ADVISORY COMMITTEE
ON
EVIDENCE RULES

Charleston, South Carolina
October 5, 2012

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ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Charleston, South Carolina

October 5, 2012

I. Opening Business

Opening business includes:

- Approval of the minutes of the Spring, 2012 meeting;
- A report on the June, 2012 meeting of the Standing Committee;
- A tribute to departing members Bill Hangley and Marjorie Meyers; and
- A review and assessment of the Rule 502 Symposium, which takes place on the morning of the meeting.

II. Proposed Amendment to Rule 803(10)

The proposed amendment to Rule 803(10) was approved by the Standing Committee and is scheduled to become effective on December 1, 2013. The agenda book contains a short memorandum on the proposed amendment.

III. Possible Amendment to Rule 801(d)(1)(B)

The proposed amendment to Rule 801(d)(1)(B) has been released for public comment. The agenda book contains a short memorandum on the proposal.

IV. Possible Amendments to Rules 803(6), 803(7) and 803(8)

The proposed amendment to Rules 803(6), (7), and (8) have been released for public comment. The agenda book contains a short memorandum on the proposals.

V. *Crawford* and *Williams v. Illinois*

The Supreme Court's recent decision in *Williams v. Illinois* has brought uncertainty and confusion to the question of how the Confrontation Clause interacts with the Federal Rules of Evidence — specifically the hearsay exceptions and Rule 703. The agenda book contains a memorandum discussing the impact of *Williams* on the Evidence Rules. That memorandum includes a description of all of the cases applying *Williams*, as well as an analysis of the post-*Crawford* federal circuit cases.

At the meeting, Paul Shechtman, Professor Broun, and the Reporter will conduct a roundtable discussion on the meaning and import of *Williams.*

VI. Symposium on Technology and the Federal Rules of Evidence

The Evidence Rules Committee is sponsoring a symposium on whether the Evidence Rules should be amended to accommodate technological advances in the presentation of evidence. This symposium will take place on the morning before the Fall, 2013 meeting of the Committee. The agenda book contains a short memo on the plans for the symposium.

VII. Privilege Project

Professor Broun will provide an oral report on the Privilege Project.

VIII. Next Meeting

The next meeting of the Committee is scheduled for Friday May 3, 2013, in Miami.

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair, Advisory Committee on Evidence Rules	**Honorable Sidney A. Fitzwater** Chief Judge United States District Court Earle Cabell Federal Bldg. and U.S. Courthouse 1100 Commerce Street, Room 1528 Dallas, TX 75242-1310
Reporter, Advisory Committee on Evidence Rules	**Professor Daniel J. Capra** Fordham University School of Law 140 West 62nd Street New York, NY 10023
Members, Advisory Committee on Evidence Rules	**Honorable Brent R. Appel** Iowa Supreme Court Iowa Judicial Branch Building 1111 East Court Avenue Des Moines, IA 50319 **Honorable Anita B. Brody** United States District Court 7613 James A. Byrne United States Courthouse 601 Market Street Philadelphia, PA 19106-1797 **Honorable Stuart M. Goldberg** Principal Associate Deputy Attorney General (ex officio) United States Department of Justice 950 Pennsylvania Avenue, N.W. – Room 4208 Washington, DC 20530 **William T. Hangley, Esq.** Hangley, Aronchick, Segal & Pudin, P.C. One Logan Square, 27th Floor Philadelphia, PA 19103-6933 **Marjorie A. Meyers, Esq.** Federal Public Defender Southern District of Texas 440 Louisiana, Suite 1350 Houston, Texas 77002

Members, Advisory Committee on Evidence Rules *(cont'd.)*	**Honorable William K. Sessions III** United States District Court Federal Building 11 Elmwood Avenue, 5th Floor Burlington, VT 05401 **Elizabeth J. Shapiro, Esq.** AD, Federal Programs Branch United States Department of Justice – Civil Division 20 Massachusetts Avenue, N.W. - Room 7152 Washington, DC 20530 **Paul Shechtman, Esq.** Zuckerman Spaeder LLP 1185 Avenue of the Americas, 31st Floor New York, NY 10036 **Honorable John A. Woodcock, Jr.** Chief Judge United States District Court Margaret Chase Smith Federal Building 202 Harlow Street, 3rd Floor Bangor, ME 04401-4901
Consultant, Advisory Committee on Evidence Rules	**Professor Kenneth S. Broun** University of North Carolina School of Law CB #3380, Van Hecke-Wettach Hall Chapel Hill, NC 27599
Liaison Members, Advisory Committee on Evidence Rules	**Honorable Paul S. Diamond** *(Civil)* United States District Court James A. Byrne United States Courthouse 601 Market Street, Room 6613 Philadelphia, PA 19106 **Honorable John F. Keenan** *(Criminal)* United States District Court 1930 Daniel Patrick Moynihan U.S. Courthouse 500 Pearl Street New York, NY 10007-1312 **Honorable Richard C. Wesley** *(Standing)* United States Court of Appeals Livingston County Government Center Six Court Street Geneseo, NY 14454-1043

Liaison Members, Advisory Committee on Evidence Rules *(cont'd.)*	**Honorable Judith H. Wizmur** *(Bankruptcy)* Chief Judge United States Bankruptcy Court Mitchell H. Cohen U.S. Courthouse 2nd Floor – 400 Cooper Street Camden, NJ 08102-1570
Secretary, Standing Committee	**Peter G. McCabe** Secretary Committee on Rules of Practice & Procedure Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 4-180 Washington, DC 20544 Phone 202-502-1800 Fax 202-502-1766 Peter_McCabe@ao.uscourts.gov
Chief Counsel	**Andrea L. Kuperman** Chief Counsel to the Rules Committees 11535 Bob Casey U.S. Courthouse 515 Rusk Ave. Houston, TX 77002-2600 Phone 713-250-5980 Fax 713-250-5213 Andrea_Kuperman@txs.uscourts.gov
Rules Committee Officer	**Jonathan C. Rose** Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Jonathan_Rose@ao.uscourts.gov
Deputy Rules Committee Officer and Counsel	**Benjamin J. Robinson** Deputy Rules Committee Officer and Counsel to the Rules Committees Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1516 Fax 202-502-1755 Benjamin_Robinson@ao.uscourts.gov

LIAISON MEMBERS

Liaison for the Advisory Committee on Appellate Rules	**Dean C. Colson**	***(Standing)***
Liaison for the Advisory Committee on Appellate Rules	**Honorable Adalberto Jordan**	***(Bankruptcy)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Judge James A. Teilborg**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Diane P. Wood**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Marilyn L. Huff**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Judith H. Wizmur**	***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge John F. Keenan**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Peter G. McCabe
Secretary
Committee on Rules of Practice & Procedure
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-180
Washington, DC 20544
Phone 202-502-1800
Fax 202-502-1766
Peter_McCabe@ao.uscourts.gov

Jonathan C. Rose
Rules Committee Officer
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755
Jonathan_Rose@ao.uscourts.gov

Benjamin J. Robinson
Deputy Rules Committee Officer
and Counsel to the Rules Committees
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1516
Fax 202-502-1755
Benjamin_Robinson@ao.uscourts.gov

Julie Wilson
Attorney Advisor
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-250
Washington, DC 20544
Phone 202-502-3678
Fax 202-502-1766
Julie_Wilson@ao.uscourts.gov

James H. Wannamaker III
Senior Attorney
Bankruptcy Judges Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-254
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988
James_Wannamaker@ao.uscourts.gov

Scott Myers
Attorney Advisor
Bankruptcy Judges Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-250
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988
Scott_Myers@ao.uscourts.gov

Bridget M. Healy
Attorney Advisor
Bankruptcy Judges Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-273
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988
Bridget_Healy@ao.uscourts.gov

Bernida D. Evans
Management Analyst
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755
Bernida_Evans@ao.uscourts.gov

FEDERAL JUDICIAL CENTER

Joe Cecil *(Rules of Practice & Procedure)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4084 Fax 202-502-4199 jcecil@fjc.gov	**Marie Leary** *(Appellate Rules Committee)* Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4069 Fax 202-502-4199 mleary@fjc.gov
Molly T. Johnson *(Bankruptcy Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 315-824-4945 mjohnson@fjc.gov	**Emery G. Lee** *(Civil Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4078 Fax 202-502-4199 elee@fjc.gov
Laural L. Hooper *(Criminal Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4093 Fax 202-502-4199 lhooper@fjc.gov	**Tim Reagan** *(Evidence Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4097 Fax 202-502-4199 treagan@fjc.gov

Advisory Committee on Evidence Rules

Members	Position	District/Circuit	Start Date		End Date
Sidney A. Fitzwater Chair	D	Texas (Northern)	2010		2013
Brent R. Appel	JUST	Iowa	2010		2013
Anita Brody	D	Pennsylvania (Eastern)	2007		2013
Paul S. Diamond**	D	Pennsylvania (Eastern)	2009		2012
Stuart M. Goldberg*	DOJ	Washington, DC	----		Open
William T. Hangley	ESQ	Pennsylvania	2006		2012
John F. Keenan**	D	New York (Southern)	2007		2013
Marjorie A. Meyers	FPD	Texas (Southern)	2006		2012
Paul Schectman	ESQ	New York	2010		2013
William K. Sessions III	D	Vermont	2011		2014
John A. Woodcock, Jr.	D	Maine	2011		2014
Daniel J. Capra Reporter	ACAD	New York	1996		Open

Principal Staff: Jonathan C. Rose 202-502-1820

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* Ex-officio

** Ex-officio, non-voting members' terms coincide with terms on Civil & Criminal Rules

TAB 1

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TAB 1A

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Advisory Committee on Evidence Rules

Minutes of the Meeting of April 3, 2012

Dallas, Texas

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 4, 2012, at the SMU Dedman School of Law, in Dallas, Texas.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. John A. Woodcock, Jr.
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Richard Wesley, Liaison from the Standing Committee
Hon. Paul Diamond, Liaison from the Civil Rules Committee
Hon. Judith H. Wizmur, Liaison from the Bankruptcy Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Timothy Reagan, Esq., Federal Judicial Center
Peter McCabe, Esq., Secretary to the Standing Committee
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, Esq., Rules Committee Support Office
Dean John B. Attanasio, SMU Dedman School of Law
Professor Jeffrey Bellin, SMU Dedman School of Law
Professor Jeffrey Kahn, SMU Dedman School of Law
Professor Nathan Cortez, SMU Dedman School of Law
Tina Hoang, Law Clerk to Judge Fitzwater
Roger A. Sharpe, Law Clerk to Judge Fitzwater

I. Opening Business

Introductory Matters

Judge Fitzwater, the Chair of the Committee, welcomed the members and thanked Dean Attanasio for hosting the Committee. Dean Attanasio greeted the members and observers, and expressed his thanks for holding the Committee meeting at the law school. He highlighted recent events and distinguished speakers on campus.

Judge Fitzwater observed that the forthcoming edition of the William & Mary Law Review will collect the proceedings of the October 2011 Symposium on the Restyled Federal Rules of Evidence. He encouraged those who were unable to attend the events to obtain a copy of the Symposium edition.

The minutes of the Fall 2011 Committee meeting were approved.

Judge Fitzwater reported on the January meeting of the Standing Committee. He summarized the Committee's report and his presentation to the Standing Committee including the Committee's consideration of Rule 801(d)(1)(B). Several members of the Standing Committee expressed support for the Committee's consideration of Rule 801(d)(1)(B) and none discouraged the Committee's continued work. Judge Fitzwater also updated the Standing Committee on the status of Professor Broun's privileges project. He received and conveyed a clear preference from Judge Kravitz, the Chair of the Standing Committee, that the Committee avoid any role in approving or otherwise placing the Judicial Conference's imprimatur on published work in the area of privileges. Professor Broun expressed his full agreement with this approach, and several members thanked him for his significant and ongoing research. Judge Wesley echoed the thanks given and counseled the Committee to avoid even the slightest appearance of endorsing publications in the area of privileges.

II. Proposed Amendment to Rule 803(10)

In *Melendez-Diaz v. Massachusetts*, the Supreme Court held that certificates reporting the results of forensic tests conducted by analysts were "testimonial" and therefore the admission of such certificates (in lieu of testimony) violated the accused's right to confrontation. The Court reasoned that the certificates were prepared exclusively for use in a criminal trial, as substitutes for trial testimony, and so were testimonial within the meaning of the Confrontation Clause as construed by *Crawford v. Washington.*

The Advisory Committee at its Spring 2011 meeting proposed an amendment to Rule 803(10), which currently allows the government to introduce a certificate to prove that a public record does not exist. A certificate of the absence of public record is ordinarily prepared for use in a criminal case, and so under *Melendez-Diaz*, such a certificate would be testimonial — and lower courts after *Melendez-Diaz* have so found. The proposed amendment to Rule 803(10) adds a

"notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if, after receiving notice from the government of intent to introduce a certificate, the defendant makes a timely pretrial demand for production of the witness. In *Melendez-Diaz*, the Court declared that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates. The Advisory Committee's proposed amendment was approved for release for public comment.

At the Spring meeting, the Committee reviewed the comments received on the proposed amendment. Only two comments were received. The Magistrate Judges' Association is in favor of the proposal. The National Association of Criminal Defense Lawyers commented that it agreed in principle with a notice-and-demand solution to the Confrontation problem inherent in Rule 803(10), but it had several objections to the Committee's proposal. The Reporter provided a memorandum for the meeting that considered the NACDL suggestions in detail, and suggested that the proposed changes were unnecessary and in fact several would raise problems in the application of other rules. A member of the Committee observed that the comments submitted were insubstantial and unpersuasive, and that the rule is very much needed. No member expressed support for the alternative recommendations received from the National Association of Criminal Defense Lawyers.

The Committee unanimously decided by voice vote to amend Rule 803(10) by adopting the language published for public comment, and to transmit the matter to the Standing Committee with the recommendation that the proposed amendment be approved and sent to the Judicial Conference. The full text of the proposed amendment and Committee Note provides as follows:

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

(10) ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:

(A) the testimony or certification is admitted to prove that

(~~A~~ i) the record or statement does not exist; or

(~~B~~ ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a

different time for the notice or the objection.

Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

III. Possible Amendment to Rule 801(d)(1)(B)

At the Spring 2011 meeting the Committee considered a proposal to amend Evidence Rule 801(d)(1)(B), the hearsay exemption for certain prior consistent statements. Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper influence or motive — are also admissible substantively. In contrast, other rehabilitative statements — such as those that explain a prior inconsistency or rebut a charge of faulty recollection — are not admissible under the hearsay exemption but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

At the Spring 2011 meeting the Committee unanimously agreed that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow. But some members were concerned that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be taken as a signal that the Rules were taking a more liberal attitude toward admitting prior consistent statements generally. Members opined that parties might seek to use the exemption as a means to bolster the credibility of their

witnesses. The Committee at the Spring meeting resolved to consider the amendment further, and also to seek the input of Public Defenders, the Department of Justice, and state court judges on the merits of amending Rule 801(d)(1)(B). Before the Fall 2011 meeting, the Department of Justice submitted a letter in favor of the amendment and the Public Defender submitted a letter opposed to the amendment.

At the Fall 2011 meeting, the Committee again considered the proposed amendment and resolved to seek further input. Pursuant to the Committee's recommendation, the Reporter worked with Dr. Reagan, the FJC representative, to send out a survey to district judges to seek their views on the need for and merits of the proposed amendment. The proposal was also sent to the ABA Litigation Section, the American College of Trial Lawyers, the NACDL, and other interested groups for their views. The Chair also raised the proposal as an information item at the January, 2012 Standing Committee meeting, to seek guidance on whether the amendment was worth pursuing.

As might have been expected from asking the views of so many sources, the responses were mixed. The Standing Committee, in its discussion at the January 2012 meeting, appeared to favor the amendment on the ground that the instruction required under the current rule is impossible for jurors to follow. The lawyers' groups were of two minds — some lawyers agreed with the premise of the amendment and some thought it would increase the use of prior consistent statements and might lead to impermissible bolstering. The majority of judges surveyed appeared to favor the amendment but there was no unanimity.

At the Spring 2012 meeting, Judge Fitzwater queried whether any members, regardless of discussion, planned to vote against a recommendation to the Standing Committee that a proposed amendment be published for public comment. A member indicated opposition to publication because of the momentum generated merely by soliciting public comments. Another member indicated skepticism but encouraged further discussion. The Reporter invited Dr. Reagan to summarize the responses to the email questionnaire, which the Federal Judicial Center sent to district judges in January 2012.

Dr. Reagan observed that there was support for the feeling that jurors find the instruction difficult. The survey showed substantial support for the idea that the proposed amendment to Rule 801(d)(1)(B) would have a positive practical effect, but also some support for the empirical prediction that the amendment would lead to an increase in prior consistent statements coming into evidence. Two rebuttals to this concern–that more prior consistent statements would be good or that Rule 403 would mitigate any trend toward increased admission of prior consistent statements–received lukewarm support.

The Committee discussed whether to use the word "rehabilitates" as opposed to "supports" credibility if the rule were to be proposed. The Committee ultimately determined that the word "rehabilitates" was preferable because "supports" might be read too broadly to admit almost any prior consistent statement, and it could mean that a consistent statement might be admitted under the rule even though the declarant's credibility had ever been attacked — an expansion that the Committee rejected.

The Reporter then introduced an alternate draft of the rule, which was developed after distributing the agenda materials based on a suggestion from a respondent to the FJC questionnaire. The survey respondent had encouraged the Committee to retain language familiar and comfortable to judges and practitioners, such as the phrase "motive to fabricate." The Reporter welcomed this suggestion as did several members.

A member suggested that the better way to treat prior consistent statements would be to provide that none of them are admissible for their truth, i.e., to abrogate Rule 801(d)(1)(B). Such a result would alleviate the problem of giving incomprehensible jury instructions. The member suggested that there was no reason why prior consistent statements should ever be exempt from the hearsay rule.

The Reporter responded that the hearsay rule exists as a safeguard against admitting testimonial evidence not subject to cross-examination, but that in the cases of both prior consistent and prior inconsistent testimony, the declarant is present and subject to cross examination. Thus, there is every reason to admit prior consistent statements for their truth and the only real concern is to prohibit impermissible bolstering and unnecessary padding of a witness's credibility. Thus, the proposal to abrogate Rule 801(d)(1)(B) cut against the theory of and the reason for the hearsay rule. The Reporter also noted that the Committee had never proposed an amendment that would completely remove one of the initial rules from the Federal Rules of Evidence — thus the proposal was fairly radical and needed to be substantially supported.

The Public Defender reiterated concerns that more prior consistent statements would be admitted than have been in the past. She expressed concerns about "evidence shaping" and the incentive to package prior statements in an effort to shore up a witness's performance on the stand. She explained the common scenario of child witnesses "falling apart" in sexual abuse cases, and suggested that the amended rule may incentivize the prosecution to introduce the reports of child assessment interviews (at which the defendant is obviously not present). There may be an effort to build up "insurance in case the witness crumbles on the stand." A liaison responded that rulemaking should not be based on an assumption that lawyers will violate their professional responsibilities.

The DOJ representative stated that Rule 801(d)(1)(B) is particularly impervious to a limiting instruction, and used as an example *United States v. Frazier*, 469 F.3d 85, 88 (3d Cir. 2006). She repeated a consensus view that there can be no intellectually honest way to distinguish between accepting a prior consistent statement for the purpose of assessing credibility and accepting it substantively. She resisted any notion that the Department might want to have more prior statements come in or win a tactical advantage through a rules amendment.

Several members noted the temptation to bolster, but ultimately agreed that a rule change would have no effect on the prohibition against bolstering.

A member expressed concern that the cure may be worse than the problem and that any issue could be cured up front through the pretrial conference. Another member mentioned the risk of unintended consequences, noting the significant number of respondents to the survey who believe

that more evidence of prior consistent statements will be admitted.

A member concluded that while the amendment might have a disproportionate impact on the criminal defendant, the change should be pursued. The member stated that the distinction between substantive and rehabilitative evidence in prior consistent statements is "mind numbing" for a jury and thus adds to the burdens of jurors. From the judicial perspective, prior consistent statements are typically cumulative and are almost always considered harmless error. The member remarked that the rule would bring much-needed clarity and uniformity to the circuit courts of appeal. The member also expressed a strong preference for the updated draft that included familiar language, but also encouraged the Reporter to bolster the accompanying note to emphasize the importance of applying Rule 403. Other members agreed that the updated draft was a step forward and that the note should be fortified, with a particular emphasis on the danger of admitting cumulative evidence.

After this extensive discussion, the Committee approved the proposed amendment to Rule 801(d)(1)(B) (as revised), and voted to recommend to the Standing Committee that it be released for public comment. One Committee member abstained. The Committee also agreed with an addition to the Committee Note emphasizing that the Rule is not to be used to expand the admissibility of prior consistent statements or to allow cumulative consistent statements to be admitted.

What follows is the full text of the proposed amendment to Rule 801(d)(1)(B), and the Committee Note, both as approved by the Committee with the recommendation that they be released for public comment:

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:

* * *

(B) is consistent with the declarant's testimony and
(i) is offered 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) otherwise rehabilitates the declarant's credibility as a witness;

* * *

Committee Note

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the

opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

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

The amendment provides that prior consistent statements are exempt from the hearsay rule whenever they are admissible to rehabilitate the witness. It extends the argument made in the original Advisory Committee Note to its logical conclusion. As commentators have stated, "[d]istinctions between the substantive and nonsubstantive use of prior consistent statements are normally distinctions without practical meaning," because "[j]uries have a very difficult time understanding an instruction about the difference between substantive and nonsubstantive use." Hon. Frank W. Bullock, Jr. and Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 Fla.St. L.Rev. 509, 540 (1997). *See also United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001) ("the line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors").

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may only be brought before the factfinder if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that do no more than provide cumulative accounts of the witness's prior statements. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that all prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

IV. Possible Amendment to Rules 803(6)-(8)

The restyling project uncovered an ambiguity in Rules 803(6)-(8), the hearsay exceptions

for business records, absence of business records, and public records. Those exceptions in original form set forth admissibility requirements and then provide that a record meeting those requirements is admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules do not specifically state which party has the burden of showing trustworthiness or untrustworthiness.

The restyling sought to clarify the ambiguity by providing that a record fitting the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information, etc., indicate a lack of trustworthiness. But the Committee did not submit this proposal as part of restyling because research into the case law indicated that the change would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. Thus the proposal would have changed the law in at least one court, and so was substantive under the restyling protocol.

When the Standing Committee approved the Restyled Rules, several members suggested that the Evidence Rules Committee consider making the minor substantive change that would clarify what is implicit in Rules 803(6)-(8) — that the opponent has the burden of showing untrustworthiness. Those members believed that allocating the burden to the opponent made sense for a number of reasons, including: 1) the Rules' reference to a "lack of trustworthiness" suggests strongly that the burden is on the opponent, as it is the opponent who would want to prove the lack of trustworthiness; 2) almost all the case law imposes the burden on the opponent; and 3) if the other admissibility requirements are met, the qualifying record is entitled to a presumption of trustworthiness, and adding an additional requirement of proving trustworthiness would unduly limit these records-based exceptions.

But at the Spring 2011 Advisory Committee meeting, a majority of Committee members was opposed to any amendment to the trustworthiness language of Rules 803(6)-(8). Members stated that any problem in the application of the rule was caused by a few wayward cases; that parties understand that the burden of proving untrustworthiness is on the opponent; and that the restyling did nothing to change that basic understanding.

At the Spring 2012 meeting, the Reporter informed the Committee that the Texas restyling committee was unanimously of the view that the restyled Rule 803(6) and (8) could be interpreted as making a substantive change to the Rule: by putting the burden on the *proponent* of the evidence to show trustworthiness. In light of this report from the Texas restyling committee, the Reporter suggested that the Committee might wish to discuss whether the previously proposed amendment to Rules 803(6) and (8) should be reconsidered.

At the meeting, several members expressed support for the amendments to clarify that the opponent has the burden of showing that the proffered record is untrustworthy. The Public Defender expressed concern that it may be difficult to access the information needed to demonstrate that the record at issue is untrustworthy. But other members responded that the restyled rule may be read to constitute a substantive change even where none was intended. Several members dismissed the suggestion that the restyling worked a substantive change upon these rules, but they agreed that a

clarifying amendment would be helpful.

The Committee unanimously decided by voice vote, with one abstention, to recommend to the Standing Committee that the proposed amendments to Rules 803(6)-(8) be published for public comment.

What follows are the proposed amendments to Rules 803(6)-(8), together with the Committee Notes, as approved by the Committee with the recommendation that they be released for public comment.

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

*** * ***

(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

- **(A)** the record was made at or near the time by - or from information transmitted by - someone with knowledge;
- **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- **(C)** making the record was a regular practice of that activity;
- **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
- **(E)** ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose the burden of proving untrustworthiness on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. A determination of untrustworthiness necessarily depends on the circumstances.

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

*** * ***

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) ~~neither~~ the opponent does not show that the possible source of the information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — set forth in Rule 803(6) — then the burden is on the opponent to show a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

*** * ***

(8) ***Public Records.*** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability and it should be up to the proponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. A determination of untrustworthiness necessarily depends on the circumstances.

V. "Continuous Study" of the Evidence Rules

The Procedures for the Standing Committee require the Evidence Rules Committee to engage in a "continuous study" of the need for any amendment to the Rules. At the Chair's request, the Reporter prepared a memorandum setting forth the history of the studies that have already been undertaken by the Advisory Committee, and providing some suggestions of possible amendments for consideration by the Committee. The grounds for a possible amendment included: 1) a split in authority about the meaning of an Evidence Rule; 2) a disparity between the text of a rule and the way that the rule is actually being applied in courts; 3) difficulties in applying a rule, as indicated by courts, practitioners, or academic commentators.

Possible amendments raised by the Reporter included: 1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; 2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; 3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; 4) clarifying the business duty requirement in Rule 803(6); and 5) resolving the dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given.

At the meeting, the Reporter introduced one additional area of emerging difficulties in applying the evidence rules. Professor Jeffrey Bellin's recent article, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, contends that the increasing admission of electronic present sense impressions based on social media communications signals a departure from the traditional rationale for the present sense impression exception. Professor Bellin proposes that Rule 803(1) be amended to explicitly require corroboration from an equally percipient witness. The Reporter stated that Professor Liesa Ricter has published a rebuttal that rejects Professor Bellin's proposal and encourages the Committee to abstain from tinkering with the evidence rules while social media communications remain nascent.

The Committee resolved to continue its continuous study of the Evidence Rules without recommending action on any particular possible amendment. The Chair suggested that the Committee hold a symposium in the Fall of 2013 to consider the intersection of the evidence rules and emerging technologies. The members expressed strong support and briefly discussed prospective panelists and topics.

VI. *Crawford* Developments

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was 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 Committee reviewed the memo and the Reporter noted that — with the exception of Rule 803(10), the proposed amendment published for public comment in August 2011 — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The Reporter observed that the Supreme Court is currently considering the case of *Williams v. Illinois*, in which it will address whether an expert witness can testify to the results of a lab test where the certificate of the test is not itself admitted at trial. The Court's decision in *Williams* may have an effect on the application of Rule 703. Currently the lower courts are allowing experts to testify on the basis of testimonial hearsay where 1) the hearsay itself is not admitted into evidence, and 2) the expert is testifying to her own opinion and is not just testifying to the opinion of the underlying expert who rendered the testimonial hearsay.

At the meeting, the Reporter also noted that some recent lower court decisions have found autopsy reports to be testimonial when prepared with the participation of law enforcement — though this might not raise a rulemaking problem because, if a law enforcement report is prepared for purposes of litigation, it is inadmissible under Rule 803(8)(A).

The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VII. Symposium on Rule 502

The Committee is planning a symposium on Rule 502. The goal of the symposium is to review the current use of Rule 502 by courts and litigants, and to discuss ways in which Rule 502 can be better known and understood, so that it can fulfil its original promise — to reduce the cost of preproduction privilege review. The symposium will take place on October 5, 2012 before the Committee's Fall meeting in Charleston. The Committee has already invited a number of distinguished judges, practitioners and academics to make presentations at the symposium. The proceedings of the symposium will be published in Fordham Law Review.

At the Spring 2012 meeting the Committee discussed the goals of the symposium and whether other participants should be invited. A member noted the need to energize the application of Rule 502. The Reporter observed that the developing case law tended to focus on the reasonableness of steps taken to prevent inadvertent disclosure and subject matter waiver.

The Reporter noted that Judge John M. Facciola plans to participate and he invited suggestions from the members for other symposium panelists. One member suggested Arizona Vice Chief Justice Andrew D. Hurwitz. The Committee resolved to continue discussion of potential panelists leading up to the symposium.

VIII. Privilege Project

At the Spring meeting Professor Broun, the Committee's consultant on privileges, submitted materials on the marital testimonial privileges and described the limited and conflicting federal case law on the subject. This submission is part of Professor Broun's continuing project to develop an article on the federal common law of privileges. Professor Broun's work, when it is published, will neither represent the work of the Committee nor suggest explicit nor implicit approval by the Standing Committee or the Advisory Committee. Committee members expressed gratitude to Professor Broun for keeping the Committee apprised of developments in the area of privileges.

Professor Broun stated that he planned to continue his research with a focus on cases concerning the journalists' privilege and related shield laws.

VII. Next Meeting

The Fall 2012 meeting of the Committee is scheduled for Friday October 5 in Charleston — to take place after the Symposium on Rule 502.

Respectfully submitted,

Benjamin Robinson
Daniel J. Capra

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE *Aug. 15, 2012*
Meeting of June 11-12, 2012
Washington, D.C.
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Monday and Tuesday, June 11 and 12, 2012. The following members were present:

Judge Mark R. Kravitz, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Diane P. Wood

Deputy Attorney General James M. Cole was unable to attend. The Department of Justice was represented throughout the meeting by Elizabeth J. Shapiro, Esquire, and at various points by Kathleen A. Felton, Esquire; H. Thomas Byron III, Esquire; Jonathan J. Wroblewski, Esquire; Ted Hirt, Esquire; and J. Christopher Kohn, Esquire.

Judge Jeremy D. Fogel, Director of the Federal Judicial Center, participated in the meeting, as did the committee's consultants – Professor Geoffrey C. Hazard, Jr.; Professor R. Joseph Kimble; and Joseph F. Spaniol, Jr., Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Jonathan C. Rose	Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Chief, Rules Committee Support Office
Julie Wilson	Attorney, Rules Committee Support Office
Andrea L. Kuperman	Rules law clerk to Judge Kravitz
Joe Cecil	Research Division, Federal Judicial Center

Also attending were Administrative Office attorneys James H. Wannamaker III, Bridget M. Healy, and Holly T. Sellers, and the judiciary's Supreme Court fellows.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Kravitz reported that he would retire as committee chair on September 30, 2012, and the Chief Justice had nominated Judge Sutton to succeed him. He congratulated Judge Sutton and thanked the Chief Justice for making an excellent selection.

Judge Kravitz reported that the Supreme Court in April 2012 had adopted the proposed amendments to the bankruptcy and criminal rules recommended by the Conference at its September 2011 session. The changes will take effect by operation of law on December 1, 2011, unless Congress acts to reject, modify, or defer them.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Robinson reported that there had been no further significant legislative action related to electronic discovery since the committee's January 2012 meeting.

He said that the House Judiciary Committee had held a hearing on the Class Action Fairness Act, at which no calls were made either for an overhaul of FED. R. CIV. P. 23 (class actions) or for dramatic changes to the rule. One witness, though, criticized the continuing reliance on cy près in class actions.

Mr. Robinson said that there had been no recent action on legislation addressing sunshine in regulatory decrees and settlements. He suggested that legislative attention now seemed to focus more on the criminal rules. A hearing, he reported, had been held before the Senate Judiciary Committee in June 2012 addressing the obligations of prosecutors to disclose exculpatory materials to the defense. At the hearing Senator Murkowski summarized her legislation on the subject, introduced in the wake of the prosecution of the late Senator Stevens and the ultimate dismissal of the criminal case.

Mr. Robinson reported that Judge Raggi had submitted a letter in connection with the hearing, in which she set out in broad terms the extensive work of the Advisory Committee on Criminal Rules over the last decade on FED. R. CRIM. P. 16 (discovery and inspection in criminal cases). The letter, he said, had a 909-page attachment describing that work in detail. In addition, Carol Brook, the federal defender for the Northern District of Illinois and a member of the advisory committee, testified at the hearing. He added that the legislators and witnesses appeared to agree that there were problems with non-disclosure of *Brady* materials that should be addressed, but most concluded that the pending legislation did not offer the right solution to the problems.

He reported that Senator Leahy had introduced legislation underscoring the nation's obligations under article 36 of the Vienna Convention to provide consular notification when foreign nationals are arrested. The legislation, he said, had been added to a State Department appropriations bill. He pointed out that language had been removed from the bill that would have duplicated the substance of proposed amendments to FED. R. CRIM. P. 5 and 58. The committee report accompanying the bill, moreover, encouraged the ongoing work of the rules committees and the Uniform Law Commission in facilitating compliance with the Vienna Convention by federal, state, and local law-enforcement officials. Mr. Robinson thanked the Judicial Conference's Federal-State Jurisdiction Committee for monitoring the legislation and informing the Senate of the activities of the rules committees.

He reported that the House Judiciary Committee had favorably reported out legislation to require bankruptcy asbestos trusts to report claimant filing information to the bankruptcy courts on a quarterly basis. The substance of the legislation, he noted, had previously been proposed as an amendment to the bankruptcy rules, but was not adopted by the Advisory Committee on Bankruptcy Rules. He added that the legislation would continue to be monitored.

Mr. Robinson noted that Magistrate Judge Paul W. Grimm, a member of the Advisory Committee on Civil Rules, had testified at the Senate hearing on his nomination to a district judgeship on the U.S. District Court for the District of Maryland. In addition, a Senate vote was expected shortly to confirm the nomination of Justice Andrew D. Hurwitz, a recent alumnus of the Advisory Committee on Evidence Rules, to a judgeship on the U.S. Court of Appeals for the Ninth Circuit.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 5 and 6, 2012.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of May 8, 2012 (Agenda Item 7).

Amendments for Final Approval

FED. R. APP. P. 13, 14, 24(b)

Judge Sutton reported that 26 U.S.C. § 7482(a)(2), enacted in 1986, authorizes permissive interlocutory appeals from the United States Tax Court to the courts of appeals. The statute, however, has never been implemented, and the appellate rules currently do not distinguish between appeals of right from the Tax Court and interlocutory appeals from the court.

The proposed changes to FED. R. APP. P. 13 (review of a Tax Court decision) and FED. R. APP. P. 14 (applicability of other appellate rules to review of a Tax Court decision) would implement the statute and specify the procedures applicable in each type of appeal. The proposed change to FED. R. APP. P. 24(b) (leave to proceed in forma pauperis) would clarify the rule by recognizing that the Tax Court is not an administrative agency.

Judge Sutton reported that the advisory committee had consulted closely with the Tax Court and the Tax Division of the Department of Justice in developing the proposals. He added that no public comments had been received and no changes made in the proposals following publication.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. APP. P. 28 and 28.1(c)

Judge Sutton explained that the proposed change to FED. R. APP. P. 28(a) (appellant's brief) would revise the list of the required contents of an appellant's brief by combining paragraphs 28(a)(6) and 28(a)(7). Paragraph (a)(6) now requires a statement of the case, and (a)(7) a statement of the facts. The new, combined provision, numbered Rule 28(a)(6), would require "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." Conforming changes would be made in Rule 28(b), governing appellees' briefs, and Rule 28.1(c), governing briefs in cross-appeals.

Judge Sutton pointed out that most lawyers will choose to present the factual and procedural history of a case chronologically. The revised rule, though, gives them the flexibility to follow a different order. In addition, the committee note specifies that a statement of the case may include subheadings, particularly to highlight the rulings presented for review.

He reported that the proposed amendments had attracted six public comments, four of them favorable. Some comments expressed concern that deleting the current rule's reference to "the nature of the case, the course of proceedings, and the disposition below" might lead some to conclude that the procedural history of a case may no longer be included in the statement of the case. Therefore, after publication, the committee inserted into proposed Rule 28(a)(6)'s statement of the case the phrase "describing the relevant procedural history." The committee note was also modified to reflect the addition. He noted, too, that the Supreme Court's rule – which similarly requires a single, combined statement – appears to have worked well.

A member noted that a prominent judge had argued in favor of maintaining separate statements of the case and of the facts, predicting that combined statements will require judges to comb through a great deal of detail to find the key procedural steps in a case – the pertinent rulings made by the lower court. She suggested that the judge's concern might be addressed by requiring that the combined statement begin with the ruling presented for review, followed by the relevant facts and procedural history..

Judge Sutton said that the committee note contemplates that approach, emphasizing that it gives lawyers flexibility in presenting their statements. Most, he said, will state the facts first and then the procedural history and ruling below. He suggested that the judge would have been pleased with simply reversing the order of current paragraphs (a)(6) and (a)(7) to set out the statement of facts first, followed by the statement of the case. Professor Struve added that it would be consistent with the rule for a circuit to have a local rule specifying a particular order of subheadings in briefs.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FORM 4

Judge Sutton explained that Questions 10 and 11 on the current version of Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) require an IFP applicant to provide the details of all payments made to an attorney or other person for services in connection with the case. The questions, he said, ask for more information than needed to make an IFP determination. In addition, some have argued that the form's disclosures implicate the attorney-client privilege. But, he said, research shows that the payment information is very unlikely to be subject to the privilege. Sometimes, though, it might constitute protected work product.

The proposed amendments, he pointed out, combine the two questions into one. The new question asks broadly whether the applicant has spent, or will spend, any money for expenses or attorney fees in connection with the lawsuit – and if so, how much. Only one public comment was received, which proposed an additional modification to the form

to deal with the Prison Litigation Reform Act. The committee, he said, decided not to incorporate the suggestion into the current amendment, but to add the matter to its study agenda as a separate item.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments for Publication

FED. R. APP. P. 6

Professor Struve noted that the advisory committee was proposing several amendments to FED. R. APP. P. 6 (appeals in bankruptcy cases from a district court or bankruptcy appellate panel to a court of appeals). The modifications dovetail with the simultaneous amendments being proposed to Part VIII of the Federal Rules of Bankruptcy Procedure, which govern appeals from a bankruptcy court to a district court or bankruptcy appellate panel.

Revised FED. R. APP. P. 6 would update the rule's cross-references to the new, renumbered Part VIII bankruptcy rules. New subdivision 6(c) will govern permissive direct appeals from a bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2), enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It specifies that the record on a direct appeal from a bankruptcy court will be governed by FED. R. BANKR. P. 8009 (record on appeal and sealed documents) and FED. R. BANKR. P. 8010 (completing and transmitting the record). New Rule 6(c) takes a different approach from Rule 6(b), where the record on appeal from a district court or bankruptcy appellate panel is essentially the record in the mid-level appeal to the district court or panel.

She noted that proposed new Bankruptcy Rule 8010(c) deals with electronic transfer of the record from the bankruptcy court. It specifies that the bankruptcy clerk must transmit to the clerk of the court where an appeal is pending "either the record or a notice that it is available electronically."

In the proposed amendments to FED. R. APP. P. 6(b)(2)(C), she said, the clerk of the district court or bankruptcy appellate panel must number the documents constituting the record and "promptly make it available." The amended appellate rule, she said, is very flexible and works well with the revised Part VIII bankruptcy rules. It allows the clerk to make the record available either in paper form or electronically.

The committee without objection by voice vote approved the proposed amendments for publication.

Informational Items

Judge Sutton reported that he had sent a letter to each chief circuit judge explaining that the advisory committee, like the circuits themselves, was divided on the wisdom of amending FED. R. APP. P. 29 (amicus briefs) to treat federally recognized Native American tribes the same as states. The proposal would allow tribes to file amicus briefs as of right and exempt them from the rule's authorship-and-funding disclosure requirement. The committee, he said, had informed the chief judges that the issue warrants serious consideration, will be maintained on the committee's agenda, and will be revisited in five years.

He noted that the advisory committee had removed from its agenda an item providing for introductions in briefs. Many of the best practitioners, he said, currently include introductions in their briefs to lay out the key themes of their argument. The committee's proposed amendment to FED. R. APP. P. 28(a)(6), he said, was sufficiently flexible to permit inclusion of an introduction as part of a brief's statement of the case. Moreover, it would be difficult to specify how an introduction differs from the statement of the issues presented for review in FED. R. APP. P. 28(a)(5).

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of May 14, 2012 (Agenda Item 5).

Judge Wedoff noted that the advisory committee had 14 action items to present, six of them for final approval by the Judicial Conference and eight for publication. He suggested that the most important were the amendments dealing with the Supreme Court's decision in *Stern v. Marshall*, the revision of the Part VIII bankruptcy appellate rules, and the modernization of the bankruptcy forms.

Amendments for Final Approval

FED. R. BANKR. P. 1007(b)(7) and 5009(b) and 4004(c)(1)

Judge Wedoff explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 has required virtually all individual debtors to complete a personal course in financial management as a pre-condition for receiving a discharge. He noted that FED. R. BANKR. P. 1007(b)(7) (required schedules and statements) and 5009(b) (case closing) implement the statute by requiring individual debtors to file an official form (Official Form 23) certifying that they completed the course before filing their petition. FED. R. BANKR. P. 1007(c) imposes deadlines for filing the certification. In

Chapter 7 cases, for example, the debtor must file it within 60 days after the first date set for the meeting of creditors under 11 U.S.C. § 341.

If the debtor has not filed the form within 45 days after the first meeting of creditors, FED. R. BANKR. P. 5009(b) instructs the bankruptcy clerk to warn the debtor that the case will be closed without a discharge unless the certification is filed within Rule 1007's time limits. FED. R. BANKR. P. 4004(c) then specifies that the court may not grant a discharge if the debtor has not filed the certificate.

Judge Wedoff reported that the advisory committee recommended amending FED. R. BANKR. P. 1007(b) to allow the provider of the financial-management course to notify the court directly that the debtor has completed the course. This action would relieve the debtor of the obligation to file Official Form 23. FED. R. BANKR. P. 5009(b) would be amended to require the bankruptcy clerk to send the warning notice only if: (1) the debtor has not filed the certification; and (2) the course provider has not notified the court that the debtor has completed the course.

A conforming amendment to FED. R. BANKR. P. 4004(c)(1)(H) (grant of discharge) specifies that the court does not have to deny a discharge if the debtor has been relieved of the duty to file the certification. In addition, language improvements would be made in the rule. Paragraph (c)(1) currently instructs a court to grant a discharge promptly unless certain acts have occurred. The amendment reformulates the text to instruct the court affirmatively not to grant a discharge if those acts have occurred.

Section 524(m) of the Bankruptcy Code, added in 2005, specifies that when a debtor files a reaffirmation agreement, the court must determine whether the statutory presumption that the agreement is an undue hardship for the debtor has been rebutted, *i.e.,* by finding that the debtor is apparently able to make payments under the agreement. A judge needs to make that determination before a discharge is granted. Therefore, FED. R. BANKR. P. 4004(c)(1)(K) tells the court to delay the discharge until the judge considers the debtor's ability to make the payments.

The proposed amendment to FED. R. BANKR. P. 4004(c)(1)(K) would make it clear that the rule's prohibition on entering a discharge due to a presumption of undue hardship ends when the presumption expires or the court concludes a hearing on the presumption. As a result, there would be no delay if the judge has already ruled on the matter.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference. The proposed amendments to FED. R. BANKR. P. 4004(c)(1) were approved without publication.

FED. R. BANKR. P. 9006(d), 9013, and 9014

Judge Wedoff noted that FED. R. BANKR. P. 9006 is entitled "computing and extending time," but it also specifies the default time for filing motions and affidavits in response to motions. Unlike FED. R. CIV. P. 6 (computing and extending time; time for motion papers), the civil rules counterpart on which it is based, FED. R. BANKR. P. 9006 does not indicate by its title that it also addresses time periods for motions. Nor is it followed immediately by another rule that addresses the form of motions, as the civil rules do. FED. R. CIV. P. 7 (pleadings, motions, and other papers) specifies the pleadings allowed and the form of motions and other papers.

The advisory committee, he said, was proposing amendments to highlight Rule 9006(d). First, the rule's title would be expanded to add a reference to "time for motion papers." Second, cross-references to Rule 9006(d) would be added to both FED. R. BANKR. P. 9013 (form and service of motions) and FED. R. BANKR. P. 9014 (contested matters) to specify that motions must be filed "within the time determined under FED. R. BANKR. P. 9006(d)."

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

OFFICIAL FORM 7

Judge Wedoff explained that Official Form 7 (statement of financial affairs) is a lengthy form that details many of the debtor's financial transactions. It makes frequent references to "insiders." The current definition of "insider" on the form refers to any owner of 5% of more of the voting or equity securities of a corporate debtor. That definition, though, has no basis in law, and it is not clear why it was adopted. The advisory committee would replace it with the Bankruptcy Code's definition of "insider," which includes any "person in control" of a corporate debtor.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments for Final Approval Without Publication

OFFICIAL FORMS 9A-I and 21

Professor McKenzie noted that there are several variations of Official Form 9 (notice of a bankruptcy filing, meeting of creditors, and deadlines), based on the nature of the debtor and the chapter of the Bankruptcy Code under which a case is filed. Form 9 is directed at creditors, notifying them that a bankruptcy case has been filed and informing them of upcoming case events and what steps they need to take. The form includes identifying information about the debtor that allows recipients of the notice to determine whether they are in fact a creditor of the debtor. In the case of individual debtors, the identifying information includes the debtor's social security number.

Debtors are required to provide their social security numbers to the bankruptcy clerk on Official Form 21 (statement of social security number). That form is submitted separately and not included in the court's public electronic records. The social security number is revealed to creditors on their personal copies of Form 9 purely for identification purposes, but only a redacted version of Form 9 is included in the case file.

The Court Administration and Case Management Committee expressed concern that bankruptcy forms may be mistakenly filed with the courts in ways that publicly reveal debtors' private identifying information. In some cases, creditors may file a copy of their unredacted Form 9 with their proofs of claim without redacting the debtor's social security number. Debtors, moreover, may file Form 21 with other case papers, rather than submit it to the clerk separately.

Professor McKenzie explained that the advisory committee would add prominent warnings on both Form 9 and Form 21 alerting users that the forms should not be filed with the court in a way that makes them publicly available. He pointed out that the advisory committee had made two minor changes in the language of Form 21's warning after the agenda book had been distributed. A corrected version was circulated to the members.

Judge Wedoff reported that the Court Administration and Case Management Committee had suggested that the debtor's full social security number be eliminated entirely from the forms to prevent any problems of inadvertent disclosure. But, he said, the advisory committee was convinced that social security numbers are still needed for some creditors to be able to identify the debtors. The full number, for example, is essential for the Internal Revenue Service. He added, though, that the committee will revisit the matter if the situation changes in the future.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference without publication.

OFFICIAL FORM 10

Professor McKenzie pointed out that the current version of Official Form 10 (proof of claim) contains a requirement at odds with FED. R. BANKR. P. 9010(c) (power of attorney). The form instructs an authorized agent of a creditor filing a proof of claim to attach to the claim a copy of its power of attorney. Rule 9010(c) generally requires an agent to give evidence of its authority to act on behalf of a creditor in a bankruptcy case by providing a power of attorney. But it does not apply when an agent files a proof of claim.

In addition, Form 10 would be amended to require additional documentation in certain cases. For claims based on an open-end or revolving consumer-credit agreement, the filer of the proof of claim will have to attach the information required by FED. R. BANKR. P. 3001(c)(3)(A) (proof of claim based on open-end or revolving consumer credit agreement), scheduled to take effect on December 1, 2012. If a claim is secured by the debtor's principal residence, the filer will have to attach the Mortgage Proof of Claim Attachment (Official Form 10, Attachment A), required as of December 1, 2011.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. BANKR. P. 1014(b)

Professor McKenzie explained that Rule 1004(b) (dismissal and change of venue) deals with the procedure when petitions involving the same debtor or related debtors are filed in different districts. The current rule specifies that, upon motion, the court in which the petition is filed first may determine the district or districts in which the cases will proceed. All other courts must stay proceedings in later-filed cases until the first court makes its venue determination, unless the first court orders otherwise. As a result, later cases are stayed by default while the venue question is pending before the first court.

The rule, he said, has been the subject of game playing because it allows an attorney who wants to stay all further proceedings to do so by filing a motion, or threatening to file a motion, in the first case. Therefore, the advisory committee proposal would change the default requirement to state that proceedings in later-filed cases are stayed only on express order of the first court. The change, he said, will prevent disruption of the other cases unless the judge in the first court determines affirmatively that a stay of a related case is needed while he or she makes the venue determination. In addition, the advisory committee made style changes in the rule.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 7004(e)

Professor McKenzie reported that the proposed amendment to FED. R. BANKR. P. 7004(e) would reduce the amount of time that a summons remains valid after it is issued. Currently, a summons must be served within 14 days after issuance. The proposed amendment to Rule 7004(e) would reduce that time to seven days.

Under the civil rules, a defendant's time to respond to a summons and complaint (30 days) begins when the summons and complaint are actually served. Under the bankruptcy rules, however, the defendant's response time is calculated from the date that the summons is issued.

He noted that concern had been expressed that seven days may be too short a period to effect service. Nevertheless, he said, the advisory committee believed that the time is sufficient and will encourage prompt service after issuance of a summons. He added that bankruptcy service is relatively easy and may be effected anywhere in the United States by first-class mail. Moreover, the necessary paperwork is usually generated by computer.

He added that the bankruptcy system has a strong objective in favor of moving cases quickly. In addition, calculating the time for service from the date of issuance, rather than service, provides clarity because issuance is noted on the court's docket. Finally, he explained that the time for service had traditionally been 10 days in the bankruptcy rules, but was increased to 14 days as a result of the omnibus 2009 time-computation amendments.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 7008, 7012(b), 7016, 9027, and 9033(a)

Professor McKenzie reported that the advisory committee was recommending publishing proposed amendments to five bankruptcy rules to deal with the recent Supreme Court decision in *Stern v. Marshall,* 564 U.S. ___, 131 S.Ct. 2594 (2011). In *Stern,* the Court held that a non-Article III bankruptcy judge could not enter final judgment on a debtor's state common-law counterclaim against a creditor of the bankruptcy estate. Even though the governing statute, 28 U.S.C. § 157(b), specifies that the counterclaim is a "core proceeding" that a bankruptcy judge may hear and determine with finality, the Court held that it was unconstitutional for Congress to assign final adjudicatory authority over the matter to a bankruptcy judge.

Professor McKenzie noted that the Federal Rules of Bankruptcy Procedure incorporate the statutory distinction between "core" and "non-core" proceedings and recognize that a bankruptcy judge's authority is much more limited in "non-core proceedings" than in "core proceedings." Under the current rules, a party filing a motion has to state whether the proceeding is "core" or "non-core," and a response must do the same.

Since *Stern*, however, a core proceeding under the statute may not be a "core proceeding" under the Constitution. Therefore, the advisory committee, he said, decided that it was necessary to remove the words "core" and "non-core" from the rules entirely.

Instead, the advisory committee would amend FED. R. BANKR. P. 7016 (pretrial procedures and formulating issues) to make clear that a bankruptcy judge must consider his or her authority to enter final orders and judgment in all adversary proceedings. The judge's decision, moreover, will be informed by the allegations of the parties as to whether the judge has that authority. This broad approach, he said, will allow the law to continue to develop without having to change the rules again in the future.

Judge Wedoff reported that it is unclear since *Stern* whether a bankruptcy judge may enter a final judgment in a preference action or avoidance action. He pointed out that under the proposed amendments, however, there will be no need to distinguish between core and non-core proceedings. Rather, the parties will only have to decide whether they consent to entry of final orders or judgment by the bankruptcy judge. The judge will then decide whether to: (1) hear and determine the proceeding; (2) hear it and issue proposed findings of fact and conclusions of law; or (3) take some other action.

A member commended the advisory committee for an elegant solution to a difficult problem. He suggested that the revised heading to revised Rule 9016 ("procedure") may be too limited.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 8001-8028

Judge Wedoff explained that the advisory committee's thorough revision of Part VIII of the Federal Rules of Bankruptcy Procedure – the bankruptcy appellate rules – was the result of a multi-year project to bring the rules into closer alignment with the Federal Rules of Appellate Procedure, to make the rules simpler and clearer, and to recognize that bankruptcy documents today are normally filed, served, and transmitted electronically, rather than in paper form.

He thanked Professor Gibson, emphasizing that she deserved enormous credit for having coordinated the huge forms project. He noted that she had immersed herself in all the details of appellate practice, had conducted considerable research, and had drafted a great many documents for the committee. He also thanked James Wannamaker and Bridget Healy, attorneys in the Bankruptcy Judges Division of the Administrative Office, for their dedication and professional assistance to the project. In addition, he expressed the committee's appreciation to Professor Struve, Professor Kimble, and Mr. Spaniol for their incisive and important contributions to the project, often made on very short notice.

He and Professor Gibson proceeded to describe each Part VIII rule not previously presented to the Standing Committee (Rules 8013-8028) and some additional changes made in the rules presented at the January 2012 meeting (Rules 8001-8011).

Fed. R. Bankr. P. 8001

Professor Gibson reported that since the January 2012 Standing Committee meeting, the advisory committee had made two additional changes in Rule 8001 (scope of Part VIII, definition of "BAP," and method of transmitting documents). The draft rule presented in January had included a general definition of the term "appellate court" to mean either the district court or the bankruptcy appellate panel – the court in which the first-level bankruptcy appeal is pending or will be taken. It did not, though, include the court of appeals.

It was suggested at the last meeting that the term is misleading because "appellate court" in common parlance generally refers to the court of appeals. As a result, she said, the advisory committee had eliminated the general definition. Each of the revised rules now refers specifically to the district court or the "BAP." Despite the objections of the style consultants, she added, the advisory committee decided to use the universally recognized abbreviation for a bankruptcy appellate panel and to define BAP in Rule 8001(b).

She said that there was a need to highlight a strong presumption in the revised rule in favor of electronic transmission of documents. Accordingly, revised Rule 8001(c) states specifically that a document must be sent electronically under the Part VIII rules, unless: (1) it is being sent by or to a pro se individual; or (2) a local court's rule permits or requires mailing or other means of delivery. She added that the advisory committee was comfortable with using the term "transmitting."

Fed. R. Bankr. P. 8007

Professor Gibson stated that Rule 8007 (stay pending appeal, bonds, and suspension of proceedings) had been restyled and subheadings added. In addition, the

advisory committee corrected the omission of a reference to the court of appeals in subdivision (c).

A member pointed out that under proposed Rule 8007(b), the showing required for making a motion for relief in the appellate court deals with two situations: (1) where moving first in the bankruptcy court would be impracticable; and (2) where the bankruptcy court has already ruled. But, he said, the Federal Rules of Appellate Procedure cover a third possibility – where a motion was filed below but not ruled on.

Judge Wedoff agreed to revise Rule 8007(b)(2)(B) to require the moving party to state whether the bankruptcy court has ruled on the motion, and, if so, what the reasons were for the ruling.

Fed. R. Bankr. P. 8009

Professor Gibson noted that proposed Rule 8009 (record on appeal and sealed documents) was incorporated by reference in the proposed new FED. R. APP. P. 6(c), which will govern permissive direct appeals from a bankruptcy court to a court of appeals.

Fed. R. Bankr. P. 8010

Professor Gibson reported that the advisory committee had made several changes in Rule 8010 (completing and transmitting the record) since the January 2012 meeting after conferring with clerks of the bankruptcy courts, the clerk of a bankruptcy appellate panel, and Administrative Office staff. She noted that bankruptcy courts generally use recording devices to take the record. If a transcript of a proceeding is ordered, it is produced for the court from the electronic record, usually by a contract service provider.

The rule requires the "reporter" to prepare and file the transcript with the bankruptcy clerk, but there is some question as to the identity of the reporter when a recording device is used. The advisory committee, she said, decided that the "reporter" should be defined in Rule 8010(a) as the person or service that the bankruptcy court designates to transcribe the recording.

In addition, the rule requires reporters to file all documents with the bankruptcy clerk. In the Federal Rules of Appellate Procedure, by contrast, reporters file certain documents in the appellate court and others in the district court. The reporter in a bankruptcy case, though, may not know where an appeal is pending.

Fed. R. Bankr. P. 8011

Professor Gibson reported that a minor typographical error had been corrected in Rule 8011 (filing, service, and signature) since the last Standing Committee meeting.

With regard to proof of service, a member questioned whether affidavits of service still serve a useful purpose in light of the universal use of CM/ECF in the federal courts. He noted that service in virtually all his civil cases is accomplished through CM/ECF, and there is no need to make the parties file an affidavit of service. He suggested that the Advisory Committee on Civil Rules consider removing the requirement of a certificate of service in the future.

Fed. R. Bankr. P. 8013

Professor Gibson noted that proposed Rule 8013 (motions and intervention) would change current bankruptcy practice. Currently, a person filing a motion or response may file a separate brief. The new rule, however, would not permit briefs to be filed in support of or in response to motions. Instead, it adopts the practice in FED. R. APP. P. 27 (motions), requiring that legal arguments be included in the motion or response.

She reported that proposed FED. R. BANKR. P. 8013(g) is a new provision for the bankruptcy rules. It is also not included in the Federal Rules of Appellate Procedure. It will authorize motions for intervention in an appeal pending in a district court or bankruptcy appellate panel. The party seeking to intervene must state in its motion why it did not intervene below.

Fed. R. Bankr. P. 8014

Professor Gibson explained that Rule 8014 (briefs) largely tracks the Federal Rules of Appellate Procedure and incorporates the proposed amendment to FED. R. APP. P. 28(a)(6) (briefs), which combines the statements of the case and of the facts into a single statement. (See pages 5 and 6 of these minutes.) In a change from current bankruptcy practice, revised Rule 8014 follows the Federal Rules of Appellate Procedure and requires inclusion of a summary of argument in the briefs. New Rule 8014(f) adopts the provision of FED. R. APP. P. 28(j) regarding the submission of supplemental authorities. Unlike the appellate rule, the proposed Rule 8014(f) proposes a definite time limit of seven days for any response, unless the court orders otherwise.

She emphasized that the advisory committee was attempting to make the bankruptcy rules as similar as practicable to the Federal Rules of Appellate Procedure to make it easier for the bar to handle double appeals, *i.e.*, an appeal first to a district court or bankruptcy appellate panel, and then to the court of appeals.

Fed. R. Bankr. P. 8015

Professor Gibson noted that Rule 8015 (form and length of briefs, appendices, and other papers) was modeled on FED. R. APP. P. 32 (form and length of briefs, appendices, and other papers). The new bankruptcy rule adopts the provisions of the appellate rule governing the length of briefs, but not those prescribing the colors for brief covers. She added that the change is likely to attract comments during the publication period because new Rule 8015(a)(7) reduces the length of principal and reply briefs currently permitted in the bankruptcy rules. To achieve consistency with FED. R. APP. P. 32(a)(7), it reduces the page limits for a principal brief from 50 pages to 30, and those for a reply brief from 25 to 15.

Fed. R. Bankr. P. 8016

Professor Gibson reported that Rule 8016 (cross-appeals) was new to bankruptcy and modeled on FED. R. APP. P. 28.1 (cross-appeals). A member noted, though, that proposed Rule 8016(e) does not exactly parallel the appellate rule. Moreover, it does not include a provision, similar to that in Rule 8018(a), allowing a district court or bankruptcy appellate panel by local rule or order to modify the rule's time limits.

Judge Wedoff suggested that it would be possible to incorporate the Rule 8018 language on local court modifications into Rule 8016. He added that Rules 8016 and 8018 should be internally consistent, even though there may be some differences between them and the counterpart appellate rules. A participant recommended making both the bankruptcy and appellate rules internally consistent and consistent with each other. The same provisions should apply in both sets of rules.

Another participant recommended not including any provision in the bankruptcy rules allowing a local court to extend the time limits of the national rules. He suggested that it will only encourage extensions.

Fed. R. Bankr. P. 8017

Professor Gibson reported that Rule 8017 (amicus briefs) was new to bankruptcy and was derived from FED. R. APP. P. 29 (amicus briefs). She pointed out that proposed Rule 8017(a) would allow a bankruptcy court on its own motion to request an amicus brief.

Fed. R. Bankr. P. 8018

Professor Gibson reported that Rule 8018 (serving and filing briefs) would continue the existing bankruptcy practice that allows an appellee to file a separate appendix. It differs from FED. R. APP. P. 30 (appendix to briefs), which requires all the parties to file a single appendix. Rule 8018(a) lengthens the period for filing initial briefs

from the current 14 days to 30. Since requests for extensions of time are very common, she said, it just makes sense to increase the deadline to 30 days.

Fed. R. Bankr. P. 8019

Professor Gibson noted that proposed Rule 8019 (oral argument) tracks FED. R. APP. P. 34(a)(1) (oral argument) and is more detailed than the current bankruptcy rule. Rule 8019(a) would alter the existing bankruptcy rule by: (1) authorizing the court to require the parties to submit a statement about the need for oral argument; and (2) permitting a statement to explain why oral argument is not needed, rather than only why it should be allowed. Rule 8019(f) gives the court discretion, when the appellee fails to appear for oral argument, either to hear the appellant's argument or to postpone it.

Fed. R. Bankr. P. 8020

Professor Gibson reported that Rule 8020 (frivolous appeal and other misconduct) was derived from FED. R. APP. P. 38 (frivolous appeals, damages and costs) and FED. R. APP. P. 46(c) (attorney discipline). It applies to misconduct both by parties and attorneys.

Fed. R. Bankr. P. 8021

Professor Gibson noted that Rule 8021 (costs) would continue the existing bankruptcy practice that gives the bankruptcy clerk the entire responsibility for taxing costs on appeal. The practice under FED. R. APP. P. 39 (costs), on the other hand, involves both the court of appeals and the district court in taxing costs.

Rule 8021(b) was added to govern costs assessed against the United States. Derived from FED. R. APP. P. 39(b), it is not included in the current bankruptcy rules.

Fed. R. Bankr. P. 8022

Professor Gibson reported that Rule 8022 (motion for rehearing) would continue the current bankruptcy practice of requiring that a motion for rehearing be filed within 14 days after entry of judgment on appeal. It differs from FED. R. APP. P. 40(a)(1) (time to file a petition for rehearing), which gives parties 45 days to file a rehearing motion in any civil case in which the United States is a party. She added that the Department of Justice reported that it had no problem with the rule.

Fed. R. Bankr. P. 8023

Professor Gibson reported that proposed Rule 8023 (voluntary dismissal) deviates from both the existing bankruptcy rule and the Federal Rules of Appellate Procedure. It

would allow a voluntary dismissal while a case is still pending. Under the current rules, a case on appeal from a bankruptcy judge is not docketed in the district court or bankruptcy appellate panel until the record is transmitted. But under the new Rule 8023, the appeal will be docketed immediately after the notice of appeal is filed. The notice, moreover, will normally be transmitted electronically to the district court or bankruptcy appellate panel. The advisory committee, she said, concluded that it is very unlikely that an appeal will be voluntarily dismissed before it is docketed.

Fed. R. Bankr. P. 8024

Professor Gibson reported that Rule 8024 (clerk's duties on disposition of an appeal) contained virtually no changes, other than stylistic, from the current bankruptcy rule.

Fed. R. Bankr. P. 8025

Professor Gibson reported that Rule 8025 (stay of a district court or BAP judgment) contained only stylistic changes from the existing bankruptcy rule. She pointed out, though, that subdivision (c) was new. It specifies that if the district court or BAP affirms a bankruptcy court ruling and the appellate judgment is stayed, the bankruptcy court's order, judgment, or decree will be automatically stayed to the same extent as the stay of the appellate judgment.

Fed. R. Bankr. P. 8026

Professor Gibson reported that Rule 8026 (rules by circuit councils and district courts, and procedure when there is no controlling law) contained only stylistic changes from the current bankruptcy rule.

Fed. R. Bankr. P. 8027

Professor Gibson reported that Rule 8027 (notice of mediation procedure) was a new rule with no counterpart in the Federal Rules of Appellate Procedure. It provides that if a district court or bankruptcy appellate panel has a mediation procedure applicable to bankruptcy appeals, the clerk of the district court or the panel must notify the parties promptly after the appeal is docketed whether the mediation procedure applies, what its requirements are, and how it affects the time for filing briefs in the appeal.

Fed. R. Bankr. P. 8028

Professor Gibson explained that Rule 8028 (suspension of rules in Part VIII) was derived from current FED. R. BANKR. P. 8019 (suspension of rules in Part VIII) and FED. R. APP. P. 2 (suspension of rules). It authorizes a district court, bankruptcy appellate

panel, or court of appeals to suspend the requirements or provisions of the Part VIII rules, except for certain enumerated rules. The new rule expands the current list of rules that may not be suspended.

Professor Gibson reported that the current FED. R. BANKR. P. 8013 (disposition of appeal and weight accorded fact findings) would be eliminated. The first part of that rule specifies what a district court or BAP may do on an appeal, *i.e.*, affirm, modify, reverse, or remand. She noted that there is no similar provision in the Federal Rules of Appellate Procedure. The second part of the current rule specifies the weight that must be given to a bankruptcy judge's findings of fact. She explained that the provision is not needed because it is already covered by FED. R. CIV. P. 52 (findings and conclusions) and incorporated by FED. R. BANKR. P. 7052 (findings by the court).

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 9023 and 9024

Judge Wedoff explained that FED. R. BANKR. P. 9023 (new trials and amendment of judgments) and FED. R. BANKR. P. 9024 (relief from a judgment or order) would be amended to add a cross-reference in each rule to the procedure set forth in proposed new Rule 8008, governing indicative rulings.

The committee without objection by voice vote approved the proposed amendments for publication.

MODERNIZATION OF THE OFFICIAL FORMS

Judge Wedoff explained that the bankruptcy process is driven in large measure by forms. Several of the current forms, however, are difficult to complete, especially for people unfamiliar with the bankruptcy system. In addition, the forms take little cognizance of electronic filing in the bankruptcy courts.

He explained that forms modernization has been a major, multi-year project of the advisory committee, working under the leadership of Judge Elizabeth L. Perris and in close coordination with the Administrative Office and the Federal Judicial Center. The major goals of the project have been: (1) to improve the quality and clarity of the forms in order to elicit more complete and accurate information from debtors and creditors; and (2) to enhance the interface between the forms and modern technology, especially the "next generation" of CM/ECF currently under development.

He said that the advisory committee and the forms-project team had reached out extensively to users of the bankruptcy system to seek their input in redesign and testing

of the forms. In addition, the committee had made an important policy decision at the outset to separate the forms used by individual debtors from those used by entities other than individuals.

He explained that the first nine forms, now presented for authority to publish, are a subset of the larger package of individual forms filed by debtors at the beginning of a case. He emphasized that the forms used by individuals need to be less technical in language because individuals are generally less sophisticated than other entities and may not have the assistance of experienced bankruptcy counsel. As a result, he said, the revised individual forms are written in more conversational language, have a more approachable format, and contain substantially more instructions.

OFFICIAL FORMS 3A AND 3B

Judge Wedoff explained that debtors who cannot pay the filing fee have two options – either to ask the court for permission to pay the fee in installments (Form 3A) or to waive the fee (Form 3B). The latter option is available only to individuals whose combined family monthly income is less than 150% of the official poverty guideline last published by the Department of Health and Human Services.

In addition to major stylistic and formatting changes common to all the new forms, three minor substantive changes were made in Form 3B. First, the opening question asks for the size of the debtor's family, as listed on Schedule J. That information is currently required on Schedule I. Second, the income portion of the form was changed to specify that non-cash governmental assistance, such as food stamps or housing subsidies, will not count against the debtor as income in determining eligibility for a fee waiver. The information, though, will continue to be reported for purposes of determining the debtor's ability to pay the filing fee. Third, the new form eliminates the declaration and signature section for non-attorney bankruptcy petition preparers because the same declaration is already required on Official Form 19.

The committee without objection by voice vote approved the proposed forms for publication.

OFFICIAL FORMS 6I and 6J

Judge Wedoff noted that some substantive changes had been made on Forms 6I (statement of the debtor's income) and 6J (statement of the debtor's expenses) to elicit more accurate and useful information from individual debtors. First, the debtor will have to provide more information on Forms 6I and 6J about non-traditional living arrangements, such as living with an unmarried partner or living and sharing expenses in a household with non-relatives. Form 6I asks for all financial contributions to the household. Second, Form 6J asks for separate information on dependents who live with

the debtor, dependents who live separately, and other members of the household. Third, in Chapter 13 cases, Form 6J asks for the debtor's expenses at two different points in time – when the debtor files the bankruptcy petition and when the proposed Chapter 13 plan is confirmed. Fourth, a line has been added to the form setting out a calculation of the debtor's monthly net income.

The committee without objection by voice vote approved the proposed forms for publication.

OFFICIAL FORMS 22A-1, 22A-2, 22B, 22C-1, and 22C-2

Judge Wedoff explained that Form 22, commonly referred to as the "means test" form, has five variations. It is used to determine a debtor's "current monthly income" under 11 U.S.C. § 101(10A) and, in Chapter 7 and Chapter 13 cases, to determine the debtor's income remaining after deducting certain specified expenses.

In Chapter 7 cases, the form is used to assess whether the debtor qualifies under the statute to file a petition under Chapter 7. In Chapter 13, cases, it determines how much the debtor is able to pay under the plan. Other than stylistic changes, no changes were made in the form's Chapter 11 version (Form 22B). But four changes would be made in the Chapter 7 and Chapter 13 versions.

First, the advisory committee separated both the Chapter 7 and Chapter 13 forms into two distinct forms each because debtors with income below the median of their state do not have to list their expenses. As a result, the vast majority of debtors will only have to fill out the income portion. Thus, all debtors will complete an income form (Form 22A-1 or 22C-1), but only some will have to file the expense form (Form 22A-2 or 22C-2).

Second, the revised forms modify the deduction for cell phone and internet expenses to reflect more accurately the Internal Revenue Service allowances incorporated by the Bankruptcy Code.

Third, line 60 on the current Chapter 13 form (Form 22C) will not be included in the new chapter 13 expense form (Form 22C-2)) because it is rarely used. It allows debtors to list, but not deduct from income, "other necessary expense" items not included within the categories specified by IRS.

Fourth, Form 22C-2 reflects the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. ___, 130 S. Ct. 2464 (2010). *Lanning* requires taking a "forward-looking approach" in calculating a Chapter 13 debtor's projected disposable income by considering changes in income or expenses that have occurred or are virtually certain to occur by the time the plan is confirmed. The changes may either increase or decrease the

debtor's disposable income. Part 3 of Form 22C-2 will require the debtor to report those changes.

The committee without objection by voice vote approved the proposed forms for publication.

Information Items

FED. R. BANKR. P. 3007(a)

Judge Wedoff reported that proposed amendments to FED. R. BANKR. P. 3007(a) (objections to claims), published in August 2011, would have specified the time and manner of serving objections to claims. The rule currently requires that notice of an objection be provided at least 30 days "prior to the hearing" on the objection. The proposal would have authorized a negative notice procedure – requiring notice of an objection to be made at least 30 days before "any scheduled hearing on the objection or any deadline for the claimant to request a hearing."

He noted that at its March 2012 meeting, the advisory committee decided to withdraw the proposed amendments temporarily and consider them as part of its project to draft a national Chapter 13 form plan.

OFFICIAL FORM 6C

Judge Wedoff reported that the advisory committee had decided not to proceed with amending Form 6C (property claimed as exempt) by adding a box to give debtors the option of declaring that the value of property claimed as exempt is the "full fair market value of the exempted property." The amendment, published in August 2011, was intended to reflect the Supreme Court's decision in *Schwab v. Reilly*, 560 U.S. ___, 130 S. Ct. 2652 (2010).

He said that representatives of the Chapter 7 and Chapter 13 trustee associations had objected to the change on the grounds that it would encourage debtors to claim the full market value of property even when the exemption is capped by statute at a specific dollar amount. They predicted that the revision would lead to gamesmanship and a "plethora of objections." On the other hand, supporters of the amendment, including representatives of the consumer bankruptcy attorneys' association, disputed the prediction. They argued that it was consistent with *Schwab* and would be beneficial to debtors.

Judge Wedoff reported that the advisory committee decided not to proceed with the amendment because: (1) it is unnecessary since debtors already incorporate the *Schwab* language into the existing form; and (2) courts are divided on whether it is

always improper for a debtor to claim as exempt the full fair market value of property when the exemption is capped at a specific dollar amount. The advisory committee decided, therefore, that any amendment to the form should await further case law development. It might also be considered as part of the forms modernization project.

OFFICIAL FORMS 22A AND 22C

Judge Wedoff reported that the advisory committee had decided to defer final approval of proposed amendments to Forms 22A and 22C (the means test forms) that would have: (1) reflected changes in the IRS standards on telecommunication expenses; and (2) changed the Chapter 13 version of the form to respond to the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. ___, 130 S. Ct. 2464 (2010).

He said that it would be better to avoid having the proposed amendments take effect in 2012, only to have substantially reformatted versions of the same forms take effect in 2013 as part of the forms modernization project. The proposed amendments, he added, had been incorporated into the first set of modernized forms to be published for comment in August 2012. (See pages 21-23 of these minutes.)

OFFICIAL FORM FOR CHAPTER 13 PLAN AND RELATED RULE AMENDMENTS

Judge Wedoff explained that the advisory committee was working on drafting a national form for Chapter 13 plans. He pointed out that a wide variety of local forms and model plans are currently used in the bankruptcy courts. They impose different requirements and distinctive features from district to district. The lack of a national form, he said, makes it difficult for lawyers who practice in several districts, and it adds transactional costs that are passed on to debtors.

He reported that a recent survey of the bankruptcy bench had established that a majority of chief bankruptcy judges support developing a national form plan. Therefore, he said, the advisory committee had established a working group that expects to have a draft ready soon for informal circulation and comment. He added that it became apparent during the course of the group's work that the effectiveness of a national form plan will depend on making some simultaneous amendments to the bankruptcy rules to harmonize practice among the courts and clarify certain procedures.

MINI-CONFERENCE ON NEW MORTGAGE FORMS

Judge Wedoff reported that the advisory committee will hold a mini-conference in conjunction with its September 2012 meeting to discuss the effectiveness of the new mortgage-information disclosure forms that took effect on December 1, 2011.

ELECTRONIC SIGNATURES

Judge Wedoff noted that the advisory committee was considering the use of electronic signatures as part of its forms modernization project. In particular, it was focusing on whether, and under what circumstances, bankruptcy courts should accept for filing documents signed electronically without also requiring retention of a paper copy with an original signature. If retention of an original signature is required, moreover, who should maintain it? He noted that the committee was exploring a range of options and contemporary practices.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the forms modernization project had nearly completed its work on all the individual-debtor forms and had begun its work on revising the non-individual forms.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of May 8, 2012 (Agenda Item 4).

Amendments for Final Approval

FED. R. CIV. P. 45 and 37

Judge Campbell reported that the advisory committee had undertaken a multi-year project to revise Rule 45 (subpoenas) by simplifying the rule and addressing several problems brought to its attention. He noted that during the course of its study, the advisory committee came to appreciate that Rule 45 is an important workhorse in civil litigation that governs virtually all discovery involving non-parties and accomplishes several other important procedural purposes.

After reviewing the pertinent literature on the rule and canvassing the bar, the committee developed a list of 17 concerns that might potentially be addressed through rule amendments. The list was eventually boiled down to four proposed changes: (1) simplification of the rule; (2) transfer of subpoena-related motions; (3) trial subpoenas for distant parties and party witnesses; and (4) notice of service of documents-only subpoenas. A revised rule incorporating those changes was published for public comment in August 2011, and some minor modifications were made after publication. The revised rule, he said, was now ready for final approval by the Judicial Conference.

1. Simplification of the rule

He noted that the first category of proposed changes would simplify an overly complex rule. As Rule 45 is now written, he explained, a lawyer has to look in three different parts of the rule to determine where a subpoena may be issued, where it may be served, and where performance may be required.

First, Rule 45(a)(2) specifies which court may issue a subpoena. It may be a different court for trial, for deposition discovery, or for document discovery. Second, Rule 45(b)(2) specifies four different possibilities for the place where a subpoena may be served. It may be within the district, outside the district but within 100 miles of the place of compliance, anywhere in the state where the district sits if state law permits, or anywhere in the United States if federal law authorizes it. Third, Rule 45(c) imposes limits on the place of enforcement. A non-party, for example, cannot be required to travel more than 100 miles to comply with a subpoena, except to attend a trial. In that case, attendance may be anywhere in the state if the person does not have to incur "substantial expense" to travel. He said that it was the experience of all the judges on the advisory committee that even good lawyers get the various provisions of the rule wrong from time to time.

The advisory committee's proposed simplification addresses those problems and should eliminate most of the confusion. First, revised Rule 45(a)(2) specifies that the court that issues a subpoena is the court that presides over the case. There are no other possibilities. Second, Rule 45(b)(2) specifies that a subpoena may be served at any place in the United States. Third, Rule 45(c)(3) specifies where performance may be required. Essentially, it preserves the performance requirements of the current rule, but eliminates its reference to state law.

There is, he said, precedent in the rules for authorizing nationwide service. Rule 45(b)(2)(D), he noted, currently authorizes service in another state if there is a federal statute that authorizes it. In addition, the Federal Rules of Criminal Procedure authorize nationwide service (FED. R. CRIM. P. 17)(e)).

Professor Marcus said that the public comments on simplification of the rule were very favorable, and some offered suggestions for additional clarification. As a result, the committee made some changes in the committee note, dealing with depositions of party witnesses and subpoenas for remote testimony. In essence, though, the changes made after publication were very minor.

Professor Marcus pointed out that under the committee's proposal, as published, Rule 45(c)(2) would have left it essentially to the parties to designate the place for production of Rule 34 discovery materials. It provided that a subpoena could command production "at a place reasonably convenient for the person who is commanded to produce." But, he explained, that simplification did not work and could lead to mischief. Accordingly, the committee revised Rule 45(c)(2) to specify that a subpoena may command production "at a place within 100 miles of where the person resides, is

employed, or regularly transacts business in person." That formulation essentially preserves the current arrangements, but states them more clearly.

2. Transfer of subpoena-related motions

Judge Campbell explained that the modified rule, like the current rule, specifies that a party receiving a subpoena typically has to litigate the enforceability of the subpoena in the court in the district where the performance is required. The producing party, thus, enjoys the convenience of having its dispute handled locally and does not have to travel to a different part of the country to litigate.

Rule 45, however, does not currently allow the court where production is required to transfer a dispute back to the court having jurisdiction over the case. Yet, there are certain situations in which the court in the district of performance should be allowed to refer a dispute to the judge presiding over the case. There is, he said, a split in the case law on the matter, and some courts in fact transfer disputes. The current rule, though, does not authorize the practice expressly.

The proposed new Rule 45(f) would resolve the matter and explicitly allow certain disputes to be resolved by the judge presiding over the case. It would allow the local court to transfer the case either on the consent of the person subject to the subpoena or if the court finds "exceptional circumstances." He reported that some public comments questioned whether exceptional circumstances was the appropriate standard for authorizing a transfer, but the advisory committee ultimately concluded unanimously that it was.

The proposed amendment to FED. R. CIV. P. 37 (failure to make disclosures or cooperate in discovery) would conform that rule to the proposed amendments to Rule 45(f). A new second sentence in Rule 37(b)(1) deals with contempt of orders entered after a transfer. It provides that failure to comply with a transferee court's deposition-related order may be treated as contempt of either the court where the discovery is taken or the court where the action is pending..

Professor Marcus pointed out that the August 2011 publication had highlighted the new transfer provision and expressly invited comment on two questions: (1) whether consent of the parties should be required in addition to consent by the person served with the subpoena; and (2) whether "exceptional circumstances" should be the standard for transfer if the non-party does not consent. Considerable public comment argued that it was inappropriate to require party consent. As long as the recipient of the subpoenas consents to the transfer, the parties should have no veto over the matter. The advisory committee, he said, revised the rule to remove the party-consent feature.

With regard to the appropriate standard for authorizing a transfer in the absence of consent, considerable public support was voiced for a more flexible, less demanding standard. But formulating an appropriate lesser standard, while still protecting the primary interests of the producing party, had been very challenging. The advisory committee and its discovery subcommittee discussed the matter at considerable length and decided to retain the exceptional circumstances standard, but add some clarifying language to the committee note. The note was recast to state that if the local non-party served with a subpoena does not consent to a transfer, the court's prime concern should be to avoid imposing burdens on that person. In some circumstances, though, a transfer may be warranted to avoid disrupting the issuing court's management of the underlying litigation. In short, transfer is appropriate only if those case-management interests outweigh the interests of the producing party in obtaining local resolution of the dispute.

A member praised the work of the advisory committee and said that the proposed changes were long overdue. He noted that few rules of procedure are used more often, yet are harder to work with, than Rule 45. Nevertheless, he said, the "exceptional circumstances" standard may be too high. It may underestimate the needs of a judge presiding over a big, hotly disputed civil case to have flexibility in controlling the case. It may also underestimate how easy it is today to conduct hearings and resolve disputes by telephone or video-conference. He noted that when subpoena disputes arise, it is common for the judge in the district of compliance to call the judge having jurisdiction over the underlying case to discuss the matter.

In addition, he said, the language in the committee note stating that transfers should be "truly rare" events is much too restrictive. It tells judges, in essence, that transfers should almost never occur. He added that a more generous standard is warranted, and "good cause" should be considered as a substitute. He recommended combining a good cause standard with an appropriate explanation in the committee note to give judges the flexibility they need to decide what is best in each case.

Judge Campbell explained that some public comments had suggested a good cause standard, and the advisory committee considered them carefully. But it ultimately concluded that it had to err in favor of protecting third parties who receive subpoenas and sparing them from assuming undue burdens and hiring counsel in other parts of the country. The exceptional circumstances standard, he said, will afford them more protection than the good cause standard.

He said that the committee was concerned that if the rule were to contain a "good cause" standard, many busy district judges faced with subpoena disputes in out-of-district cases would be readily inclined to transfer them routinely to the issuing court. The rule, he said, should make those busy district judges pause and carefully balance the reasons for a transfer against the burdens imposed on the subject of the subpoena. In essence, he

explained, the committee concluded that it was essential to have a higher threshold than mere good cause.

Professor Marcus added that it is very difficult to achieve just the right balance in the rule. It is, he said, particularly difficult to draft a standard that falls somewhere between "exceptional circumstances," which is very difficult to satisfy, and "good cause," which is quite easy to satisfy. He added that the comments from the ABA Section on Litigation were very supportive of retaining the exceptional circumstances standard in order to protect non-party witnesses.

A member argued in favor of retaining the exceptional circumstances standard, and emphasized that it was important to resolve the current conflict in the law and explicitly authorize transfers in appropriate, limited circumstances. She added that the rule should be designed for the average civil case, not the exceptional case. The great majority of subpoena disputes, she said, involve local issues and should be resolved locally. As a practical matter, a good cause standard would lead to excessive transfers.

A participant spoke in favor of the good cause standard, but recommended that if the exceptional circumstances standard were retained, the committee note should be toned down and revised to eliminate the current language stating that transfers should be "truly rare." In addition, it would be useful to refer in the note to the difference between the average case with a local third party and complex litigation in which the lawyers hotly dispute every aspect of a case, including the subpoenas. He added that not all subpoenaed persons are in fact uninvolved, uninterested third parties. Often, the subpoenaed person, although not a party to the case, may well have a direct financial interest in the litigation.

A member agreed that the word "truly" should be eliminated from the note, but supported the advisory committee's decision to retain the exceptional circumstances standard. A member recommended resolving the matter by eliminating the second sentence in the third paragraph of the portion of the committee note dealing with Rule 45(f). As revised, it would read: "In the absence of consent, the court may transfer in exceptional circumstances, and the proponent of transfer bears the burden of showing that such circumstances are presented."

A member expressed concern about the language added to the committee note after publication regarding the issuance of subpoenas to require testimony from a remote location. He suggested that the committee should consider amending Rule 45(c)(1) itself to clarify that it applies both to attendance at trial and testimony by contemporary transmission from a different location under Rule 43(a).

3. Trial subpoenas for distant parties and party officers

Judge Campbell explained that the third change in the rule resolves the split in the case law in the wake of *In re Vioxx Products Liability Litigation,* 438 F. Supp. 2d 664 (E.D. La. 2006). The district court in that case read Rule 45 as permitting a subpoena to compel a party officer to testify at a trial at a distant location. Other courts, though, have ruled that parties cannot be compelled to travel long distances from outside the state to attend trial because they have not been served with subpoenas within the state, as required by Rule 45(b)(2).

The advisory committee, he said, was of the view that *Vioxx* misread Rule 45, in part because the current rule is overly complex. The proposed amendments, he said, would overrule the *Vioxx* line of cases and confirm that party officers can only be compelled to testify at trial within the geographical limits that apply to all witnesses. He noted that the committee had highlighted the matter when it published the rule by including in the publication an alternative draft text that would have codified the *Vioxx* approach.

The public comments, he said, were split, with no consensus emerging for either position. The advisory committee decided ultimately that it should not change the original intent of a rule that has worked well for decades. Professor Marcus added that the committee's concern was that if the rule were amended to codify *Vioxx,* subpoenas could be used to exert undue pressures on a party and its officers. Moreover, there are alternate ways of dealing with the problems of obtaining testimony from party witnesses, including the use of remote testimony under Rule 43(a).

4. Notice of service of documents-only subpoenas

Judge Campbell explained that the current Rule 45 requires parties to notice other parties that they are serving a subpoena. But the provision is hidden as the last sentence of Rule 45(b)(1), and many lawyers are unaware of it. The advisory committee proposal, he said, relocates the provision to a more prominent place as a separate new paragraph 45(a)(4), entitled "notice to other parties before service." In addition, the revised rule requires that a copy of the subpoena be attached to the notice.

Judge Campbell said that the advisory committee realized that many other reasonable notice provisions might have been added to the rule. For example, it could have required that: notice be given a specific number of days in advance of service of the subpoena; additional notice be given if the subpoena is modified by agreement; notice be given when documents are received; and copies of documents be provided by the receiving party to the other parties in the litigation. The rule could also have specified the sanctions for non-compliance with the notice requirements.

The advisory committee, however, concluded that those provisions, though sensible, should not be included because the primary purpose of the amendments is to get

parties to give notice of subpoenas. Just accomplishing that objective should resolve most of the current problems. The remaining issues can generally be worked out if lawyers are left to their own devices to consult with opposing counsel to obtain copies of whatever documents they need. The committee, he said, was concerned about the length and complexity of the current rule and did not want to add to that length and complexity by dictating additional details. He added, though, that the committee could return to the rule in the future if problems persist.

Professor Marcus said that many competing suggestions had been received for additional provisions. He added that, at the urging of the Department of Justice, the committee had made a change in the rule following publication to restore the words "before trial" to the notice provision. It also added in Rule 45(c)(4) the word "pretrial" before "inspection of premises."

Judge Campbell noted that the advisory committee had considered whether the time limit in current Rule 45(c) for serving objections to subpoenas was too short, but decided not to change it. He added that the matter rarely results in litigation, as courts allow extensions of time when appropriate. He agreed to a member's suggestion that language in lines 43 and 44 of the committee note be deleted. It had suggested that parties may ask that additional notice requirements be included in a court's scheduling order.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Information Items

PRESERVATION AND SPOLIATION

Judge Campbell reported that one of the panels at the committee's 2010 Duke Law School conference had urged the committee to approve a detailed civil rule specifying when an obligation to preserve information for litigation is triggered, the scope of that obligation, the number of custodians who should preserve information, and the sanctions to be imposed for various levels of culpability. After the conference, Judge Kravitz, then chair of the advisory committee, tasked the committee's discovery subcommittee with following up on the recommendations.

The subcommittee began its work in September 2010 by asking the Federal Judicial Center to study the frequency and nature of sanctions litigation in the district courts. The Center's research found that litigation is rare, as only 209 spoliation motions had been filed in more than 130,000 civil cases studied, only about half of which involved electronic discovery. The subcommittee also studied a large number of federal and state laws that impose various preservation obligations.

The subcommittee, he said, then drafted three possible rules to address preservation. The first was a very detailed rule that provided specific directives and attempted to prescribe which events trigger a duty to preserve, what the scope of the preservation duty is, and what sanctions may be imposed for a failure to preserve. The committee, however, found it exceedingly difficult to draft a detailed rule that could be applied across all the broad variety of potential cases and give any meaningful certainty to the parties.

The second rule also addressed the triggering events for preservation, the scope of retention obligations, and sanctions for violations, but it did so in a much more general way. Essentially it provided broad directions to behave reasonably and preserve information in reasonable anticipation of litigation.

The third rule focused just on sanctions under Rule 37 in order to promote national uniformity and constraint in imposing sanctions. Currently, there is substantial dispute among the circuits on what level of culpability gives rise to sanctions for failure to preserve. The prevailing standards now range from mere negligence to wilfulness or bad faith.

The third rule specified that a court may order curative or remedial measures without finding culpability. Imposition of sanctions of the kind listed in Rule 37(b), on the other hand, would require wilfulness or bad faith. The proposed rule identified the factors that a court should consider in assessing the need for sanctions. Those factors, moreover, should also provide helpful guidance to parties at the time they are considering their preservation decisions.

Judge Campbell said that the three draft rules had been discussed with about 25 very knowledgeable people at the committee's September 2011 mini-conference in Dallas. A wide range of views was expressed, but no consensus emerged. Many written comments were received by the committee and posted on the judiciary's website. They embrace a full range of proposals. Some groups argued that there is an urgent need for a very detailed rule on preservation and spoliation with bright-line standards. One, for example, suggested that a duty to preserve should only be triggered by the actual commencement of litigation. Others contended that no rule is needed at all, as the common law should continue its development. The Department of Justice, he said, took the position that it is premature to write a rule on these subjects.

The subject area, he said, continues to be very dynamic. In April 2012, the RAND Corporation completed a study of large corporations, documenting that they spend millions of dollars in trying to comply with preservation obligations. About 73% of the costs are spent on lawyers reviewing materials and 27% on the preservation of information itself. A recent in-house study by the Department of Justice generally corroborated the conclusion of the Federal Judicial Center that spoliation disputes in

court are rare. Another recent study, by Professor William Hubbard, found that the problem arises only in a small percentage of cases, but when it does it can be extraordinarily expensive.

Judge Campbell pointed out that the Seventh Circuit was conducting a pilot program on electronic discovery and preservation that emphasizes the need for the parties to cooperate and discuss preservation early in the litigation. The pilot, he said, was entering its third phase and producing a good deal of helpful information. The Southern District of New York recently launched a complex-case pilot program that also includes preservation as an element. The Federal Circuit promulgated clear guidelines on discovery of electronically stored information and has placed some important limits on discovery in patent cases. A Sedona Conference working group has been working for months on a consensus rule for the committee's consideration. The group, he noted, had not yet reached consensus on potential rule amendments. Finally, he said, the case law continues to evolve, as trial judges are taking imaginative steps to deal with preservation problems and restrain unnecessary costs.

Judge Campbell reported that the advisory committee was still leaning towards a sanctions-only rule, rather than a rule that tries to define trigger and scope. Nevertheless, the subcommittee was still absorbing and discussing the many sources of information coming before it. He suggested that the subcommittee may have a more concrete draft available for the advisory committee's consideration at its November 2012 meeting.

He noted that the advisory committee was aware that some are frustrated with the pace of the project. But, he said, the delay in producing a rule has not been for lack of effort. Rather, the issues are particularly difficult, and the views expressed to the subcommittee have been very far apart. He noted that even if the committee were to approve a rule at its next meeting, it could not take effect before December 2015.

He reported that in December 2011, the House Judiciary Subcommittee on the Constitution had held a hearing on the costs and burdens of civil discovery. The proceedings included substantial discussion on electronic discovery issues. The basic message from the majority was that preservation obligations and electronic discovery cost corporations substantial money and are a drain on innovation and jobs. He pointed out that the witnesses testified that the federal rules process works well, and the rules committees should continue their efforts to solve the current problems. After the hearings, the subcommittee chair wrote a letter urging the advisory committee to approve a strong rule. The subcommittee minority, though, followed with a letter asking the committee to proceed slowly and let the common law work its course.

Professor Marcus pointed out that the advisory committee had not resolved two critical policy questions and invited input on them from the members. First, he said, a decision must be made on whether a new rule should be confined just to electronic

discovery or apply to all discoverable information. Second, in light of the strikingly divergent views expressed to the committee on the subject, a basic decision must be made on how urgently a new rule is needed and how aggressive it should be.

A member argued that national uniformity is very important because preservation practices and litigation holds cost parties a great deal of money. The precise contents of the new rule may not be clear at this point, but the advisory committee should continue to proceed deliberately and carefully study the various pilot projects underway in the courts. Eventually, however, it needs to produce a national rule. A participant added that the primary risk of moving too slowly is that courts will develop their own local rules and become attached to them, making it more difficult to impose a uniform national rule.

A participant pointed out that efforts have been made, without much result so far, to prod the corporate community into developing a series of best practices to deal with preservation of information. Corporations, he said, need to balance their legitimate need to get rid of information in the normal course of business against the competing need to preserve certain information in anticipation of eventual litigation. There is, he said, reluctance on the part of corporate management even to consider the matter, but there may be some movement in that direction in the future.

He suggested that a sanctions-only rule is appropriate. It would also be desirable, he said, to include a more emphatic emphasis in Rules 16 and 26 on getting the parties and the judge to address preservation obligations more directly at the outset of a case.

A member expressed great appreciation for the advisory committee's work and agreed with its inclination to pursue a narrow rule that focuses just on Rule 37 sanctions. He emphasized that the Rules Enabling Act restricts the rules committees' authority to matters of procedure only. Preservation duties, though, generally go beyond procedure and simply cannot be fixed by a rule.

Moreover, he said, the committee cannot the preservation problems because most litigation is conducted in the state courts, not the federal courts. He suggested that the more the committee sticks to procedure and avoids matters of substantive conduct, the more likely the states will follow its lead. A member added that there is an important opportunity for the committee to achieve greater national uniformity by working with the state courts. If the committee produces a good rule, he said, effective complementary state-court rules could be promoted with the support and encouragement of the Conference of Chief Justices.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell pointed out that it is difficult to speak about preservation without considering more broadly what information should be permitted in the discovery process,

especially electronically stored information. He reported that the advisory committee had established a separate subcommittee, chaired by Judge John G. Koeltl, to evaluate the many helpful ideas for discovery reform raised at the Duke conference and to recommend which should be proposed as rule amendments. Eventually, he said, the advisory committee will marry the work of the Duke Conference subcommittee with that of the discovery subcommittee on spoliation because the two are closely related.

He reported that Professor Cooper had produced very helpful and thought-provoking drafts of several potential rule amendments to implement the Duke recommendations. The proposals, he explained, can be categorized as falling into three sets of proposed changes.

The first set of proposals was designed to promote early and active case management. They include: reducing the time for service of a complaint from 120 days to 60; reducing the time for holding a scheduling conference from 120 days to 60 or 45; requiring judges to actually hold a scheduling conference in person or by telephone; no longer allowing local court rules to exempt cases from the initial case-management requirements; requiring parties to hold a conference with the court before filing discovery motions; and allowing written discovery to be sought before the Rule 26(f) conference is held, but providing that requests do not have to be answered until after the case-management conference. The latter provision would let the parties know what discovery is contemplated when they meet with the judge to discuss a discovery schedule. Those and other ideas were designed to get the courts more actively involved in the management of cases and at an earlier stage.

Judge Campbell noted that the second category of possible changes was designed to curtail the discovery process and make it more efficient. One set of proposals would take the concept of proportionality and move it into Rule 26(b)((1)'s definition of discoverable information. It is already there by cross-reference in the last sentence of that provision, but the proposals would make it more prominent. In essence, the revised definition would define discoverable information as relevant, non-privileged information that is proportional to the reasonable needs of the case.

In addition, he said, the subcommittee was considering limiting discovery requests by lowering presumptive numbers and time limits, such as reducing the number of depositions from 10 to 5, the time of depositions from 7 hours to 4, and the number of interrogatories from 25 to 15, and by imposing caps of 25 requests for production and 25 requests for admissions. Although courts may alter them, just reducing the presumptive limits may reduce the amount of discovery that occurs and change the prevailing ethic that lawyers must seek discovery of everything.

Another proposal, he noted, would require parties objecting to a request for production to specify in their objection whether they are withholding documents. A

responding party electing to produce copies of electronically stored information, rather than permitting inspection, would have to complete the production no later than the inspection date in the discovery request. Rule 26(g) would be amended to require the attorney of record to sign a discovery response to attest that the response is not evasive. Another proposal would defer contention interrogatories and requests to admit until after the close of all other discovery. The subcommittee, he said, was also considering cost-shifting provisions and may make cost shifting a more prominent part of discovery. All these changes are designed to streamline the discovery process and reduce the expenses complained about at the Duke conference.

Judge Campbell reported that a third category of proposals was designed to emphasize cooperation among the attorneys. One amendment would make cooperation an integral part of Rule 1. The rule, thus, might specify that the civil rules are to be construed and used to secure the just, speedy, and inexpensive determination of cases, and the parties should cooperate to achieve these ends.

Judge Campbell said that the advisory committee will study these drafts at its November 2012 meeting. It will likely marry them with the proposed rule on preservation to produce a package of rule amendments to make litigation more efficient. Professor Cooper added that it would be very beneficial for the Standing Committee members to review the proposed drafts carefully and point out any flaws and make additional suggestions that the advisory committee might consider.

A member praised the comprehensive and impressive efforts of the committee. She noted, though, that several corporate counsel had expressed concern about giving proportionality a more prominent place in the rules. They fear that it would give attorneys an excuse to litigate more discovery disputes.

A participant pointed out that the objective of fostering cooperation among the parties is excellent, but specifying a cooperation requirement in the text of the rules is troublesome. Cooperation inevitably is entwined with attorney conduct, an area on the edge of the Rules Enabling Act that may impinge on the role of the states in regulating attorney conduct.

Another participant suggested that consideration be given to appointing special masters to handle discovery in complex cases because busy judges often do not have the time to devote undivided attention to overseeing discovery. Some way would have to be found to pay for masters, but at least in large corporate cases, the parties may be able to work it out. He also recommended reducing the presumptive limit for expert-witness depositions to 4 hours.

A member commended the advisory committee for undertaking the discovery project. He suggested that anything the committee can do to limit the number of

discovery requests and reduce discovery time periods, at least in the average case, will be beneficial. He also commended the proposed modest recommendations on cost-shifting and proportionality. He urged the committee to carry on the work and move as quickly as possible.

His only reservation, he said, concerned adding a cooperation requirement to the rules. The concept, he said, was fine, but it may conflict with an attorney's ethical duty to pursue a client's interests zealously. He asked how much lawyers can be reasonably expected to cooperate in discovery when they are not expected to cooperate very much in other areas. The adversarial process, he said, is a highly valued attribute of the legal system, and the committee should avoid intruding into the states' authority over attorney conduct.

Members noted that some states have imposed effective, stricter limits on depositions that led lawyers to reassess how long they really need to take a deposition. A member added that depositions of expert witnesses have been eliminated completely in his state. It was noted that the original intent of Rule 26(a)(2)'s report requirement was to reduce the length of depositions of expert witnesses or even to eliminate them in many cases. That benefit, however, has not been realized.

PLEADING STANDARDS

Professor Cooper reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Iqbal v. Ashcroft*, 556 U.S. 662 (2009). There is, he said, no sense that the lower courts have unified around a single, identifiable pleadings standard for civil cases, but there is also no sense of a crisis or emergency. The committee, he said, was essentially biding its time and did not plan to move forward quickly. It has several potential proposals on the table, including directly revising the pleading standards in FED. R. CIV. P. 8 (general rules of pleading), addressing pleading indirectly through Rule 12(e) motions for a more definite statement, or integrating pleading more closely with discovery, particularly in cases where there is an asymmetry of information.

Dr. Cecil reported that the Federal Judicial Center had begun pilot work on its new study of all case-dispositive motions in the district courts. The study, he said, will be different from earlier studies because it will take a more comprehensive, holistic look at all Rule 12 motions and summary judgment issues and explore whether there are any tradeoffs, such as whether an increase in motions to dismiss has led to a reduction in motions for summary judgment. In addition, the Center is collaborating closely with several civil procedure scholars and hopes to reach a consensus with them about what is actually going on in the courts regarding dispositive motions. The study, he said, will be

launched in September 2012 with the help of law professors and students in several schools.

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FED. R. CIV. P. 84 AND FORMS

Judge Campbell reported that the advisory committee was examining FED. R. CIV. P. 84 (forms), which states that the forms appended to the rules "suffice" and illustrate the simplicity and brevity that the rules contemplate. He explained that many of the forms are outdated, and some are legally inadequate.

Professor Cooper pointed out that the Standing Committee had appointed an ad hoc forms subcommittee, chaired by Judge Gene E. K. Pratter of the civil committee, to review now the advisory committees develop and approve forms. The subcommittee, he said, made two basic observations: (1) in practice, the civil, criminal, bankruptcy, and appellate forms are used in widely divergent ways; and (2) the process for generating and approving forms differs substantially among the advisory committees.

The civil and appellate forms, for example, adhere to the full Rules Enabling Act process, including publication, approval by the Judicial Conference and the Supreme Court, and submission to Congress. The bankruptcy rules, on the other hand, follow the process partly, only up through approval by the Judicial Conference. At the other extreme, the criminal rules have no forms at all. Instead, the Administrative Office drafts the criminal forms, sometimes in consultation with the criminal advisory committee. He said that the subcommittee ultimately concluded that there is no overriding need for the advisory committees to adopt a uniform approach.

Professor Cooper explained that the civil advisory committee was now in the second phase of the forms project and was focusing on what to do specifically with the civil forms. He noted that the project had received an impetus from the Supreme Court's *Twombly* and *Iqbal* decisions on pleading requirements and from the widely held perception that the illustrative civil complaint forms are legally insufficient. There is, he said, a clear tension between the simplicity of those forms and the pleading requirements announced in the Supreme Court decisions.

He noted that the advisory committee was considering several different options. One would be just to eliminate the pleading forms. An alternate would be to develop a set of new, enhanced pleading forms for each category of civil cases consistent with *Twombly* and *Iqbal*. There was, though, no enthusiasm in the committee for that approach. Going further, the committee could consider getting back into the forms business full-bore and spend substantial amounts of time on improving and maintaining all the forms. At the other extreme, the committee could eliminate all the forms and allow the Administrative Office to generate the forms, with appropriate committee consultation.

CLASS ACTIONS AND RULE 23 SUBCOMMITTEE

Judge Campbell reported that the advisory committee had appointed a Rule 23 subcommittee to consider several topics involving class-action litigation and whether certain amendments to the class-action rule were appropriate.

Professor Marcus said that the subcommittee had begun its work and was examining a variety of controversial issues that have emerged as a result of several Supreme Court decisions in the past couple of years, recent litigation developments, and experience under the Class Action Fairness Act. Among the topics being considered are: (1) the relationship between considering the merits of a case and determining class action certification, particularly with regard to the predominance of common questions; (2) the viability of issues classes under Rule 23(c)(4); (3) monetary relief in a Rule 23 (b)(2) class action; (4) specifying settlement criteria in the rule; and (5) revising Rule 23 to address the Supreme Court's announcement in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fairness and adequacy of a settlement are no substitute for full-dress consideration of predominance.

Professor Marcus noted that the list of issues continues to evolve and many were discussed at the panel discussion during the Standing Committee's January 2012 meeting. He pointed out that the project to consider appropriate revisions to Rule 23 will take time, since several topics are controversial and will pose drafting difficulties.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum and attachments of May 17, 2012 (Agenda Item 8).

Amendment for Final Approval

FED. R. CRIM. P. 11(b)

Judge Raggi reported that the proposed amendment to FED. R. CRIM. P. 11(b)(1) (pleas) would add a new subsection (o) to the colloquy that a court must conduct before accepting a defendant's guilty plea. It would require a judge to advise defendants who are not United States citizens that they may face immigration consequences if they plead guilty.

She noted that at every stage of the advisory committee's deliberations, a minority of members questioned whether it is wise or necessary to add further requirements to the already lengthy Rule 11 plea colloquy. Moreover, the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2012), addressed the duty of defense counsel, not the duty of courts, to provide information on immigration consequences to the defendant. Nevertheless, a majority of the advisory committee concluded that immigration is qualitatively different from other collateral consequences that may flow from a conviction. Moreover, a large number of criminal defendants in the federal courts are aliens who are affected by immigration consequences.

The committee, she said, recognized the importance of not allowing Rule 11(b) to become such a laundry list of every possible consequence of a guilty plea that the most critical factors bearing on the voluntariness of a plea do not get lost, *i.e.*, knowledge of the important constitutional rights that the defendant is waiving. She added that the only change made after publication was a modest change in the committee note.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 5(d) and 58(b)

Judge Raggi explained that the proposed amendments to FED. R. CRIM. P. 5(d) (initial appearance) and FED. R. CRIM. P. 58(b)(2) (initial appearance in a misdemeanor) dealt with advising detained foreign nationals that they may have their home country's consulate notified of their arrest.

The amendments had been approved by the Judicial Conference in September 2011, but returned by the Supreme Court in April 2012. The advisory committee then discussed possible concerns that the Court may have had, such as that the possibility that the language of the amendments could be construed to intrude on executive discretion or

confer personal rights on a defendant. She suggested that there may have been concern over the proposed language in Rule 5(d)(1)(F), which specified that a detained non-citizen be advised that an attorney for the government or law-enforcement officer will do either of two things: (1) notify a consular office of the defendant's country, or (2) make any other consular notification required by treaty or international agreement.

She suggested that use of the word "will" might have been seen as potentially tying the hands of the executive in conducting foreign affairs. In addition, despite language in the committee note that the rule did not create any individual rights that a defendant may enforce in a federal court, the rule might have been seen as taking a step in that direction,

After the rule was returned by the Court, the advisory committee went back to the drawing board and produced a revised draft of the amendments. As revised, the first part provides that the defendant must be told only that if in custody, he or she "may request" that an attorney for the government or law-enforcement officer notify a consular office. It does not guarantee that the notification will in fact be made. The second part of the amendments was not changed. It specifies that even without the defendant's request, consultation notification may be required by a treaty or other international agreement.

Judge Raggi pointed out that the primary concern in revising the amendments was to assuage any concerns that the Supreme Court may have had with the amendments as originally presented. She noted that the Department of Justice had been consulting closely with the Department of State, which is very eager to have a rule as an additional demonstration to the international community of the nation's compliance with its treaty obligations.

A member noted that the Vienna Convention only requires notification of a consular office if a defendant requests it. She said that the Supreme Court might have found the original language of proposed Rule 5(d)(1)(F)(i) too strong in stating that the government will notify a consular office if the defendant requests. But the new language in Rule 5(d)(1)(F)(ii) may go too far in the other direction by requiring notification without the defendant's request if required by a treaty or international agreement.

Ms. Felton explained that several bilateral treaties, separate from the Vienna Convention, require notification regardless of the defendant's request. She added that the Departments of Justice and State had proposed the amendments to Rules 5 and 58 primarily as additional, back-up insurance that consular notification will in fact be made.

The main thrust of the amendments, she said, was to inform defendants of their option to request consular notification. In the vast majority of cases, however, the notification will already have been made by a law-enforcement officer or government attorney at the time of arrest. That is what the Vienna Convention contemplates. The

proposed amendments, which apply at initial appearance proceedings, will help catch any cases that may have slipped through the cracks.

Judge Raggi noted that this factor was part of the discussion on whether a rule is needed at all because there are no court obligations under the Convention and treaties. The rule, essentially, is a belt-and-suspenders provision designed to cover the rare cases when a defendant has not been advised properly. It only states that a defendant may request notification, and that is as far as it can go. If were to imply that the notice will in fact be given, which is what some treaties actually require, there would be concern that the rule itself was creating an enforceable individual right in the defendant.

Professor Beale added that the revised amendments were acceptable to the Departments of Justice and State. They may be more acceptable to the Supreme Court because they do not in any way tie the hands of the executive and avoid creating any individual rights or remedies. A member noted that the last part of the committee notes makes that point explicitly.

Judge Raggi pointed out that it was up to the Standing Committee to decide whether to republish the rule. Although the changes made after the return from the Supreme Court simply clarify the intent of the amendments, the advisory committee had reason to think that they were different enough to warrant publishing the rule again for further comment.

The committee unanimously by voice vote approved the proposed amendments for republication.

Information Items

FED. R. CRIM. P. 12 and 34

Judge Raggi explained that the proposed amendments to FED. R. CRIM. P. 12 (pleadings and pretrial motions) and the conforming amendment to FED. R. CRIM. P. 34 (arresting judgment) deal with motions that have to be made before trial and the consequences of an untimely motion. The amendments, she said, had been prompted by a proposal by the Department of Justice to include motions objecting to a defect in the indictment in the list of motions that must be made before trial.

The proposal, she said, had now come to the Standing Committee for the third time. The last draft was published for public comment in August 2011. It generated many thoughtful comments, which led the advisory committee to make some additional changes. It is expected that the ad hoc subcommittee reviewing the rule will present a final draft to the advisory committee in October 2012, and it may be presented to the Standing Committee for final approval in January 2013.

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee had received a letter from the Attorney General in October 2011 recommending that FED. R. CRIM. P. 6(e) (grand jury secrecy) be amended to establish procedures for disclosing historically significant grand jury materials. She noted that applications to release historic grand jury materials had been presented to the district courts on rare occasions, and the courts had resolved them by reference to their inherent supervisory authority over the grand jury.

The Department of Justice, however, questioned whether that inherent authority existed in light of Rule 6(e)'s clear prohibition on disclosure of grand jury materials. Instead, it recommended that disclosure should be permitted, but only under procedures and standards established in the rule itself. The Department submitted a very thoughtful memo and proposed rule amendments that would: (1) allow district courts to permit disclosure of grand jury materials of historical significance in appropriate circumstances and subject to required procedures; and (2) provide a specific point in time at which it is presumed that materials may be released.

She noted that a subcommittee, chaired by Judge John F. Keenan, had examined the proposal and consulted with several very knowledgeable people on the matter. In addition, the advisory committee reporters prepared a research memorandum on the history of Rule 6(e), the relationship between the court and the grand jury and case law precedents on the inherent authority of a judge to disclose grand jury material. After examining the research and discussing the proposal, all members of the subcommittee, other than the Department of Justice representatives, recommended that the proposed amendment not be pursued.

The full advisory committee concurred in the recommendation and concluded that in the rare cases where disclosure of historic materials had been sought, the district judges acted reasonably in referring to their inherent authority. Therefore, there is no need for a rule on the subject.

Judge Raggi added that she had received a letter from the Archivist of the United States strongly supporting the Department of Justice proposal. She spoke with him at length about the matter and explained that it would be a radical change to go from a presumption of absolute secrecy, which is how grand juries have always operated, to a presumption that grand jury materials should be presumed open after a certain number of years. A change of that magnitude, she said, would have to be accomplished through legislation, rather than a rule change. She noted that the archivist has a natural, institutional inclination towards eventually releasing historical archived documents and might consider supporting a legislative change.

FED. R. CRIM. P. 16

Judge Raggi reported that a suggestion had been received from a district judge to amend FED. R. CRIM. P. 16(a) (government's disclosure) to require pretrial disclosure of all the defendant's prior statements. There was, however, a strong consensus on the advisory committee that there are no real problems in criminal practice that warrant making the change. The committee, accordingly, decided not to pursue an amendment.

Judge Raggi reported that the Senate Judiciary Committee was considering legislation addressing the government's obligations to disclose exculpatory materials under *Brady* and *Giglio*. The committee had asked the judiciary for comments and a witness at the hearings. She said that she had decided not to testify but wrote to the committee to document the work of the advisory committee and the Standing Committee on the subject over the last decade. Attached to the letter were 900 pages of the public materials that the committee had produced.

She explained in the letter that the advisory committee had tried to write a rule that would codify all the government's disclosure obligations under case law and statute, but concluded that it could not produce a rule that fully captures the obligations across the wide range of federal criminal cases. In addition, she said, her letter alluded to a Federal Judicial Center survey of federal judges showing, among other things, that judges see non-disclosure as a problem that only arises infrequently. Although the advisory committee decided not to pursue a rule change, she added, the subject is being addressed in revisions to the *Bench Book for U.S. District Court Judges*. She noted that the Federal Judicial Center's Bench Book Committee was close to completing that work.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of May 3, 2012 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Amendments for Final Approval

FED. R. EVID. 803(10)

Judge Fitzwater reported that the proposed amendment to FED. R. EVID. 803(10) (hearsay exception for the absence of a public record) was needed to address a constitutional infirmity as a result of the Supreme Court's decisions in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). It raised the concern that "testimonial" evidence is being allowed when a certificate that a public record does not exist is introduced in

evidence without the presence of the official who prepared the certificate. The proposed amendment would create a notice-and-demand procedure that lets the prosecution give written notice of its intention to use the information. Unless the defendant objects and demands that the witness be produced, the certificate may be introduced.

The proposed procedure, he said, had been approved in *Melendez-Diaz*. The advisory committee received two comments on the amendment, one of which endorsed it and the other approved it in principle with some comments.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater reported that FED. R. EVID. 801(d) (declarant-witness's prior statement) specifies that certain prior statements are not hearsay. Under Rule 801(d)((1)(B), the proponent of testimony may introduce a prior consistent statement for its truth, *i.e*. to be admitted substantively, but not for another rehabilitative purpose, such as faulty recollection.

He said that two problems have been cited with the way the rule is now written. First, the prior consistent statement of the witness is of little or no use for credibility unless the jury actually believes the testimony to be true anyway. The jury instruction, moreover, is very difficult for jurors to follow, as it asks them to distinguish between prior consistent statements admissible for the truth and those that are not. Second, the distinction has little, if any, practical effect because the proponent of the testimony has already testified in the presence of the trier of fact.

The proposed amendment would allow a prior consistent statement to be admitted substantively if it otherwise rehabilitates the witness' credibility.

The committee without objection by voice vote approved the proposed amendment for publication.

FED. R. EVID. 803(6)-(8)

Judge Fitzwater noted that FED. R. EVID. 803(6), (7), and (8) are the hearsay exceptions, respectively, for business records, the absence of business records, and public records. When the admissibility requirements of the rule are met, the evidence is admitted as an exception to the hearsay rule unless the source, method, or circumstances indicate a lack of trustworthiness.

During the restyling of the rules, he said, a question arose as to who has the burden on the issue of lack of trustworthiness. By far the vast majority of court decisions have held that the burden is on the opponent of the evidence, not the proponent. But a few decisions have placed the burden on the proponent. Since the case law was not unanimous, the advisory committee decided that it could not clarify the matter as part of the restyling project because a change would constitute a matter of substance.

Although the ambiguity was not resolved during the restyling project, the Standing Committee suggested that the advisory committee revisit the rule. The advisory committee initially was of the view that no further action was needed until it was informed that the State of Texas, during its own restyling project, had looked at the restyled federal rules and concluded that FED. R. EVID. 803(6)-(8) had placed the burden on the proponent of the evidence. This, clearly, was not the advisory committee's intention. At that point, it decided to make a change in the rules to make it clear that the burden is on the opponent of the evidence.

At members' suggestions, minor changes were made in the proposed committee notes. Line 34 of the note to Rule 806(8) was corrected to conform to the text of the rule, and an additional sentence was added to the second paragraph of the note to Rule 806(6).

The committee without objection by voice vote approved the proposed amendments for publication.

Information Items

SYMPOSIUM ON FED. R. EVID. 502

Judge Fitzwater noted that the advisory committee's next meeting will be held on October 4 and 5, 2012, in Charleston, South Carolina. A symposium on Rule 502 will be held in conjunction with the meeting, with judges, litigators, and academics in attendance. There is concern, he said, that Rule 502 (limitations on waiver of attorney-client privilege and work product) is not being used as widely as it should be as a means of reducing litigation costs. He noted that Professor Marcus will be one of the speakers at the program, and he invited the members of the Standing Committee to attend.

REPORT OF THE E-FILING SUBCOMMITTEE

Judge Gorsuch noted that the ad hoc committee, which he chaired, was comprised of representatives from all the advisory committees. It was convened to consider appropriate terminology that the rules might use to describe activities that previously had only involved paper documents but now are often processed electronically. Although the

impetus for the subcommittee's formation arose in connection with the appropriate terminology to use in the pending amendments to Part VII of the bankruptcy rules and FED. R. APP. P. 6, the subcommittee took a comprehensive look at all the federal rules. Professor Struve served as the subcommittee reporter, and Ms. Kuperman compiled a comprehensive list of all the terms used in each set of federal rules to describe the treatment of the record and other materials that may be either in paper or electronic form.

He noted that the subcommittee had identified four possibilities for defining its work and listed them from the most aggressive to the least. First, he said, it could conduct a major review of all the federal rules in order to achieve uniformity in terminology across all the rules. That major project would be conducted along the lines of the recent restyling efforts. Second, the subcommittee could compile a glossary of preferred terms. Third, it could serve as a screen for all future rule amendments, and advisory committees would have to run their proposals through the subcommittee. And fourth, the subcommittee could simply make itself available for assistance at the request of the advisory committees.

He reported that the subcommittee opted for the last alternative, largely because the others would all take a great deal of time and effort. Moreover, it recognized that technology is changing so rapidly that it may not be timely to undertake a more aggressive approach at this juncture. At some point in the future, though, terminology will have to be addressed more comprehensively. He added that the most valuable result of the subcommittee's work was to make the reporters cognizant of the extraordinary number of synonyms currently in use in the rules and to encourage them to coordinate with each other on terminology.

INTERIM ASSESSMENT OF THE JUDICIARY'S STRATEGIC PLAN

Judge Kravitz noted that he would work with the advisory committees to prepare a response to Judge Charles R. Breyer, the Judicial Planning Coordinator, on the committee's progress in implementing the *Strategic Plan for the Federal Judiciary.*

NEXT MEETING

The committee will hold its next meeting on Thursday and Friday, January 3 and 4, 2013 in Boston, Massachusetts.

Respectfully submitted,

Peter G. McCabe,
Secretary

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FORDHAM

University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra Phone: 212-636-6855
Philip Reed Professor of Law e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Proposed Amendment to Rule 803(10)
Date: September 1, 2012

At its Spring 2011 meeting, the Committee unanimously approved an amendment to Rule 803(10) for release for public comment. By another unanimous vote, the Standing Committee released the proposed amendment for public comment. After receiving public comment, the Committee unanimously approved the proposed amendment without change. The Standing Committee unanimously approved the proposal and referred it to the Judicial Conference. At this writing, the proposal is before the Judicial Conference but it is not on the discussion calendar. Therefore it is anticipated that it will be referred to the Supreme Court. If all goes well, the proposed amendment will be effective December 1, 2013.

The proposed amendment to Rule 803(10) is designed to remedy a constitutional infirmity in the Rule after the Supreme Court's opinion in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). *Melendez-Diaz* bars the admission of certificates offered to prove the absence of a public record when that certificate is prepared for use in the criminal case — but the current Rule 803(10) allows such certificates to be admissible. Lower courts have recognized that admitting a certificate of absence of public record under Rule 803(10), when it is prepared for the criminal case, violates the accused's right to confrontation after *Melendez-Diaz.*

The proposed amendment to Rule 803(10) adds a "notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if the defendant, after receiving notice makes a pretrial demand for that production. The Court in *Melendez-Diaz* specifically approved a state version of a notice-and-demand procedure. What follows is the proposed amendment to Rule 803(10) exactly as it was sent to the Judicial Conference.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(10)

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

(10) ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:

(A) the testimony or certification is admitted to prove that

(~~A~~ i) the record or statement does not exist; or

(~~B~~ ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to

offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

No changes were made to the proposed amendment or Committee Note as they were issued for public comment.

SUMMARY OF PUBLIC COMMENTS

The Federal Magistrate Judges Association (11-EV-001) approves the proposed amendment.

The National Association of Criminal Defense Lawyers (11-EV-002) is not opposed in principle to the addition of a notice-and-demand procedure to Rule 803(1). The Association recommends, however, that: 1) the obligation to provide notice be placed on the "government" rather than the prosecutor; 2) the obligation to provide notice should be an objective standard; 3) the notice period should be tied to the government's discovery obligations under Fed. R. Crim. P. 16.

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FORDHAM

University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Evidence Rule 801(d)(1)(B)
Date: September 1, 2012

At the last meeting, the Committee approved the release for public comment of a proposed amendment to Evidence Rule 801(d)(1)(B). The proposal provides that prior consistent statements are admissible under the hearsay exception whenever they would be admissible to rehabilitate the witness's credibility. The basic justifications for the proposal are: 1) there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements; and 2) the current rule is fatally confusing because it grants substantive effect to certain prior consistent statements that rehabilitate, but not to others — even though the end result is that all rehabilitative consistent statements will be heard by the jury — and the necessary jury instruction is impossible to follow.

The Standing Committee at its June meeting unanimously approved the release of the proposed amendment for public comment. The proposed amendment and Committee Note are set forth beginning on the next page:

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 801(d)(1)(B)

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:

* * *

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

(i) is offered 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) otherwise rehabilitates the declarant's credibility as a witness;

* * *

Committee Note

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those

consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not provide for admissibility of, for example, consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it include consistent statements that would be probative to rebut a charge of faulty recollection. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment provides that prior consistent statements are exempt from the hearsay rule whenever they are admissible to rehabilitate the witness. It extends the argument made in the original Advisory Committee Note to its logical conclusion. As commentators have stated, "[d]istinctions between the substantive and nonsubstantive use of prior consistent statements are normally distinctions without practical meaning," because "[j]uries have a very difficult time understanding an instruction about the difference between substantive and nonsubstantive use." Hon. Frank W. Bullock, Jr. and Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 Fla.St. L.Rev. 509, 540 (1997). *See also United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001) ("the line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors").

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

Informal comment received on "post-motive" statements:

No formal public comment has been received on the proposed amendment — none would be expected at this early point in the public comment process. The Reporter did however receive an informal comment from an Evidence professor and the rest of this memo discusses that comment and whether the Rule or Committee Note should be altered in light of it.

The professor notes that in *Tome v. United States*, 513 U.S. 150 (1995), the Court was divided on whether prior consistent statements could be admissible when the witness was attacked for fabricating, and the consistent statement was made *after* the motive to fabricate arose. The majority opinion, written by Justice Kennedy, imposed a *pre*-motive requirement for admissibility under Rule 801(d)(1)(B). Justice Kennedy cited McCormick for the proposition that

> The applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated.

Justice Kennedy concluded that the language of Rule 801(d)(1)(B) incorporated the common-law pre-motive requirement, and concluded as follows:

> Our holding is confined to the requirements for admission under Rule 801(d)(1)(B). The Rule permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive. These conditions of admissibility were not established here.

Justice Breyer in dissent argued that even post-motive statements could be rehabilitative and as such should be admissible substantively under the terms of Rule 801(d)(1)(B). He concluded as follows:

> I would hold that the Federal Rules authorize a district court to allow (where probative in respect to rehabilitation) the use of postmotive prior consistent statements to rebut a charge of recent fabrication or improper influence or motive (subject of course to, for example, Rule 403). Where such statements are admissible for this rehabilitative purpose, Rule 801(d)(1)(B), as stated above, makes them admissible as substantive evidence as well (provided, of course, that the Rule's other requirements, such as the witness' availability for cross-examination, are satisfied). In most cases, this approach will not yield a different result from a strict adherence to the premotive rule for, in most cases, postmotive statements will not be significantly probative. And, even in cases where the statement is admitted as significantly probative (in respect to rehabilitation), the effect of admission on the trial will be minimal because the prior consistent statements will (by their nature) do no more than repeat in-court testimony.

The professor providing the informal comment expressed concern that the proposed amendment would "overrule *Tome*" by allowing for substantive use of prior consistent statements to rehabilitate a charge of fabrication even if the statement was made *after* the motive to fabricate

arose. He notes that Judge Bullock's article, which is cited in the Committee Note, in one part advocates for the admission of post-motive prior consistent statements.

One answer to the professor's concerns is that the very language construed by the Supreme Court to provide a pre-motive requirement is *retained* in the proposed amendment. That would seem to be a strong indication that there is no intent to "overrule" *Tome.* All the amendment proposes to do is to allow *other already permitted* forms of rehabilitation — specifically rehabilitating attacks for prior inconsistent statement or faulty recollection — and make them admissible substantively.

That said, it can certainly be argued that any reference to Judge Bullock's article might be considered by some to be an invitation to reject the *Tome* pre-motive limitation on prior consistent statements offered to rebut a charge of recent fabrication. Therefore, the Committee might consider deleting the reference to that article in the Committee Note. It should be noted that the Standing Committee would approve of the deletion of the reference to the article without regard to the merits. The Standing Committee has for several years been hounding Reporters to keep Committee Notes short and to delete references to cases and articles.

The merits question for the Committee is whether anything at all should be specifically stated, in either the text or the Committee Note, about the admissibility of prior consistent statements that are offered to rehabilitate a charge of fabrication when they were made after the motive to fabricate arose. Certainly it would seem that, if a court *did* find that a post-motive statement was properly offered for rehabilitation, then it should also be considered for substantive effect . That is the whole point of the amendment, i.e., to eradicate the unnecessary and unexplainable distinction between substantive and rehabilitative use of prior consistent statements. It would appear to be the height of absurdity for a judge to have to instruct the jury that some prior consistent statements could only be used to rehabilitate bad motive, when others admitted at the same trial could be used to rehabilitate that same bad motive and also for their substantive effect. So there would appear to be no reason for the rule or committee note to single out statements offered to rehabilitate bad motive from any other statement that is properly admitted to rehabilitate credibility.

The real question then appears to be whether the text or Committee Note should express a proviso that post-motive statements offered to rehabilitate a motive to fabricate are not admissible either to rehabilitate or for substantive effect. This is obviously for the Committee to decide, but it would seem unwise to set down a categorical rule (or statement in the Committee Note) that such a statement could never, ever be admissible to rehabilitate. Indeed both the majority and the dissenting opinions in *Tome* agreed that a post-motive statement might in some random case be rehabilitative. It would seem that leaving the admissibility question to Rule 403, as the Rule does, is more prudent than establishing an absolute rule of inadmissibility. Therefore it could be argued that no reference to post-motive statements is necessary as they will be treated, as any other statement, under Rule 403.

If the Committee believes it appropriate to address the issue of admissibility of post-motive statements offered to rehabilitate a charge of bad motive — as opposed to just leaving the issue unaddressed and relying on the courts' use of Rule 403 — then here are some options (beyond the

minor one of deleting the reference to Judge Bullock's article):

1. A statement in the Committee Note that post-motive statements, *if* admissible to rehabilitate, are also admissible substantively, but that this should be quite rare.

2. A statement in the Committee Note that such statements are never admissible.

3. A statement in the Committee Note that there is no intent to overrule *Tome.*

4. Something in the text addressed to the admissibility or inadmissibility of post-motive statements — though this seems far from preferable as it would muck up what is a pretty concise amendment, and it would probably have to be added to the part that carries over from the original rule. Such an addition to the original language would undermine the reason for retaining that language in the first place, which was to assure courts that the familiar language and principle of the original rule was being retained.

The Reporter will prepare any or all of these alternatives for the next meeting if the Committee so directs.

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FORDHAM

University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra Phone: 212-636-6855
Philip Reed Professor of Law e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Proposed Amendment to the Trustworthiness Clauses of Rules 803(6)-(8)
Date: September 1, 2012

Evidence Rule 803(6) provides a hearsay exception for records of regularly conducted activity, so long as "neither the source of information nor the method or circumstances of preparation indicate lack of trustworthiness." Rules 803(7) and 803(8) contain the same lack of trustworthiness proviso for absence of business records and public records respectively. At the Spring 2012 meeting the Committee approved proposed amendments for each Rule to be sent to the Standing Committee with the recommendation that they be released for public comment. The Standing Committee, at its June meeting, unanimously voted to release the proposed amendments for public comment.

The proposed amendments would clarify that the opponent of the evidence has the burden of showing untrustworthiness. The amendments would remedy a conflict in the case law and also would clarify that when the rules were restyled, they were not intended to provide that the proponent had the burden of showing trustworthiness.

No public comment has yet been received on the proposed amendments.

The proposed amendments and Committee Notes, are set forth below.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(6)

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

*** * ***

(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by - or from information transmitted by - someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a

statute permitting certification; and

(E) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose the burden of proving untrustworthiness on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(7)

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

* * *

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) ~~neither~~ the opponent does not show that the possible source of the information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — set forth in Rule 803(6) — then the burden is on the opponent to show a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(8)

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

*** * ***

(8) ***Public Records.*** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or other

circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability, and it should be up to the opponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

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FORDHAM

University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra Phone: 212-636-6855
Philip Reed Professor of Law e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington* — and After the Confusion of *Williams v. Illinois*
Date: September 1, 2012

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. It has been substantially revised since the last meeting to account for the Supreme Court's decision in *Williams v. Illinois*, which throws the Supreme Court's Confrontation Clause jurisprudence in disarray.

The memo is in four parts:

1) Part one is a description of *Williams* and its effect on admitting hearsay under the Confrontation Clause.

2) Part two sets forth all federal and state court cases that have applied *Williams*. The goal is to see how the courts are trying to figure out what to do in light of the disaster that is *Williams*, so that the Committee might have some indication of whether any part of Article 8 — or Rule 703 — needs to be amended.

3) Part three is essentially the outline that has been produced in previous agenda books, with subject matter categories and cases set forth by circuit. It has been updated substantially from the last agenda book. And all cases previously set forth in this outline have been re-evaluated in light of *Williams*. Where *Williams* clearly has no effect on the outcome of a case decided before it, it will not be discussed. Where *Williams* probably has an effect or the question is close, that impact will be discussed.

4) Part four is a short discussion of the effect of *Williams* on rulemaking.

I. *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; but 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 facts are as follows: Williams was tried for rape in a bench trial. When the victim was brought to the hospital, doctors took a blood sample and vaginal swabs for a sexual-assault kit. The police eventually sent these samples to a private laboratory, Cellmark, for DNA testing. Cellmark prepared a DNA profile and sent it back to the police. At the time the Cellmark report was prepared, the rapist was still at-large (that fact turns out to be important). Then Lambatos, a forensic specialist for the State Police, conducted a computer search to see if the Cellmark profile matched any profiles in the state DNA database. The computer showed a match with Williams's profile, which had been produced by the state lab from a sample of Williams's blood that had been taken in an unrelated arrest. At trial, witnesses testified to the preparation of Williams's DNA profile and its entry into the database — thus there was no confrontation objection as to this part of the proof. But no witness from Cellmark was called to testify to the preparation of the profile from the sample taken from the victim. Instead the state offered Lambatos as an expert witness in forensic biology and DNA analysis. She testified about the general process of DNA testing, and how profiles are matched based on a unique genetic code. She further testified that Cellmark was an accredited crime lab. Finally she testified that, based on her own comparison of the two DNA profiles, there was a match. The Cellmark report was neither admitted into evidence nor shown to the factfinder, i.e., the judge. Lambatos did not quote or read from the report. But she did testify on cross-examination that she relied on the DNA profile produced by Cellmark to reach her conclusion of a match.

Williams argued that his right to confrontation was violated because the person or persons who prepared the Cellmark report did not testify. The government argued that 1) under Illinois Rule 703 — substantively identical to Federal Rule 703 for present purposes — an expert is allowed to rely on inadmissible hearsay; 2) the Cellmark report was not itself entered into evidence; 3) Lambatos was testifying to her own opinion, not that of Cellmark, so she was the "witness" against Williams for purposes of the Confrontation Clause; and 4) Williams had a full opportunity to thoroughly cross-examine Lambatos. Williams was convicted and the Illinois court affirmed on the ground that the Cellmark report was never offered into evidence and therefore nobody at Cellmark was a witness against Williams — the Illinois court reasoned that the Cellmark report was not offered for its truth but only "to show the underlying facts and data Lambatos used before rendering an expert opinion."

The Supreme Court affirmed the conviction, but beyond that fact there is nothing clear about the result in *Williams.* Here is the scorecard of Justices in Williams:

The Alito Opinion:

Four members of the Court in a plurality opinion ---- Justice Alito, joined by the Chief Justice and Justices Kennedy and Breyer — found no Confrontation violation on two independent grounds:

1. Justice Alito agreed with the Rule 703-based analysis of the Illinois Courts — i.e., that the Cellmark report was never offered for truth and never entered into evidence, and so its preparer was not a witness against him. Justice Alito also noted that the distinction between using the Cellmark report for its truth and use only as the basis of an expert opinion is one that can easily be made by a judge in a bench trial, as was the instant case. (Whether that means that the Rule 703 analysis *only* works in bench trials is one of the post-*Williams* mysteries. The best answer would appear to be that the plurality would also accept the Rule 703 analysis in a jury trial at least if there is a good limiting instruction.).

2. Justice Alito also set forth an independent ground for decision: he declared that even if the Cellmark report had been offered for truth, the Confrontation Clause was not violated because the report was not "testimonial" within the meaning of *Crawford*. The test for testimoniality previously employed, most recently in *Michigan v. Bryant*, (set forth infra in Part III under excited utterances) is whether the "primary motive" for making the statement was to have it used in a criminal prosecution. Justice Alito declared that the Cellmark report did not trigger the "primary motive" test, because the "primary motive" for preparing the report was not to use it at trial *against a particular individual*, i.e., *Williams*. This was so because at the time the report was prepared, nobody knew who the perpetrator was. Thus the view from Justice Alito is that the primary motive test of testimoniality is dependent on whether the statement targeted *a particular person*, with the primary intent of having that statement used in a criminal prosecution of that particular person. For Justice Alito, the test is not satisfied if the statement is made only for use in some unidentified criminal prosecution.

The Kagan Opinion:

Four members of the Court in a dissenting opinion — Justice Kagan, joined by Justices Scalia, Ginsburg and Sotomayor — disagreed vehemently with both premises of Justice Alito's opinion:

1) As to the Rule 703-based analysis, Justice Kagan 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. While she recognized that Rule 703 rests on the very distinction she rejected, her response was that an Evidence Rule cannot define an accused's right to confrontation.

2) 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. [1]

The Thomas Opinion:

Justice Thomas was the tiebreaker. He essentially agreed completely with Justice Kagan's critique of Justice Alito's two grounds for affirming the conviction, i.e., that the Rule 703 analysis was an artifice and that the "primary motive" test is not limited to statements that target a particular individual. So one might wonder, with five Justices agreeing that Justice Alito's reasons for affirming the conviction were wrong, why did Williams lose in the Supreme Court? That happened because Justice Thomas concurred in the judgment because he had his own reason for affirming the conviction. In his view, the use of the Cellmark report for its truth did not offend the Confrontation Clause because that report was not sufficiently "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.

In Justice Thomas's view, a hearsay statement cannot be testimonial unless it is equivalent to a formal affidavit or certificate, as it was those types of formal documents that the Confrontation Clause was historically meant to regulate.

Fallout from Williams:

It must be noted that *eight* members of the Court rejected Justice Thomas's view that

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[1] Justice Breyer wrote a concurring opinion. He argued that rejecting the Rule 703 analysis would end up requiring the government to call every person who had anything to do with a forensic test — a result he found untenable. He also re-raised many of the arguments of the dissenters in *Melendez-Diaz.* Finally, he 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 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.

testimoniality is defined by whether a statement is sufficiently formal as to constitute an affidavit or certification. As Justice Kagan stated, "Justice Thomas's approach grants constitutional significance to minutia." Yet because of the fractured opinions in *Williams*, it appears that it will often 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 will probably 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 does the declarant does not testify, then the government would appear to have to establish that the hearsay is not tantamount to a formal affidavit — this is because five members of the court flatly 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. (Moreover, there is some confusion raised in Justice Alito's opinion about whether the distinction set forth in Rule 703 — between hearsay that is admitted and hearsay that is used only as the basis for an expert opinion — will work as well in a jury trial as it does in a trial before the judge, who can more easily understand such a nuance.)

In the end Justice Thomas's formality requirement may not be much of a bar to the government after *Williams.* As Justice Kagan noted, it is possible that the government could satisfy the Thomas view "with the right kind of language" in any forensic or other report. That is, don't call the report a "certificate," don't use the word "affidavit," and use a private lab. Obviously the courts will need to struggle with the Thomas view of "formality" in the post-*Williams* landscape.

Williams is basically a disgrace — the Court that is supposed to be telling us what the law is in fact creates nothing but confusion. The Court would have been much better off in dismissing the case as improvidently granted when it came to discover how it was going to come out. As Justice Kagan noted, "[t]he five Justices who control the outcome of today's case agree on very little" and the result of that is "who knows what."

It should be noted, however, 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 satisfied 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*, 131 S.Ct. 1143, 1167 (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 allowing admission of testimonial statements on the ground that they are not offered for their truth — for example a statement is offered to show the

background of a police investigation, or offered to show that the statement is in fact false. That case law appears unaffected by *Williams.* As will be discussed further below, while both Justice Thomas and Justice Kagan reject the not-for-truth analysis in the context of expert reliance on hearsay, they both distinguish that use from admitting a statement for a *legitimate* not-for-truth purpose. Moreover, both approve of the language in *Crawford* that the Confrontation Clause "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-*Williams* Cases in the Lower Courts, Federal and State

What is remarkable so far is how many lower court cases after *Williams* are simply treating the Alito-Rule 703 analysis as the law — i.e., if an expert relies on a report that contains testimonial hearsay, there is no confrontation clause violation so long as the report itself is not admitted and the expert comes to her own conclusion. Very little (or no) effort is made to parse through all the goofy Justice Thomas formality requirements.

Those courts that don't just ignore the Thomas formality requirements either recognize them in passing or simply evade *Williams* entirely by relying on harmless error, no plain error, etc. I have yet to come upon a case that really goes through all the opinions in *Williams* as a basis for coming to a conclusion. That is, there is no court so far that relies on an analysis something like "the expert's opinion is a proper use of Rule 703 and so gets four votes in the Supreme Corut; and it is not formal so it gets Thomas's vote as well."

As to the dispute over the "primary motive" test, the early indications are that the Alito view is being considered controlling (even though Justice Thomas and the four in the Kagan camp disagree with it). That is, the working definition for testimoniality, at least in the early post-*Williams* stages, is whether the statement was made with the primary motive that it be used against a targeted individual.

What follows are short descriptions of the post-*Williams* lower court cases:

1. Rule 703 Analysis:

Adoption of the Rule 703 not-for-truth analysis: *Goins v. Smith*, 2012 WL 3023306 (N.D. Ohio): In a habeas proceeding, the petitioner challenged the trial testimony of an expert who relied on a DNA test. The court invoked the plurality opinion in *Williams* and stated that under the

Confrontation Clause "a testifying expert may assume the truth of an out-of-court statement."

Adoption of the Rule 703 not-for-truth analysis: *State v. Joseph*, 2012 WL 3536802 (Ariz. Supreme Court)): The court found no confrontation violation when an expert relied on a doctor's report about the cause of death. It stated as follows:

> [E]xpert testimony that discusses reports and opinions of another is admissible under Arizona Rule of Evidence 703 if the expert reasonably relied on these matters in reaching his own conclusion. See *Williams v. Illinois*, 132 S.Ct. 2221, 2228 (2012) ("Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.") (plurality opinion). Similarly, testimony regarding an autopsy photograph is not hearsay when offered to show the basis of the testifying expert's opinion and not to prove the truth of prior reports or opinions.
>
> The trial court did not err in permitting Dr. Keen to testify about the basis for his conclusions regarding Tommar's injuries and cause of death. Dr. Keen's testimony did not exceed its permissible scope, and he did not offer any matters contained in Dr. Kohlmeier's autopsy report to show their truth

Adoption of the Rule 703 not-for-truth analysis: *Littleton v. State*, 2012 WL 3292443 (Mo.App. E.D.)): The court found no confrontation violation in an expert's reliance on a lab report where the expert reached his own conclusion and the report was not introduced as evidence. It stated as follows:

> Had Karr's testimony merely recited the findings presented in the laboratory report, we would have Confrontation Clause concerns as Karr would be testifying as to findings made by a technician who was not available to the accused for cross-examination. But such is not the case here. * * * Karr specifically testified that the conclusions she made regarding the DNA found in Galbreath's vehicle were independent of the findings of the technician who drafted the laboratory report, and of the report itself. As recently noted by the U.S. Supreme Court, the Confrontation Clause, as interpreted in *Crawford*, bars only testimonial statements by declarants who are not subject to cross-examination. *Williams v. Illinois*.

Adoption of the Rule 703 not-for-truth analysis: *People v. Viera,* 2012 WL 2899343 (Cal.App. 2 Dist.)): The defendant argued that DNA testimony of an expert violated his right to confrontation as it was based in part on lab work of a nontestifying technician**.** The court rejected the argument:

> [T]o the extent a portion of Ms. Bach's testimony was based in part on the laboratory work of the nontestifying technician who performed the extraction, as an expert, her testimony could properly include reference to hearsay matters upon which she relied in performing her work and rendering her opinion without offending the confrontation clause. *Williams v. Illinois.*

***Accord, People v. Magana*, 2012 WL 3039756 (Cal.App. 4 Dist.) (citing *Williams* for the proposition that " the Confrontation Clause has no application to out-of-court statements that are not offered to prove the truth of the matter asserted, including expert testimony where [the] witness expresses an opinion based on facts made known to [the] expert.").**

Adoption of the Rule 703 not-for-truth analysis: *People v. Hamilton*, 2012 WL 3089371 (Cal. 4th App.): The defendant argued that the Confrontation Clause was violated when an expert testified in part on the basis of a rape kit prepared by nurses who did not testify. The court rejected the argument, relying solely on Rule 703/not-for-truth analysis of the Alito opinion in *Williams.* The court elaborated as follows:

> Over a defense objection, a nurse, Tracey Gomez, testified as an expert about the contents of the SART (Sexual Assault Response Team) report prepared by two nurses who examined S.B. after the assault. Defendant argues Gomez's testimony violated the Confrontation Clause * * * unless the witness was unavailable and defendant had an opportunity for cross-examination. The United States Supreme Court recently confirmed that "modern rules of evidence continue to permit experts to express opinions based on facts about which they lack personal knowledge." *Williams v. Illinois*. An expert's testimony concerning a report prepared by a third party does not violate the Confrontation Clause when the report was not admitted into evidence. As an expert, Nurse Gomez could properly testify about the SART report which was not admitted into evidence.

Adoption of the Rule 703 not-for-truth analysis: *State v. Harris*, 729 S.E.2d 99 (N.C. App. 2012): Expert testimony on the significance of DNA results, conducted by an analyst not produced for trial, did not violate the right to confrontation. First, there was no error when the test itself was conducted by a trainee but testified to by the supervisor who stood over her shoulder. Second, testimony on the significance of the results, based on statistical information prepared by others, was not a violation because the expert could use this information as the basis of expert testimony. *Williams* is then cited for the following proposition:

> Williams v. Illinois,132 S.Ct. 2221 (2012) (upholding admissibility of testimony regarding DNA analysis based upon work performed by an outside laboratory despite the prosecution's failure to present testimony from an analyst employed by the outside laboratory).

Adoption of the Rule 703 not-for-truth analysis and the Alito primary motive test:

***People v. Hamilton*, 2012 WL 3291994 (Cal.App. 4 Dist.):** An expert on street gangs testifies on the basis of speaking with gang members, "while in a custody setting, discuss[ing] their lifestyles, habits[,] what landed them in detentions, and [,] as a patrol deputy, investigating gang crimes," and that his education as a gang expert included "shar[ing] thoughts, ideas [and] intelligence with other officers and deputies." The court found no confrontation violation on two grounds after *Williams*:

> [N]one of the out-of-court statements that Deputy Cady used to educate himself on criminal street gangs were described at trial, and therefore Hamilton cannot base his argument on the premise that hearsay evidence was improperly admitted. Further, even had any out-of-court statements been recited by Deputy Cady as a basis for his opinion, they would offend the Confrontation Clause only if they were testimonial statements. As our Supreme Court recently explained in the plurality opinion in *Williams v. Illinois* (2012) 132 S.Ct. 2221, an out-of-court statement is testimonial if it has "the primary purpose of accusing a targeted individual of engaging in criminal conduct" and, usually, it involves a "formalized statement[ ] such as affidavits, depositions, prior testimony, or confessions." Here, the out-of-court statements that Deputy Cady described as constituting part of his education in criminal street gangs were not described as statements accusing an individual of criminal conduct or as formalized statements, and therefore, without more, would not be testimonial even if they were recited by Deputy Cady at trial.

So the court applies both prongs of the Alito view, with only a passing reference to formality as a factor — and that reference is to the discussion of formality in the Alito opinion, not in the Thomas opinion. In any case even under the Thomas view these statements don't look formalized.

Adoption of the Rule 703 not-for-truth analysis: *State v. Francis*, 2012 WL 3166604 (N.J.Super.A.D.): A Cellmark DNA test was prepared by an analyst not produced for trial, but a "technical reviewer" who independently reviewed the data testified as an expert. The court found no confrontation violation, relying *solely* on the Alito-Rule 703 view; no mention at all was made of the Thomas formality test:

> [D]efendant argues that his Sixth Amendment confrontation rights were violated because Word testified instead of Clifton. However, in a recent decision, *Williams v. Illinois*, 132 S.Ct. 2221 (2012), the Supreme Court of the United States confirmed that the Confrontation Clause is not violated where a DNA expert testifies to her own independent conclusions, based on information from a DNA testing laboratory. In other words, the Court's decision confirmed the continuing viability of Rule 703 of the Federal Rules of Evidence and N.J.R.E. 703, both of which permit an expert witness to testify to the expert's own independent conclusions, even if the expert relied on inadmissible hearsay documents in reaching those conclusions. Consequently, we find no error, plain or otherwise, in the admission of Word's testimony.

Adoption of the Rule 703 not-for-truth analysis: *McMullen v. State*, 2012 WL 2688713

(Ga.App.)): The defendant argued that an expert's report on blood should have been excluded because he relied in part on a testimonial lab report. The court rejected the argument, relying solely on the Alito/Rule 703/not-for-truth analysis:

> Although the State's expert witness admitted that he did not physically place McMullen's blood sample into the instrumentation and perform the tests himself, he examined and analyzed "every piece of data" that was produced, drew conclusions from that data, and then testified regarding his independent expert opinion derived from that data. The expert further testified that the data report itself contains information regarding calibrations and controls run prior to and after the testing of McMullen's blood from which it was possible for him to confirm both that the instrument was in proper working order and that the tests were performed correctly.
>
> Under these circumstances, the trial court did not err in allowing the testimony of the expert witness even though he did not actually perform the testing procedure himself. It is well established that an expert may base his opinion on data collected by others and that his or her lack of personal knowledge does not mandate the exclusion of the opinion but, rather, presents a jury question as to the weight which should be assigned the opinion. Moreover, because the expert personally viewed and analyzed the data which formed the basis of the expert opinion about which he testified, he was not acting as a mere "surrogate," but rather had a substantial personal connection to the scientific test at issue. It follows then, that the expert witness's testimony did not violate McMullen's Sixth Amendment confrontation right. *Williams.*

Adoption of the Rule 703 not-for-truth analysis: *State v. Lopez*, 45 A.3d 1 (R.I. 2012): The defendant challenged the expert's use of a DNA test prepared by Cellmark, when the person who prepared the test did not testify. The expert was a Cellmark supervisor. The court rejected the confrontation claim relying specifically on a Rule 703 analysis — because the expert reached his own opinion and the DNA test was not introduced as evidence, it was the expert who was the "witness" against the defendant, not the analyst who conducted the test:

> Quartaro was the preeminent testifying witness. He testified as to his own conclusions; he did not act as a conduit of the opinions of, or parrot the data produced by, other analysts. Cf. *United States v. Ramos–Gonzalez,* 664 F.3d 1, 5 (1st Cir.2011) ("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."). * * * [T]he fact that Quartaro used data produced from the work of other analysts to form his final, independent conclusions did not bestow upon defendant the constitutional right to confront each and every one of those subordinate analysts. * * * Accordingly, we hold that in this case, where defendant had ample opportunity to confront Quartaro—the witness who undertook the critical stage of the DNA analysis, supervised over and had personal knowledge of the protocols and process of all stages involved in the DNA testing, reviewed

> the notes and data produced by all previous analysts, and testified to the controls employed by the testing lab to safeguard against the possibility of testing errors—the Confrontation Clause was satisfied.

As to *Williams*, the court simply relies on the result reached by the plurality:

> Our determination is further buttressed by the recent decision of *Williams v. Illinois*, 132 S.Ct. 2221 (2012), in which a plurality of the United States Supreme Court held that an independent DNA expert—who had no connection to the testing laboratory or knowledge of its procedures, and who took no part in the DNA testing nor in the formulation of the DNA report—was permitted to testify concerning the substance of the DNA report.

Adoption of Rule 703 not-for-truth analysis: *State v. Bussey*, 2012 WL 3628772 (N.J. Super. A.D.): In a prosecution for vehicular homicide, the government offered two experts to testify about the defendant's blood alcohol content at the time of the accident. Maxwell was a forensic scientist in charge of the toxicology unit, who described the relevant processes and his role in supervising and reviewing the work of the analyst who conducted the blood test, and who testified that he reviewed independently all aspects of the test. Brick relied on the test as well as other evidence in the record to opine about the defendant's probable level of intoxication at the time of the accident. The court held that *Williams* "would appear to allow the sort of testimony offered by Dr. Brick" under a Rule 703 analysis. As to Maxwell, the prosecutor presented his testimony "for the purpose of establishing the fact of defendant's blood alcohol content at the time the sample was drawn" but there was no error in admitting his testimony because Maxwell had independently evaluated and supervised all aspects of the test.

Confrontation Clause violation where the lab report is introduced into evidence: *Hall v. State*, 2012 WL 3174130 (Tex.App.-Dallas): The court held that the state could not avoid a confrontation violation by arguing that an expert relied on a testimonial lab report, when the testimonial lab report was actually admitted into evidence. The court distinguished *Williams* as a case in which the lab report was never entered into evidence. The court also distinguished *Williams* as a case where the report was prepared before the defendant was arrested, and do it was not testimonial. In contrast, the lab report in this case was specifically targeted toward the defendant, who had been arrested. ***Accord Connors v. State*, 2012 WL 2924389 (Miss.))** (Admission of forensic reports — a toxicology report and a ballistics report — violated the right to confrontation; the court notes that the case is not affected by *Williams*, which it clearly is not; under any view, admission of the report itself, without an expert testifying, violates *Melendez-Diaz*.).

> **Note: While the court in *Hall* finds a confrontation violation, in fact the court treats the Alito view — as to both Rule 703 and primary motive — completely controlling. The facts of the case and the use of the lab test are distinguished from the use found permissible by Justice Alito in *Williams*.**

2. Primary Motive Analysis:

Adoption of the Alito Primary Motive Analysis: *Benjamin v. Harrington,* 2012 WL 3248256 (C.D.Cal.)*:* The defendant argued that expert testimony in partial reliance on a lab report violated his right to confrontation. The court found no error, because the report was prepared before the defendant was arrested and thus he was not an adversarial target at the time. The court relied on the Alito plurality opinion and its test of "primary motive." The court also notes in passing that the report was not a certified document or affidavit. ***Accord People v. Hamilton,* 2012 WL 3291994 (Cal.App. 4 Dist.) (discussed above under point 1).**

Primary motive test not met where statements were made to an undercover informant to set up a drug transaction: *Brown v. Epps,* 2012 WL 2401670 (5th Cir.): This case is discussed more fully under "informal statements" in Part Three, infra. 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 case was decided after *Williams*, but the court did not rely on it, because statements setting up a drug deal with a confidential informant are definitely not testimonial under either of the "primary motive" tests posited in *Williams.*

Primary motive test not met where caller reports an ongoing crime to 911: *United States v. Polidore,* 2012 WL 3264561 (5th Cir.): In a drug trial, the defendant objected that a 911 call from a bystander to a drug transaction — together with questions from the 911 operators— was testimonial. This case is discussed more fully in Part Three under present sense impressions. The court held that the report from the bystander was not testimonial because 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 caller's "purpose [was] not to provide a solemn declaration for use at trial, but to bring to an end an ongoing [drug trafficking crime]," *Williams v. Illinois*, 132 S.Ct. 2221, 2243 (2012) (citing *Bryant*, 131 S.Ct. at 1155). The court did not refer to the fight over the primary motive test in *Williams* but it appears that the court's analysis comports with both versions of the primary motive test — the statement was targeted at a particular individual but even so, its primary motive was to get the police to respond to an ongoing crime rather than to prepare a statement for trial.

Primary motive test not met where report is prepared before a crime occurs: *State v. Shivers,* 280 P.3d 635 (Ariz. App. 2012) : In a case involving failure to comply with a protective order, service of the order was proved at trial by a certificate of service. The court found the certificate to be non-testimonial on grounds similar to the warrant of deportation cases, (infra in Part Three) i.e., the primary purpose was administrative and at the time of the preparation there was no

crime yet.

> The Declaration was created and filed with the court to serve administrative purposes as required by statute and would have been created regardless whether Shivers later violated the Order. Shivers was not being investigated for violating the Order at the time the Declaration was created and filed, and neither law enforcement nor the prosecution requested its creation. A reasonable person taking into account all surrounding circumstances would conclude the Declaration primarily served a contemporaneous administrative purpose rather than a prosecutorial one. *Bryant*, 131 S.Ct. at 1155. Although the possibility existed the Declaration could be used in a later prosecution if Shivers violated the Order, the Declaration remains nontestimonial because its purpose at the time of creation was not prosecutorial.
>
> The court notes the fight over the primary motivation test in *Williams* but states as follows:
>
> > The dissenting justices did not disavow the primary purpose test but criticized the plurality's description of it as including an inquiry whether the speaker intended to target a particular person. We need not wade into the choppy waters left in the wake of *Williams'* discussion of the primary purpose test; applying any iteration of the test, we conclude the primary purpose of the Declaration was administrative rather than prosecutorial.

Primary motive test not met where report is prepared before a crime occurs: *People v. Nunley,* --- N.W.2d ----, 491 Mich. 686 (2012): The defendants were charged with driving with a suspended license, an element of which was that the state sent them notice that their license was suspended. The trial court admitted certificates of mailing a license suspension. The defendants argued that the certificates of mailing were testimonial, but the court disagreed, because the primary motivation for the certificate was not for use in a criminal prosecution.

> [T]he evidence at issue in this case was not prepared as a result of a criminal investigation or created after the commission of the crime. Rather, the DOS generates certificates of mailing contemporaneously with the notices that are mailed to drivers whose licenses have been suspended or revoked. Again, under no circumstances could the drivers whose licenses have been suspended or revoked be charged with DWLS before having received the notice of the suspension or revocation. In our view, the distinction makes all the difference in the world because the certificate was not and could not have been created in anticipation of a prosecution because no crime had yet occurred.

The court notes in a footnote that the certificate satisfies both versions of the primary motive test bandied about in *Williams*:

> We note that our analysis is consistent with the reasoning of both the lead opinion and the dissenting opinion from the United States Supreme Court's recent plurality decision in *Williams.* Consistently with the reasoning of the lead opinion, the primary purpose of the

certificate of mailing was not to accuse a targeted individual of engaging in criminal conduct. Instead, because the certificate is necessarily generated before the commission of any crime, there is no one to accuse of criminal conduct. Further, consistently with the reasoning of the dissenting opinion, the primary purpose of the certificate of mailing was not to produce evidence for a later criminal prosecution. Although the dissenting opinion differed with the lead opinion in its view that " it makes not a whit of difference whether, at the time of the [creation of the evidence], the police already have a suspect,"the circumstances here would not lead an objective witness to reasonably believe that the certificate of mailing would be available for use at a later trial because no crime had been committed at the time the certificate was generated and no investigatory procedure had begun.

3. Avoiding Williams

Avoiding *Williams* by finding no plain error: *United States v. Garvey,* 2012 WL 3194242 (7th Cir.): The defendant argued that his right to confrontation was violated when an expert relied on a testimonial lab test to conclude that Williams was found with narcotics. The court noted that it had previously found such a process to be constitutional under a Rule 703 not-for-truth analysis, but that in *Williams* the Supreme Court had left "significant confusion" about whether such a procedure comported with the Confrontation Clause. The court avoided the issue because "even if Garvey can establish plain error, he cannot demonstrate that the error affected his substantial rights."

Williams* kerfuffle avoided because the expert did not rely on a lab report to establish any contested fact: *State v. Deadwiller, 2012 WL 2742198 (Wis.App.): The court found it did not have to rely on *Williams* because the State did not rely on a testimonial lab report to establish any fact:

> We need not parse in any great detail the philosophical underpinnings of the various opinions in *Williams* because although they disagreed as to their rationale, five justices agreed at the core that the outside laboratory's report was not testimonial. This conclusion governs this case, and we do not have to delve beyond this core to analyze whether, as Justice Alito's lead opinion concludes in part, that the outside laboratory's report was not relied on for its truth (with which five justices disagreed), or whether, as Justice Alito seems to indicate, the analysis might have been more far-ranging if Williams's trial had been to a jury rather than to a judge, although he also notes that he does "not suggest that the Confrontation Clause applies differently depending on the identity of the factfinder. Instead, our point is that the identity of the factfinder makes a big difference in evaluating the likelihood that the factfinder mistakenly based its decision on inadmissible evidence." This discourse on possible foundational gradations does not apply here because, as we have seen,

the State laid more than a sufficient foundation for the jury to conclude that the semen recovered from Kristina S. and Chantee O. was sent to Orchid Cellmark, and that Orchid Cellmark's profiles were consistent with approved DNA-analysis standards. * * * [U]nlike the situation to which Justices Alito and Kagan referred to in *Williams*, the jury here did not have to rely on Witucki's testimony for it to conclude beyond a reasonable doubt that the semen samples sent to Orchid Cellmark were those recovered from Kristina S. and Chantee.

III. Cases Defining "Testimonial" Hearsay Mostly Decided Before *Williams*, 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.

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* line of cases not altered by *Crawford*: *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.

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 holding 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."

The defendant's own statements are not covered by *Crawford,* but *Bruton* remains in place to protect against admission against a non-confessing co-defendant: *United States v. Ramos-Cardenas,* 524 F.3d 600 (5th Cir. 2008): In a multiple-defendant case, the trial court admitted a post-arrest statement by one of the defendants, which indirectly implicated the others. The court found that the confession could not be admitted against the other defendants, because the confession was testimonial under *Crawford.* But the court found that *Crawford* did not change the analysis with respect to the admissibility of a confession against the confessing defendant; nor did it displace the case law under *Bruton* allowing limiting instructions to protect the non-confessing defendants under certain circumstances. The court elaborated as follows:

> [W]hile *Crawford* certainly prohibits the introduction of a codefendant's out-of-court testimonial statement against the other defendants in a multiple-defendant trial, it does not signal a departure from the rules governing the admittance of such a statement against the speaker-defendant himself, which continue to be provided by *Bruton, Richardson* and *Gray.*

In this case, the court found no error in admitting the confession against the codefendant who made it. As to the other defendants, the court found that the reference to them in the confession was vague,

and therefore a limiting instruction was sufficient to assure that the confession would not be used against them. Thus, the *Bruton* problem was resolved by a limiting instruction.

Bruton* and its progeny survive *Crawford* — co-defendant'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.*"

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."

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).

Surreptitiously recorded statements of coconspirators are not testimonial: *United States v. Hendricks,* 395 F.3d 173 (3d 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 (3d 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). ***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 argument would mean that all hearsay is testimonial. 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 they were not made with the intent that they would be used in a criminal investigation or prosecution. ***See also United States v. Mooneyham,*** 473 F.3d 280 (6th Cir. 2007) (statements made by coconspirator in furtherance of the conspiracy are not testimonial because the one making them "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").

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 must be made during the course and in furtherance of the conspiracy, they are not the kind of formalized, litigation-oriented statements that the Court found testimonial in *Crawford.* The court reached the same result on co-conspirator hearsay in ***United States v. Reyes,*** 362 F.3d 536 (8th Cir. 2004); ***United States v. Singh,*** 494 F.3d 653 (8th Cir. 2007); and ***United States v. Hyles,*** 521 F.3d 946 (8th Cir. 2008) (noting that the statements were not elicited in response to a government investigation and were casual remarks to co-conspirators)**.**

Statements in furtherance of a conspiracy are not testimonial: *United States v. Allen,* 425 F.3d 1231 (9th Cir. 2005): The court held that "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).

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*).

Statements made during the course and in furtherance of the conspiracy are not testimonial: *United States v. Underwood,* 446 F.3d 1340 (11th Cir. 2006): In a drug case, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford*. But the court found no error and affirmed. The court noted that the statements "clearly were not made under circumstances which would have led [Daryl] reasonably to believe that his statement would be available for use at a later trial. Had Darryl known

that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place." The court concluded as follows:

> Although the foregoing discussion would probably support a holding that the evidence challenged here is not "testimonial," two additional aspects of the *Crawford* opinion seal our conclusion that Darryl's statements to the government informant were not "testimonial" evidence. First, the Court stated: "most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy." Also, the Court cited *Bourjaily v. United States*, 483 U.S. 171 (1987) approvingly, indicating that it "hew[ed] closely to the traditional line" of cases that *Crawford* deemed to reflect the correct view of the Confrontation Clause. In approving *Bourjaily*, the *Crawford* opinion expressly noted that it involved statements unwittingly made to an FBI informant. * * * The co-conspirator statement in *Bourjaily* is indistinguishable from the challenged evidence in the instant case.

See also United States v. Lopez, 649 F.3d 1222 (11th Cir. 2011): co-conspirator 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 inadequate at that trial (by failing to investigate a self-defense theory and failing to call two witnesses). The court, however, found the cross-examination to be adequate. The court noted that the state court had found the cross-examination to be adequate — 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.*"

Declarations Against Penal Interest (Including Accomplice Statements to Law Enforcement)

Accomplice's jailhouse statement 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 (2d 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 admissible under Rule 804(b)(3) and not testimonial).

Intercepted conversations were admissible as declarations against penal interest and were not testimonial: *United States v. Berrios,* 676 F.3d 118 (3rd Cir. 2012): Authorities intercepted a conversation between criminal associates in a prison yard. The court held that the statements were

non-testimonial, because neither of the declarants "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, be extension, for Tabon's murder. Brown made the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure.

Accomplice's statements to the victim, in conversations taped by the victim, were not testimonial: *United States v. Udeozor,* 515 F.3d 260 (4th Cir.2008): The defendant was convicted for conspiracy to hold another in involuntary servitude. The evidence showed that the defendant and her husband brought a teenager from Nigeria into the United States and forced her to work without compensation. The victim also testified at trial that the defendant's husband raped her on a number of occasions. On appeal the defendant argued that the trial court erroneously admitted two taped conversations between the victim and the defendant. The victim taped the conversations surreptitiously in order to refer them to law enforcement. The court found no error in admitting the tapes. The conversations were hearsay, but the husband's statements were admissible as declarations against penal interest, as they admitted wrongdoing and showed an attempt to evade prosecution. The defendant argued that even if admissible under Rule 804(b)(3), the conversations were testimonial under *Crawford*. He argued that a statement is testimonial if the *government's* primary motivation is to prepare the statement for use in a criminal prosecution — 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.**

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, are not testimonial: *Ramirez v. Dretke,* 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated 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."

Statement admissible as a declaration against penal interest, after *Williamson,* is not testimonial: *United States v. Manfre,* 368 F.3d 832 (8th Cir. 2004): An accomplice made a statement to his fiancee that he was going to burn down a nightclub for the defendant. The court held that this statement was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor. Rather, it was a statement made informally to a trusted person. For the same reason, the statement was not testimonial under *Crawford*; it was a statement made to a loved one and was "not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks."

Accomplice statements to cellmate are not testimonial: *United States v. Johnson,* 495 F.3d 951 (8th Cir. 2007): The defendant's accomplice made statements to a cellmate, implicating himself and the defendant in a number of murders. The court found that these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement.

Jailhouse confession implicating defendant was admissible as a declaration against penal interest and was not testimonial: *United States v. Smalls,* 605 F.3d 765 (10th Cir. 2010): The court found no error in admitting a jailhouse confession that implicated a defendant in the murder of a government informant. The statements were not testimonial because they were not made with "the primary purpose * * * of establishing or proving some fact potentially relevant to a criminal prosecution." The fact that the statements were made in a conversation with a government informant did not make them testimonial because the declarant did not know he was being interrogated, and the statement was not made under the formalities required for a statement to be testimonial. Finally, the statements were properly admitted under Rule 804(b)(3), because they implicated the declarant in a serious crime committed with another person, there was no attempt to shift blame to the defendant, and the declarant did not know he was talking to a government informant and therefore was not currying favor with law enforcement.

Declaration against interest is not testimonial: *United States v. U.S. Infrastructure, Inc.,* 576 F.3d 1195 (11th Cir. 2009): The declarant, McNair, made a hearsay statement that he was

accepting bribes from one of the defendants. The statement was made in private to a friend. The court found that the statement was properly admitted as a declaration against McNair's penal interest, as it showed that he accepted bribes from an identified person. The court also held that the hearsay was not testimonial, because it was "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 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,* 131 S.Ct. 1143 (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.
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> 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.
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> 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.
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> 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 it 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.

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 non-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*.").

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. All three statements (the two 911 calls and the girlfriend's statement to the police) were admitted as excited utterances, and the defendant was convicted. The court affirmed. 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" within the meaning of *Crawford*, as it was not the kind of statement that was equivalent to courtroom testimony. It 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.***

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.
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> **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 matter, on the ground that it was based on an artificial distinction. But the plurality decision by Justice Alito embraces this Rule 703 analysis. At this early stage, the answer appears to be that an expert can rely on testimonial hearsay so long as it is not in the form of an affidavit or certificate — that proviso would then get Justice Thomas's approval. But as seen above, the lower courts after *Williams* at least so far appear to treat the Alito opinion as controlling — that is, the use of testimonial hearsay by an expert is permitted without regard to its formality, so long as the expert makes an independent conclusion and the hearsay itself is not admitted into evidence.

Expert's reliance on testimonial hearsay does not violate the Confrontation Clause: *United States v. Henry,* 472 F.3d 910 (D.C. Cir. 2007): The court declared that *Crawford* "did not involve expert witness testimony and thus did not alter an expert witness's ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion under Federal Rule of Evidence 703. In other words, while the Supreme Court in *Crawford* altered Confrontation Clause precedent, it said nothing about the Clause's relation to Federal Rule of Evidence 703." ***See also United States v. Law,*** 528 F.3d 888 (D.C. Cir. 2008)**:** Expert's testimony about the typical practices of narcotics dealers did not violate *Crawford*. While the testimony was based on interviews with informants, "Thomas testified based on his experience as a narcotics investigator; he did not relate statements by out-of-court declarants to the jury."

> **Note: These opinions from the D.C. Circuit precede *Williams* and are questionable if you count the votes in *Williams.* But these cases are quite consistent with the Alito opinion in *Williams* and as stated above, lower courts at this early stage appear to be treating the Alito opinion as controlling on an expert's reliance on testimonial hearsay.**

Confrontation Clause violated where expert does no more that restate the results of a testimonial lab report: *United States v. Ramos-Gonzalez,* 664 F.3d 1 (1st Cir. 2011): In a drug case, a lab report indicated that substances found in the defendant's vehicle tested positive for cocaine. The lab report was testimonial under *Melendez-Diaz,* and the person who conducted the test was not produced for trial. The government sought to avoid the *Melendez-Diaz* problem by calling an expert to testify to the results, but the court found that the defendant's right to confrontation was nonetheless violated, because the expert did not make an independent assessment, but rather simply restated the report. The court explained as follows:

> Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal. Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation. See, e.g., *United States v. Ayala*, 601 F.3d 256, 275 (4th Cir.2010) ("[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 *Ramon-Gonzalez* surely remains valid. Five members of the *Williams* Court rejected the proposition that an expert can rely at all on testimonial hearsay even if the expert testifies to his own opinion. And even Justice Alito cautions that an expert may not testify if he does nothing more than parrot the testimonial hearsay.

Expert's reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly related to the jury*: United States v. Lombardozzi,* 491 F.3d 61 (2nd Cir. 2007): In an extortion case, the government called a criminal investigator who testified as an expert about the structure of La Cosa Nostra and the defendant's affiliation with organized crime. The expert based his opinion as to the defendant in part on testimony from cooperating witnesses and confidential informants. The defendant argued that the introduction of the expert's testimony violated *Crawford* because it was based in part on testimonial hearsay. 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." The court found any error in introducing the hearsay statements directly to be harmless. ***See also United States v. Mejia,*** 545 F.3d 179 (2nd Cir. 2008) (violation of Confrontation Clause where expert directly relates statements made by drug dealers during an interrogation).

Note: These opinions from the 2nd Circuit precede *Williams* and are questionable if you count the votes in *Williams.* (You would have to go back to determine whether the statements from cooperating witnesses and informants are sufficiently "formalized" to constitute testimony under the Thomas view — they are likely to be so because Thomas found the accomplice statements in *Crawford* to be sufficiently formalized.) But these cases are quite consistent with the Alito opinion in *Williams* and as stated above, lower courts at this early stage appear to be treating the Alito opinion as controlling on an expert's reliance on testimonial hearsay.

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.

Note: The holding that expert reliance on an instrument readout does not violate *Crawford* appears unaffected by *Williams* — at least it can be said that *Williams* says nothing about whether machine output is testimony.

Expert reliance on confidential informants in interpreting coded conversation does not violate *Crawford: United States v. Johnson,* 587 F.3d 625 (4th Cir. 2009): The court found no error in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. The defendant argued that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular conversations. The defendant asserted that the experts were therefore relying on testimonial hearsay. The court stated that experts are allowed to consider inadmissible hearsay as long as it is of a type reasonably relied on by other experts — as it was in this case. It stated that "[w]ere we to push *Crawford* as far as [the defendant] proposes, we would disqualify broad swaths of expert testimony, depriving juries of valuable assistance in a great many cases." The court recognized that it is "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): *Crawford* "does not prevent expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence." In this case, the court found that 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 opinions from the 4th Circuit precede *Williams* and are questionable if you count the votes in *Williams.* (You would have to go back to determine whether the

statements relied upon are sufficiently "formalized" to constitute testimony under the Thomas view.) But these cases are quite consistent with the Alito opinion in *Williams* and as stated above, lower courts at this early stage appear to be treating the Alito opinion as controlling on an expert's reliance on testimonial hearsay.

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) four Justices in *Williams* adopt the Rule 703 not-for-truth analysis (and courts so far are saying it is controlling without more); 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 *Melendez-Diaz: United States v. Turner,* 591 F.3d 928 (7th Cir. 2010): 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. ***See also United States v. Thornton,*** 642 F.3d 599 (7th Cir. 2011) (no error in allowing expert to testify to the place of manufacture of ammunition as he was relying on records prepared by manufacturers in the course of business).

Note: The Supreme Court vacated the decision in *Turner* and remanded for reconsideration in light of the mess that the Court made in *Williams.* So *Turner* can no longer be relied on. Whether the Confrontation Clause is violated under the facts of *Turner* should probably depend on whether the lab report was sufficiently "formal" as to be tantamount to an affidavit or certificate under the Thomas view. It should be noted, however, that the courts so far after *Williams* have relied solely on the Alito/Rule 703 analysis to uphold expert testimony that relied on testimonial hearsay.

Avoiding the confusion wrought by *Williams*: *United States v. Garvey,* 2012 WL 3194242 (7th Cir.)**:** The court recognized that the facts of the case mirrored the facts of *Turner,* immediately above: an expert testified that substances were narcotics, relying on a testimonial lab test, but the test itself was not admitted into evidence. The court noted that the Supreme Court in *Willliams* had left "significant confusion" about whether such a procedure comported with the Confrontation Clause. The court avoided the issue because "even if Garvey can establish plain error, he cannot demonstrate that the error affected his substantial rights."

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. In this *pre-Williams* case, 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.

Note: The result in *Huether* probably withstands *Williams*, because even if Thomas's formality view is controlling, the NCMEC report did not appear to have the degree of formality that would trigger Justice Thomas's ire. That makes five votes for the result reached by the *Huether* court. And as noted, post-*Williams* courts appear to be relying *solely* on the Alito/Rule 703 analysis.

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): 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. But 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.

> **Note: *Pablo* precedes *Williams* and may be questionable if you count the votes in *Williams*. (You would have to go back to determine whether the statements relied upon are sufficiently "formalized" to constitute testimony under the Thomas view.) But *Pablo* is quite consistent with the Alito opinion in *Williams* and as stated above, lower courts at this early stage appear to be treating the Alito opinion as controlling on an expert's reliance on testimonial hearsay.**

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 rely on the Confrontation Clause, by murdering the victim. The government made no showing that Giles murdered the victim with the intent to keep her from testifying. The Court found an intent-to-procure requirement in the common law, and therefore, under the historical analysis mandated by *Crawford*, there is necessarily an intent-to-procure requirement for forfeiture of confrontation rights. Also, at one point in the opinion, the Court in dictum stated that "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.

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.

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).

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 noted 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."

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.

Informal Circumstances, Private Statements, etc.

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; 4) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 5) 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**

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. The unidentified individuals' statements were * * * not part of a formal interrogation about past events—the conversations were informal cell-phone exchanges about future plans—and their primary purpose was not to create an out-of-court substitute for trial testimony. * * * 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. (Quoting *Bryant*). Their purpose was not to create a record for trial and thus is not within the scope of the Confrontation Clause. We conclude that the statements were nontestimonial.
>
> **Note: This case was decided after *Williams,* but is not affected by that case. Statements**

setting up a drug deal with a confidential informant are definitely not testimonial under either of the "primary motive" tests posited in *Williams.*

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).

Interpreters

Interpreter is not a witness but merely a language conduit and so testimony about 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 violated his right to confrontation. The court found that the interpreter had acted as a "mere language conduit." 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 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.

Interrogations, Etc.

Formal statement to police officer is testimonial: *United States v. Rodriguez-Marrero,* 390 F.3d 1 (1st Cir. 2004): The defendant's accomplice gave a signed confession under oath to a prosecutor in Puerto Rico. The court held that any information in that confession that incriminated the defendant, directly or indirectly, could not be admitted against him after *Crawford.* Whatever the limits of the term "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).

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 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. Under these circumstances, we find that a reasonable person in Mohammed's position would objectively foresee that an inculpatory statement implicating himself and others might be used in a subsequent investigation or prosecution.

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.

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

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 stated that the only difference between the questioning in this case and that in *Crawford* was that "instead of a police officer asking questions about a suspected criminal violation, he sat silent while a social worker did the same." But the court found that this was "a distinction without a difference" because the interview took place at the police station, it was recorded for use at trial, and the social worker utilized a structured, forensic method of interrogation at the behest of the police. Under the circumstances, the social worker "was simply acting as a surrogate interviewer for the police."

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: The court's statement that multi-purpose statements might be testimonial is surely correct, but it must be narrowed in light of the Supreme Court's subsequent decision in *Bryant.* There, the Court declared that it would find a hearsay statement to be testimonial only if the *primary* purpose was to prepare a statement for criminal prosecution.

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).

Machines

Printout from machine is not hearsay and therefore 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 alchohol, because all the technicians could do was to refer to the raw data printed out by the machine. Thus, the statements to which Dr. Levine testified in court . . . did not come from the out-of-court technicians [but rather from the machine] and so there was no violation of the Confrontation Clause. . . . The raw data generated by the diagnostic machines are the "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 testimony 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."

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 or 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.

Statement 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

Statement of an accomplice made to his attorney is not testimonial: *Jensen v. Pliler*, 439 F.3d 1086 (9th Cir. 2006): Taylor was in custody for the murder of Kevin James. He confessed the murder to his attorney, and implicated others, including Jensen. After Taylor was released from jail, Jensen and others murdered him because they thought he talked to the authorities. Jensen was tried for the murder of both James and Taylor, and the trial court admitted the statements made by Taylor to his attorney (Taylor's next of kin having waived the privilege). The court found that the statements made by Taylor to his attorney were not testimonial, as they "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* in not retroactive (the holding) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts.* Thus, if hearsay is non-testimonial, there is no constitutional limit on its admission.

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. 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."). ***See also Furr v. Brady,*** 440 F.3d 34 (1st Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth; rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

Note: Five members of the Court in *Williams* disagreed with Justice Alito's analysis that the Confrontation Clause was not violated because the testimonial lab report was never admitted for its truth. The question from *Williams* is whether those five Justices are opposed to *any* use of the not-for-truth analysis in answering Confrontation Clause challenges. The answer is apparently that their objection to the not-for truth analysis in *Williams* does not extend to situations in which 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.*

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.*

Statements by informant to police officers, offered to prove the "context" 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 context 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 "context" were actually admitted for their truth, resulting in a Confrontation Clause violation: *United States v. Cabrera-Rivera,* 583 F.3d 26 (1st Cir. 2009): In a robbery prosecution, the government offered hearsay statements that accomplices made to police officers. The government argued that the statements were not offered for their truth, but rather to explain how the government was able to find other evidence in the case. But the court found that the accusations were not properly admitted to provide context. 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."

Accomplice's confession, when offered 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 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 Confrontation Clause concerns prevent the admission of the substance of a declarant's out-of-court statement where a less prejudicial narrative would suffice in its place, this is not such a case." ***See also United States v. Diaz,*** 670 F.3d 332 (1st Cir. 2012)(testimonial statement from one police officer to another to effect an arrest did not violate the right to confrontation because it was not hearsay: "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 five (or more) members of the Court apply a distinction between legitimate and illegitimate not-for-truth usage, offering the statement to prove it is false is certainly on the legitimate side of the line. It is one of the**

clearest cases of a statement not being offered to prove that the assertions therein are true. Of course, the government must provide independent evidence that the statement is in fact false.

Accomplice statements to police officer were testimonial, but did not violate the Confrontation Clause because they were admitted to show they were false: *United States v. Trala,* 386 F.3d 536 (3rd Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford*, as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no purpose. ***See also United States v. Lore,*** 430 F.3d 190 (3rd Cir. 2005) (relying on *Trala*, the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing "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 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 accomplice confessions. While testimonial, they were offered for impeachment and not for their

truth and so did not violate the Confrontation Clause. However, the trial court gave no limiting instruction, and the court found that failure to be error. The court concluded as follows:

> Without a limiting instruction to guide it, the jury that found Adamson guilty was free to consider those facially incriminating statements as evidence of Adamson's guilt. The careful and crucial distinction the Supreme Court made between an impeachment use of the evidence and a substantive use of it on the question of guilt was completely ignored during the trial.
>
> **Note: The use of the cohort's confessions to show differences from the defendant's confession is precisely the situation reviewed by the Court in *Tennessee v. Street.* As noted above, while five Justices in *Williams* rejected the "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).

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 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. 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.

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 confessed to 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."

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 *Crawford*, 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."

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 arranged to put him in contact with an undercover informant who purported 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 "[w]e note that there is a concern that the government may, in future cases, seek to submit based on 'context' statements that are, in fact, being offered for their truth." But the court found no such danger in this case, noting the following: 1) the informant presented himself as not being proficient in English, so most of his side of the conversation involved asking the defendant to better explain himself; and 2) the informant did not "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. 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).

> **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 the only relevance of the statement requires the factfinder to assess its truth, then the statement is not being offered for a legitimate not-for-truth purpose.**

Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial: *United States v. Price,* 418 F.3d 771 (7th Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an "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."

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 unfairly runs along the same lines as those expressed by Justice Thomas and Kagan in *Williams.***

Testimonial statement was not legitimately offered for context or background and so was a violation of *Crawford: United States v. Adams,* 628 F.3d 407 (7th Cir. 2010): In a narcotics prosecution, statements made by confidential informants to police officers were offered against the defendant. For example, the government offered testimony from a police officer that he stopped the defendant's car on a tip from a confidential informant that the defendant was involved in the drug trade and was going to by 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 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 the propriety of the investigation was not disputed. The court stated that if the real purpose of admitting the evidence was to explain the officer's knowledge and the nature of the investigation, "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.").

Note: The distinction between *Holmes* and *Brooks* is essentially the distinction between legitimate and illegitimate uses of the "not-for-truth" argument adopted by Justices Thomas and Kagan in *Williams.*

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."

> **Note: Query whether the fact that the underlying statements were never admitted into evidence would satisfy Justices Thomas and Kagan in *Williams* — they were unimpressed with the fact that the lab report in that case was never admitted into evidence. They were concerned with the fact that the truth of the report would have to be assumed for the purposes for which it was used by the expert. Relatedly, it would seem that in *Spears* one would have to presume the truth of the confession in order to be able to inquire into the bad act. Accordingly, the result in *Spears* seems questionable if the proper approach to applying *Williams* is to count heads. But as noted above, the courts in the immediate aftermath of *Williams* are treating the Alito opinion — and its reliance on the fact that the report was never admitted into evidence — as controlling.**

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.

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).

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 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,* 2012 WL 3264561 (5th Cir.): In a drug trial, the defendant objected that a 911 call from a bystander to a drug transaction — together with 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 across the street, and no violent activity was occurring. But the court noted that under *Bryant* an ongoing emergency is relevant but not dispositive to whether statements about a crime are testimonial. Ultimately the court found that the caller's statements were not testimonial, reasoning as follows:

> [A]lthough the 911 caller appeared to have understood that his comments would start an investigation that could lead to a criminal prosecution, the primary purpose of his statements was to request police assistance in stopping an ongoing crime and to provide the police with the requisite information to achieve that objective. Like a statement made to resolve an ongoing emergency, the caller's "purpose [was] not to provide a solemn declaration for use at trial, but to bring to an end an ongoing [drug trafficking crime]," *Williams v. Illinois*, 132 S.Ct. 2221, 2243 (2012) (citing *Bryant*, 131 S.Ct. at 1155), even though the crime did not constitute an ongoing emergency. 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. [most internal quotations and citations omitted].
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> **Note: This case was decided after *Williams* (and cites *Williams*) but the court did not refer to the fight over the primary motive test in *Williams*. It appears, however, that the court's analysis comports with both versions of the primary motive test — the statement was targeted at a particular individual, but its primary motive was to get the police to respond to an ongoing crime rather than to prepare a statement for trial.**

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 stated 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.

> **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 *Solorio* the first premise was not met — the statements were made for safety and coordination purposes, and not primarily for use in any criminal prosecution.**

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." Again, some lower courts after *Crawford* had distinguished between ministerial affidavits on collateral matters from Raleigh-type ex parte affidavits; this reasoning is in conflict with *Melendez-Diaz*.

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)(B) and (C).

6. In response to an argument of the dissent, the majority seems to state, at least in dictum, that certificates that merely authenticate proffered documents are not testimonial.

7. As counterpoint to the argument about prior practice allowing certificates authenticating records, the *Melendez-Diaz* majority cited a line of cases about affidavits offered to prove the *absence* of a public record.

> Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition — 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 Rule 803(10) in a criminal case is prohibited. But the Court did find that a notice-and-demand provision would satisfy the Confrontation Clause because if, after notice, the defendant made no demand to produce, a waiver could properly be found. Accordingly, the Committee proposed an amendment to Rule 803(10) that added a notice-and-demand provision. That amendment was approved by the Standing Committee and if all goes well it will become effective December 1, 2013.

Admission of a testimonial forensic certificate through the testimony of a witness with no personal knowledge of the testing violates the Confrontation Clause under *Melendez-Diaz: Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011): The Court reaffirmed the holding in *Melendez-Diaz* that certificates of forensic testing prepared for trial are testimonial, and held further that the Confrontation Clause was not satisfied when such a certificate was entered into evidence through the testimony of a person who was not involved with, and had no personal knowledge of, the testing procedure. Judge Ginsburg, writing for the Court, declared as follows:

> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

Lower Court Cases on Records and Certificates Decided Before Melendez-Diaz

Certification of business records under Rule 902(11) is not testimonial: *United States v. Adefehinti,* 519 F.3d 319 (D.C. Cir. 2007): The court held that a certification of business records under Rule 902(11) was not testimonial even though it was prepared for purposes of litigation. The court reasoned that because the underlying business records were not testimonial, it would make no sense to find the authenticating certificate testimonial. It also noted that Rule 902(11) provided a procedural device for challenging the trustworthiness of the underlying records: the proponent must give advance notice that it plans to offer evidence under Rule 902(11), in order to provide the opponent with a fair opportunity to challenge the certification and the underlying records. The court stated that in an appropriate case, "the challenge could presumably take the form of calling a certificate's signatory to the stand. So hedged, the Rule 902(11) process seems a far cry from the threat of *ex parte* testimony that *Crawford* saw as underlying, and in part defining, the Confrontation Clause." In this case, the Rule 902(11) certificates were used only to admit documents that were acceptable as business records under Rule 803(6), so there was no error in the certificate process.

> **Note: While 902(11) may still be viable after *Melendez-Diaz,* some of the rationales used by the *Adefehinti* court are now suspect. First, the *Melendez-Diaz* Court rejects the argument that the certificate is not testimonial just because the underlying records are nontestimonial. Second, the argument that the defendant can challenge the affidavit by calling the signatory is questionable because the *Melendez-Diaz* majority rejected**

the government's argument that any confrontation problem was solved by allowing the defendant to call the analyst. In response to that argument, Justice Scalia stated that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses."

The *Melendez-Diaz* Court held that the Confrontation Clause would not bar the government from imposing a basic notice-and-demand requirement on the defendant. That is, the state could require the defendant to give a pretrial notice of an intent to challenge the evidence, and only then would the government have to produce the witness. But while Rule 902(11) does have a notice and procedure, there is no provision for a demand for production of government production of a witness.

It can be argued that 902(11) is simply an authentication provision, and that the *Melendez-Diaz* majority stated, albeit in dicta, that certificates of authenticity are not testimonial. But the problem with that argument is that the certificate does more than establish the genuineness of the business record.

Despite all these concerns, the lower courts *after Melendez-Diaz* have rejected Confrontation Clause challenges to the use of Rule 902(11) to self-authenticate business records. See the cases discussed under the next heading — cases on records after *Melendez-Diaz*.

Warrant of deportation is not testimonial: *United States v. Garcia*, 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held "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 s recorded routinely and not in preparation for a criminal trial").

Note: Warrants of deportation still satisfy the Confrontation Clause after *Melendez-Diaz*. Unlike the forensic analysis in that case, a warrant of deportation is prepared for regulatory purposes and is clearly not prepared for the illegal reentry litigation, because by definition the crime has not been committed at the time it's prepared. As seen below, post-*Melendez-Diaz* courts have found warrants of deportation to be non-testimonial. And as seen in Part One above, the courts after *Williams* have found similar records to be non-testimonial, i.e., records prepared before a crime occurred, such as notices of license suspension and certificates of service of an order of protection.

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.

Autopsy report found not testimonial: *United States v. Feliz,* 467 F.3d 227 (2d Cir. 2006): Affirming racketeering convictions, the court found no error in the admission of autopsy reports offered to prove the manner and the cause of death of nine victims. The court held that the autopsy reports were properly admitted as both business records under Rule 803(6) and as public records under Rule 803(8). The court concluded that to be admissible under either of these exceptions, the record could not be testimonial within the meaning of *Crawford*. Put another way, the court declared that if a record were testimonial, it could not by definition meet the admissibility requirements of either exception. With respect to business records, the court noted that Rule 803(6) cannot be used to admit a record that is prepared primarily for purposes of litigation. So by definition to be admissible under Rule 803(6) the record cannot be testimonial within the meaning of *Crawford* and

Davis. The court recognized that a medical examiner may anticipate that an autopsy report might later on be used in a criminal case. But the court stated that mere anticipation of use in litigation was not enough to make the record testimonial. It noted that the Supreme Court had not embraced such a broad definition of "testimonial" but rather defines testimonial as requiring a "primary motivation" for use in litigation. With respect to Rule 803(8), the court observed that the rule "excludes documents prepared for the ultimate purpose of litigation, just as does Rule 803(6)." The court also reasoned that an extreme application of the term "testimonial" would impose unnecessary burdens on the government without a corresponding gain in the truth-seeking process. The court noted the "practical difficulties" of proving cause and manner of death if the report is found inadmissible:

> Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the report. Moreover, medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report. Unlike other forensic tests, an autopsy cannot be replicated by another pathologist. Certainly it would be against society's interest to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case.

> **Note: The court's emphasis on a practical result is problematic under the majority's analysis in *Melendez-Diaz.* The dissenters in *Melendez-Diaz* argued vehemently that requiring live testimony of the analyst would be impractical and would impose substantial and sometimes insurmountable obligations on the government. The majority's response was that it had no authority to consider burdens, because the certificate was testimonial and admission of testimonial hearsay in the absence of cross-examination violates the Confrontation Clause.**
>
> **This does not mean, however, that autopsy reports are automatically testimonial after *Melendez-Diaz.* The forensic report in *Melendez-Diaz* was prepared *solely* for litigation and so fit squarely within the Court's definition of "testimonial." Under *Davis*, it is not enough that a report might foreseeably be used in a litigation — use in litigation has to be the *primary purpose* of the report. Under that test, a good argument can still be made that many autopsy reports are not testimonial. The question is likely to turn upon the degree of law enforcement involvement in the preparation of the autopsy report — that appears to be the focus of the autopsy report cases issued after *Melendez-Diaz* (those cases are discussed below).**

See also Vega v. Walsh, 2012 WL 516203 (2nd Cir.) (in a habeas case, state court's determination that autopsy report was not testimonial was not an unreasonable application of federal law: "although autopsies are often used in criminal prosecutions, they are also prepared for numerous other reasons-including the determination of cause of death when there is no anticipation of use of the autopsy in any kind of court proceeding").

Certificate of the non-existence of a public record found not testimonial: *United States v. Rueda-Rivera,* 396 F.3d 678 (5th Cir. 2005): The defendant was charged with being found in the United States after deportation, without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security. To prove the lack of approval, the government offered a Certificate of Nonexistence of Record (CNR). The CNR was prepared by a government official specifically for this litigation. The court found that the record was not "testimonial" under *Crawford*, declaring as follows:

> The CNR admitted into evidence in this case, reflecting the absence of a record that Rueda-Rivera had received consent to re-enter the United States, does not fall into the specific categories of testimonial statements referred to in *Crawford*. We decline to extend *Crawford* to reach such a document.

Note: Other courts before Melendez-Diaz found that certificates proving the absence of public records are not testimonial. See, e.g.: United States v. Urqhart, 469 F.3d 745 (8th Cir. 2006) (arguing that a CNR "is similar enough to a business record that it is nontestimonial under *Crawford*."); ***United States v. Cervantes-Flores,*** 421 F.3d 825 (9th Cir. 2005) (noting that while the *certificate* was prepared for litigation, the underlying records were not — though this misses the point that while the underlying records are not testimonial, the certificate as to their existence or non-existence would still be so because the certificate is prepared solely for purposes of litigation).

> **Note: For reasons discussed in the analysis of *Melendez-Diaz, supra,* it is pretty certain that CNR's are testimonial, and that the above cases are no longer good law. Certificates offered to prove the absence of a public record are prepared solely for purposes of litigation. Nor is it relevant under *Melendez-Diaz* that the records are not about contested historical facts like the *ex parte* testimony in the Raleigh case. *See United States v. Norwood,* 595 F.3d 1025 (9th Cir. 2010) (after *Melendez-Diaz,* government concedes that certificate of the absence of a public record, prepared for trial, was testimonial).**

Business records are not testimonial: *United States v. Jamieson,* 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were essentially business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "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 named Kristy, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* — despite the fact that both records were prepared with the knowledge that they were going to be used in a prosecution.

As to the medical reports, the *Ellis* court concluded as follows:

> While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. * * * They were employees simply recording observations which, because they were made in the ordinary course of business, are "statements that by their nature were not testimonial." *Crawford*, 541 U.S. at 56.

Note: *Ellis* is cited by the dissent in *Melendez-Diaz* (not a good thing for its continued viability), and the circumstances of preparing the toxic screen in *Ellis* are certainly similar to those in *Melendez-Diaz.* That said, toxicology tests conducted by *private* organizations may be found nontestimonial if it can be shown that law enforcement was not involved in or managing the testing. The *Melendez-Diaz* majority emphasized that the forensic analyst knew that the test was being done for a prosecution, as that information was right on the form. Essentially, after *Melendez-Diaz,* the less the tester knows about the use of the test, and the less involvement by the government, the better for admissibility. Primary motive for use in a prosecution is obviously less likely to be

found if the tester is a private organization.

As to the certification of business record, prepared under Rule 902(11) specifically to qualify the medical records in this prosecution, the *Ellis* court similarly found that it was not testimonial because the records that were certified were prepared in the ordinary course, and the certifications were essentially ministerial. The court explained as follows:

> As should be clear, we do not find as controlling the fact that a certification of authenticity under 902(11) is made in anticipation of litigation. What is compelling is that *Crawford* expressly identified business records as nontestimonial evidence. Given the records themselves do not fall within the constitutional guarantee provided by the Confrontation Clause, it would be odd to hold that the foundational evidence authenticating the records do. We also find support in the decisions holding that a CNR is nontestimonial. A CNR is quite like a certification under 902(11); it is a signed affidavit attesting that the signatory had performed a diligent records search for any evidence that the defendant had been granted permission to enter the United States after deportation.
>
> The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about Ellis, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.
>
> **Note: As discussed in the treatment of *Melendez-Diaz* earlier in this outline, the fact that the certificate conveys no personal information about Ellis is not dispositive, because the information imparted is being used against Ellis. Moreover, the certificate is prepared exclusively for use in litigation. On the other hand, as discussed above, Rule 902(11) might well be upheld as a rule simply permitting the authentication of a record.**
>
> **Note: The Tenth Circuit has held that the reasoning of *Ellis* remains sound after *Melendez-Diaz*. *See United States v. Yeley-Davis,*** 632 F.3d 673 (10th Cir. 2011), 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 the 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 may still be found non-testimonial, because the *Melendez-Diaz* majority states, albeit in dicta, that a certificate is not testimonial if it does nothing more than authenticate another document.**

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 — records that were not prepared in testimonial circumstances. If that absence had been proved by a *certificate,* then the Confrontation Clause, after *Melendez-Diaz,* would have been violated. But the absence was proved by a testifying agent. The second holding states the accepted proposition that business records admissible under Rule 803(6) are, for that reason, non-testimonial. Drug ledgers in particular are absolutely not prepared for purposes of litigation.**

Lower Court Cases on Records and Certificates After Melendez-Diaz

Letter describing results of a search of court records is testimonial after *Melendez-Diaz: United States v. Smith,* 640 F.3d 358 (D.C. Cir. 2011): To prove a felony in a felon firearm case, the government admitted a letter from a court clerk stating that "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.**
>
> **Note: The case also highlights the question of whether a certificate qualifying a business record under Rule 902(11) is testimonial under *Melendez-Diaz.* The letters did not come within the narrow "authentication" exception recognized by the *Melendez-Diaz* Court because they provided "an interpretation of what the record contains or shows." Arguably 902(11) certificates do just that. But because the only Circuit Court case on the specific subject of Rule 902(11) certificates finds that they are *not* testimonial, there is certainly no call at this point to propose an amendment to Rule 902(11).**

Autopsy reports generated through law enforcement involvement found testimonial after *Melendez-Diaz: United States v. Moore,* 651 F.3d 30 (D.C. Cir. 2011): The court found autopsy reports to be testimonial. The court emphasized the involvement of law enforcement in the generation of the autopsy reports admitted in this case:

> The Office of the Medical Examiner is required by D.C.Code § 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. See *Melendez–Diaz*, 129 S.Ct. at 2532; cf. *Michigan v. Bryant*, —— U.S. ——, 131 S.Ct. 1143, 1155–56, 179 L.Ed.2d 93 (2011).

Finally, the court rejected the government's argument that there was no error because the expert witness simply relied on the autopsy reports in giving independent testimony. In this case, the autopsy reports were clearly entered into evidence.

State court did not unreasonably apply federal law in admitting autopsy report as non-testimonial: *Nardi v. Pepe,* 662 F.3d 107 (1st Cir. 2011): The court affirmed the denial of a habeas petition, concluding that the state court did not unreasonably apply federal law in admitting an autopsy report as non-testimonial. The court reasoned as follows:

> Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *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* 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.

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 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.

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.").

Rule 902(11) authentication was not testimonial: *United States v. Thompson,* 686 F.3d 575 (8th Cir. 2012): To prove unexplained wealth in a drug case, the government offered and the court admitted a record from the Iowa Workforce Development Agency showing no reported wages for Thompson's social security number during 2009 and 2010. The record was admitted through an affidavit of self-authentication offered pursuant to Rule 902(11). The court found that the earnings records themselves were non-testimonial because they were prepared for administrative purposes. As to the exhibit itself, the court stated that "[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."

Prior conviction in which the defendant did not 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.**

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* the 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. 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.

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.

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 v. Massachusetts*, 557 U.S. 305, 309 (2009) 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.

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.

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 admittable. The defendant argued that the forms were inadmissible hearsay and also testimonial. The court of appeals found no error. On the hearsay question, the court held that the forms were properly admitted as public records — the exclusion of law enforcement records in Rule 803(8) did not apply because the forms were routine and nonadversarial documents requested from every alien entering the United States. Nor were the forms testimonial, even after *Melendez-Diaz.* The court distinguished *Melendez-Diaz* in the following passage:

> Like a Warrant of Deportation * * * (and unlike the certificates of analysis in *Melendez-Diaz*), the basic biographical information recorded on the I-213 form is routinely requested from every alien entering the United States, and the form itself is filled out for anyone entering the Untied States without proper immigration papers. * * * Rose gathered that biographical information from the aliens in the normal course of administrative

processing at the Pembroke Pines Border Patrol Station in Pembroke Pines, Florida. * * *

> The I-213 form is primarily used as a record by the INS for the purpose of tracking the entry of aliens into the United States. This routine, objective cataloging of unambiguous biographical matters becomes a permanent part of every deportable/inadmissible alien's A-File. It is of little moment that an incidental or secondary use of the interviews underlying the I-213 forms actually furthered a prosecution. The Supreme Court has instructed us to look only at the *primary* purpose of the law enforcement officer's questioning in determining whether the information elicited is testimonial. The district court properly ruled that the primary purpose of Rose's questioning of the aliens was to elicit routine biographical information that is required of every foreign entrant for the proper administration of our immigration laws and policies. The district court did not violate Caraballo's constitutional rights in admitting the smuggled aliens's redacted I-213 forms.

Summary charts of admitted business records is not testimonial: *United States v. Naranjo,* 634 F.3d 1198 (11th Cir. 2011): In a prosecution for concealing money laundering, the defendant argued that his confrontation rights were violated when the government presented summary charts of business records. The court found no error. The bank records and checks that were the subject of the summary were business records and "[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 the admission of autopsy reports of the defendant's former patients were testimonial under *Melendez-Diaz.* The court relied heavily on the fact that the autopsy reports were filed from an arm of law enforcement. The court reasoned as follows:

> We think the autopsy records presented in this case were prepared "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. Id. at § 406.12. Failure to do so is a first degree misdemeanor. Id.

* * *

In light of this statutory framework, and the testimony of Dr. Minyard, the autopsy reports in this case were testimonial: "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.

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.

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. 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. 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.

Cases Discussing the Impact of the Confrontation Clause on Non-Testimonial Hearsay After Crawford

Supreme Court

IV. Suggestions for Rulemaking

In light of the confusion wrought by *Williams* it would be problematic to propose any rule that would attempt to implement the "teachings" of that case. It will take at least a few years of lower court case law, and probably another Supreme Court opinion or two, to resolve the four major disputes left by *Williams,* specifically:

1. How is the "primary motive" test of testimoniality defined?

2. What is the relationship of the Confrontation Clause and testimonial statements that are not offered for truth?

3. Should the protection of the Confrontation Clause be limited to statements that are formalized in the nature of affidavits and certificates?

4. Under what circumstances, if any, can a government expert rely on testimonial hearsay under Rule 703?

Accordingly, it would not appear to make sense to propose amendments to the hearsay exceptions — or to Rule 703 — to try to square those rules with the moving target that is Confrontation. But certainly the Committee should continue to monitor developments. For example, if there comes a time when it is clear that an expert cannot constitutionally rely on testimonial hearsay, an amendment to Rule 703 could well be useful and important.

It should be noted that the Committee has already considered — after receiving an extensive memo from the Reporter — whether to propose other amendments to the Rules in light of *Crawford* and *Melendez-Diaz.* The Committee has rejected a proposal to add a reference to the right to confrontation, or to the limits on "testimonial" hearsay, in Rules 801, 803, 804 and 807 — on the ground that some generic reference would be of little use to courts and litigants. And the Committee has also rejected a proposal to amend Rule 902(11), on the ground that any question as to the constitutionality of that provision in criminal cases has not been clearly determined.

The only proposal that has been submitted to respond to *Crawford* and its progeny is the addition of a notice-and-demand procedure to Rule 803(10). The Committee found that proposal to be justified because it was *clear* that Rule 803(10) was unconstitutional as applied after *Melendez-Diaz*. There appears to be no such clarity at this point with respect to any other Evidence Rule

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TAB 6

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University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra Phone: 212-636-6855
Philip Reed Professor of Law e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Symposium on Technological Advances in the Presentation of Evidence
Date: September 1, 2012

The Evidence Rules Committee is sponsoring a symposium on whether the Evidence Rules should be amended to accommodate technological advances in the presentation of evidence. This symposium will take place on the morning before the Fall, 2013 meeting of the Committee.

That is a long way away, so the Symposium is still at the formative stage. The Reporter is reviewing cases and articles on electronic evidence, to focus on scholars, judges, and litigants who would be good participants. Possible participants include: 1) Professor Jeff Bellin, William and Mary Law School, who has written an article on the relationship between the present sense impression and twitter entries; 2) Professor Fred Galvez, McGeorge Law School, who has written a number of articles on the relationship between the Federal Rules of Evidence and technological changes; 3) Tech experts at Facebook and Google; and 4) a number of judges with extensive opinions on authentication of web data, emails, etc., including Judges Paul Friedman and David Norton.

One thing that has been decided: the Symposium proceedings will be published in the Fordham Law Review.

The Chair and Reporter welcome all ideas from Committee members regarding the Symposium, including especially suggestions for panel participants and subject matter.

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