “not-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.*

Also it should be noted that one of the “five members” of the Court that rejected Justice Alito’s broader “not-for-truth” reasoning is no longer on the Court.

Statements by informant to police officers, offered implausibly to prove the “background” 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 “the 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 --- 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* --- 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 “information 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 “was 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 “background” 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 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 "little 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 "eleven 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 --- 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 “if the government merely wanted to explain why the FBI and police failed to conduct a more thorough investigation it could have had the agent testify in a manner that entirely avoided referencing Cruz’s confession” --- for example, by stating that the police chose to truncate the investigation “because of information the agent had.” But the court held that this kind of sanitizing of the evidence was not required, because it “would have come at an unjustified cost to the government.” Such generalized testimony, without any context, “would not have sufficiently rebutted Ayala’s line of questioning” because it would have looked like one more cover-up. The court concluded that “[w]hile there can be circumstances under which 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: “The 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 “does 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 “the 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: "It 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 "context" 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 "provided in a testimonial setting." It noted first that to the extent the statements were false, they did not violate *Crawford* because "*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 some 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 "were 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 "our 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 some Justices in *Williams* rejected the "not-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 "is 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 --- recorded and sworn civil deposition testimony." Ultimately the court found it unnecessary to determine whether the deposition testimony was "testimonial" within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony "to 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 --- by showing it was inconsistent with the accomplice's refusal to answer certain questions concerning the defendant's involvement with the crime --- did not violate *Crawford* because the statement was not admitted for its truth and the jury received a limiting instruction to that effect); *United States v. Smith*, 822 F.3d 755 (5th Cir. 2016)(testimonial statement from an accomplice did not violate the Confrontation Clause because it was "introduced in the context of how Agent Michalik developed suspects . . . for the charged bank robberies. This court has consistently held that out-of-court statements providing background information to explain the actions of investigators are not hearsay" and so do not violate the Confrontation Clause).

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 --- because it was an accusation made to a police officer --- but it was not hearsay and therefore its admission did not violate Deitz's right to confrontation. The court found that admitting the testimony "explaining 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 "had 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 the defendant's wife's statement to police accusing the defendant of sexual abuse; the court found no error because it was offered for the limited purpose of explaining why an official investigation began: "Two 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 ---and so even though testimonial did not violate the defendant’s right to confrontation --- 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 “to 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: “Davidson’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 “minimal 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 “context,” 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 “to show why the police conducted a sting operation” against the defendant. But the court disagreed and found a *Crawford* violation. It reasoned that “details 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 “background” 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, “because the testimony did not bear on Gibbs’s alleged possession of the .380 Llama pistol with which he was charged.” Rather, it was admitted “solely 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 “context”: *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 "context." 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 "context" doctrine, stating: "We 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 "put 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: "*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: "Where 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: "we 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: "Gaytan'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 "putting words in Gaytan's mouth"); *United States v. Foster*, 701 F.3d 1142 (7th Cir. 2012) ("Here, 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. Faruki*, 803 F.3d 847 (7th Cir. 2015) (no confrontation violation where out-of-court statements were offered to place the defendant’s own statements in context).

For more on “context” see *United States v. Wright*, 722 F.3d 1064 (7th Cir. 2013): In a drug prosecution, the defendant’s statement to a confidential informant that he was “stocked up” would have been unintelligible without providing the context of the informant’s statements inquiring about drugs, “and a jury would not have any sense of why the conversation was even happening.” The court also noted that “most of the CI’s statements were inquiries and not factual assertions.” The court expressed concern, however, that the district court’s limiting instruction on “context” was boilerplate, and that the jury “could 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 “context” 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 context is a pretext and the statement is in fact offered for the 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 “intelligence 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 “for purposes other than proving the truth of the matter asserted.” *See also 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).

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 “the problem that *Crawford* addresses is the admission of hearsay” and the witness’s statement was not hearsay. It was not admitted for its truth --- that the witness saw the man he described pointing a gun at people --- but rather “to 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: “for example, why they looked across the street * * * and why they handcuffed Taylor when he approached.” The court noted that absent “complicating circumstances, such as a prosecutor who exploits nonhearsay statements for their truth, nonhearsay testimony does not present a confrontation problem.” The court found no “complicating circumstances” in this case.

Note: The Court’s reference in *Taylor* to the possibility of exploiting a not-for-truth purpose 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 “foundation 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 "were 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 --- 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 --- that he got guns from the defendant --- were not properly offered for context but rather were testimonial hearsay: "The 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 --- after defense counsel had questioned the connection of the defendant to the residence --- 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 "only 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 did not dispute the propriety of the investigation. 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, "a 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) ("In 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 --- 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: "From 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, "come 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: "If 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 "Clean" who was accompanied by a man named Charmar. The officer who took this statement testified that he entered "Charmar" into a database to help identify "Clean" and the database search led him to the defendant. The court found no error in admitting the victim's statement, stating that "it 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 "was only a

subterfuge to get Williams' statement about Brown before the jury." But the court responded that the defendant "did 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, "it 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 --- indeed they were not admitted at all. The court noted that there was "no 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 "the 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 “to 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.”

Statement offered for impeachment was not hearsay and therefore admission did not violate the defendant’s right to confrontation: *United States v. Cotton*, 823 F.3d 430 (8th Cir. 2016): “Cotton first argued that admission of Frazier’s post-arrest statement violated his rights under the Confrontation Clause. Because the statement was offered for impeachment [as a prior inconsistent statement of a hearsay declarant] and not to prove the truth of the matter asserted, there was no Confrontation Clause violation in this case.”

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 “it 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 “as 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: “The 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.); *United States v. Ibarra-Diaz*, 805 F.3d 908 (10th Cir. 2015) (confidential informant’s statements to a police officer about the defendant’s interest in doing a drug deal were testimonial, but the right to confrontation was not violated because the statements were offered to “explain why the officer did not put a body wire on the CI for this significant drug transaction --- i.e., because, unlike situations where the detective is in control of the informant from the outset and * * * of the circumstances of the informant’s dealings with a potential target, in this instance the CI just called the detective ‘out of the blue’ about the possible drug transaction”; other statements from accomplices were properly admitted because they were not offered for their truth but to explain the conduct of the detective who heard the statements).

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, “that 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 “there 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 “were 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 --- together with the bystander's answers to questions from the 911 operators --- 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 --- 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 of 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 "the 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 “buy-bust” operation, the defendant argued that hearsay statements of DEA agents at the scene --- which were admitted as present sense impressions ---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, “by 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 “was 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.

Records, Certificates, Etc.

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 “certificates of analysis” showing the results of the forensic tests performed on the seized substances. The certificates stated that “the 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 “testimonial” 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 “testimonial” statements. The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that “[w]e can safely assume that the analysts were aware of the affidavits’ evidentiary purpose, since that purpose --- as stated in the relevant state-law provision --- was reprinted on the affidavits themselves.”

The implications of *Melendez-Diaz* --- beyond requiring a live witness to testify to the results of forensic tests conducted primarily for litigation --- 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 “documents 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 --- 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 “accusatory” 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 “contemplates two classes of witnesses: 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*. 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, “the 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]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 because a machine can’t make a “statement,” and have also held that a machine’s output is not “testimony” within the meaning of the Confrontation Clause. This case law appears to survive the Court’s analysis in *Melendez-Diaz* 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)(A)(ii) and (A)(iii).

6. In response to an argument of the dissent, the majority states that certificates that merely authenticate proffered documents are not testimonial. As seen below, this probably means that certificates of authenticity prepared under Rules 902(11), (13) and (14) may be admitted without violating the Confrontation Clause.

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 --- it was prepared by a public officer in the regular course of his official duties --- and although the clerk was certainly not a “conventional 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 a certificate of absence of a public record 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.

It should be noted that the continuing viability of *Melendez-Diaz* has been placed into some doubt by the death of Justice Scalia, who wrote the majority opinion.

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*, 564 U.S. 647 (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. Justice 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.

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 “that 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 “mechanically 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 “the 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 “are 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 “is 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 the certificate is 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 “statements 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 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 “resemble 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) (“The 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 “the 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, 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* --- despite the fact that both records were prepared with the knowledge that they would 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.

Note that the Seventh Circuit, in a case after *Melendez-Diaz*, adhered fully to its ruling in *Ellis* that business records are not testimonial. *United States v. Brown*, 822 F.3d 966 (7th Cir. 2016) (relying on *Ellis* to find that Western Union records of wire transfers were not testimonial: “Logically, if they are made in the ordinary course of business, then they are not made for the purpose of later prosecution.”).

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: Three circuits have held that the reasoning of *Ellis* remains sound after *Melendez-Diaz*, and that 902(11) 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 --- 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, “as 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*: “Not 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 are quite probably non-testimonial, because the *Melendez-Diaz* majority states that a certificate is not testimonial if it does nothing more than authenticate another document --- and specifically uses as an example a certificate of conviction.

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 of authenticity of a record (in that case documents in an A-file) are not testimonial in nature, because they “did 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 “a 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 “are 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*, “the 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 “tool 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]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 “any 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, where the records themselves 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 “it 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 --- they “respond[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.

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 5-1405(b)(11) to investigate “[d]eaths for which the Metropolitan Police Department [“MPD”], 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: “Mobile crime diagram (not [Medical Examiner] --- use for info only).” Still another report included a “Supervisor's Review Record” from the MPD Criminal Investigations Division commenting: “Should 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 “reports.” These factors, combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are “circumstances which would lead an objective

witness reasonably to believe that the statement would be available for use at a later trial.” *Melendez-Diaz*, 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. *See also United States v. McGill*, 815 F.3d 846 (D.C.Cir. 2016) (relying on *Moore* to find a Confrontation violation where drug analysis reports and autopsy reports were admitted through testimony from witnesses other than the reports’ authors).

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 *Melendez-Diaz* 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, 133-34 (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 “clearly 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. 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 “primarily to be used in court proceedings.” Rather it was a record prepared as “a 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 “documents 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 “primary 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 --- 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 --- 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 “known 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 --- and the manufacturer’s assurance about it --- 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 “prior 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 “not 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 report --- called a “CP Report”--- 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 “suspect” screen name, email address, and IP address --- and Yahoo did not treat its customers as “suspects” 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 “[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 “no 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: “Yahoo’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. “The 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 --- stating that autopsy reports were not testimonial --- was still valid. The court adhered to its view that “routine” autopsy reports were not testimonial because they are not prepared with the primary motivation that they will be used in a criminal trial. Applying the test of “routine” to the facts presented, the court found as follows:

Somaipersaud's autopsy was nothing other than routine --- 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 “something in the order of ten percent of deaths investigated by the OCME lead to criminal investigations.” It distinguished the 11th Circuit’s opinion --- discussed below --- which found an autopsy report to be testimonial, noting that “the 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 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 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 “the 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 “common 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 “business 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 “qualified 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 --- and because the accomplice was not produced to testify --- 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 --- the cohort's production of the records at a proffer session --- 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 --- and the certifications to the logs provided by the pharmacies --- 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 “the 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) ---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 “targeted 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 "at 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 "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 "witnesses against him" in the Sixth Amendment could be interpreted as at the time the statement was made, it was being directed at the defendant. The Duron-Caldera court reads "witnesses" as of the time the statement is being introduced. But at that time, the witness is not there. All the "witnessing" 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 "against 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.

Pseudoephedrine purchase records are not testimonial: *United States v. Collins*, 799 F.3d 554 (6th Cir. 2015): Relying on the Fifth Circuit's decision in *United States v. Towns*, *supra*, the court held that pharmaceutical records of pseudoephedrine purchases were not testimonial. The court noted that while law enforcement officers use the records to track purchases, the "system is

designed to prevent customers from purchasing illegal quantities of pseudoephedrine by indicating to the pharmacy employee whether the customer has exceeded federal or state purchasing restrictions” and accordingly was not primarily motivated to generate evidence for a prosecution.

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 “[p]reparing an exhibit for trial is not itself testimonial.”

Records of wire transfers are not testimonial: *United States v. Brown*, 822 F.3d 966 (7th Cir. 2016): In a drug prosecution, the government offered records of Western Union wire transfers. The court found that the records were not testimonial, noting that “[l]ogically, if they are made in the ordinary course of business, then they are not made for the purpose of later prosecution.” It concluded that the records were “routine and prepared in the ordinary course of business, not in anticipation of prosecution.”

Note: The Western Union records in *Brown* were proven up by way of certificates offered under Rule 902(11). The court did not even mention any possible concern that those certifications would themselves be testimonial. It focused only on the testimoniality of the underlying records.

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, “*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 “*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) (*Melendez-Diaz* 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, the court stated that “[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 “[b]oth the majority and dissenting opinions in *Melendez-Diaz* noted that a clerk's certificate authenticating a record --- or a copy thereof --- for use as evidence was traditionally admissible even though the certificate itself was testimonial, having been prepared for use at trial.” It concluded that “[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 --- not for use at trial. The court stated that “[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.”

Certificates attesting to Indian blood are not testimonial: *United States v. Rainbow*, 813 F.3d 1097 (8th Cir. 2016): To prove a jurisdictional element of a charge that the defendants committed an assault within Indian Country, the government offered certificates of degree of Indian blood. The certificates certified that the respective defendants possessed the requisite degree of Indian blood. The defendants argued that, because the certificates were formalized and prepared for litigation, they were testimonial and so admitting them violated their right to confrontation. The certificates were prepared by a clerk of an officer of the BIA, and introduced at trial by the assistant supervisor of that office. The certificates reflected information about what was in records regularly kept by the BIA. The court found that the certificates were not testimonial. It explained as follows:

Although Archambault [the assistant supervisor] testified that he had these particular certificates prepared for his testimony, BIA officials regularly certify blood quantum for the purpose of establishing eligibility for federal programs available only to Indians. Archambault explained that his office maintained the records of tribal enrollment and of each member's blood quantum. He could look up an individual's enrollment status and blood quantum at any time—that information existed regardless of whether any crime was committed. Unlike the analysts in *Melendez–Diaz* and *Bullcoming*, the enrollment clerk here did not complete forensic testing on evidence seized during a police investigation, but instead performed the ministerial duty of preparing certificates based on information that was kept in the ordinary course of business. An objective witness would not necessarily know that the certificates would be used at a later trial, because certificates of degree of Indian blood are regularly used in the administration of the BIA's affairs. Simply put, the enrollment clerk prepared certificates using records maintained in the ordinary course of business by the Standing Rock Agency, and the BIA routinely issues certificates in the administration of its affairs. Thus, the certificates were admissible as non-testimonial business records.

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 --- 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 --- indeed as part of --- 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 Philippines 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 “created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial.” *Melendez-Diaz*, 129 S.Ct. at 2539–40. But Exhibit 1 is not a copy or duplicate of a birth certificate. Like the certificates of analysis at issue in *Melendez-Diaz*, despite being labeled a copy of the certificate, Exhibit 1 is “quite 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 the defendant's 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 (by sending her the notice) 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 “clearly 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 “neither 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 “small fraction of these warrants are used in immigration prosecutions.” The court concluded that “*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal --- or, for that matter, any business or public record --- 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 --- which apprises the alien of the determination that he is removable --- was non-testimonial because its “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, 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 “is 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 Rule’s apparent exclusion of 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 --- which is the charging document for deportation --- are not testimonial in an illegal entry case; the primary purpose of a notice of removal “is 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: “The 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.”)..

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 a --- Warrant of Removal, a Warning to Alien ordered Deported, and the Order from the Immigration Judge --- 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 the making of a concession 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 “a 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. (The court appears wrong about the hearsay rule because statements coming from the alien would be admissible as party-opponent statements in a public record.)

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. “No 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 *Melendez-Diaz* for the proposition that “[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because --- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial --- they 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 in criminal cases. 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 "simply 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: "A 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 ("Contrary 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* “dispositive” 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 --- whereas the certificate of authenticity “does 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 “were 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 admissible. 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 --- 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 United 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 “[b]usiness records are not testimonial.” And “[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 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 by an arm of law enforcement. The court reasoned as follows:

We think the autopsy records presented in this case were prepared “for 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 “shall determine the cause of death” in a variety of circumstances and “shall, 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. Failure to do so is a first degree misdemeanor.

* * *

In light of this statutory framework, and the testimony of Dr. Minyard, the autopsy reports in this case were testimonial: “made 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 “testimonial” within the meaning of *Crawford*. The court explained that the statements “were 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 --- 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 "Acosta 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. *See also, United States v. Smith*, 822 F.3d 755 (5th Cir. 2016) (defendant's accomplice gave testimonial statements to a police officer, but admission of those statements did not violate the right to confrontation because the accomplice testified at trial subject to cross-examination).

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. "Under *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 --- 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 "could 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 "*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. "He 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) (“Although 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 --- 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 “failure to seize this opportunity demolishes his Sixth Amendment claim.” The court observed that the defendant had a better opportunity to confront the victim “than 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 --- as is necessary to qualify a record under Rule 803(5) --- 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 --- presumably to discredit the basis for the police having targeted the defendant. The trial court then on redirect 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 “a confidential informant’s statement to a law enforcement officer are clearly testimonial.” But the court concluded that the defendant “opened 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) (“the 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”).

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